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# DEREGULATING GUILT: THE INFORMATION CULTURE OF THE CRIMINAL SYSTEM

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## ABSTRACT

*The criminal system has an uneasy relationship with information. On the one hand, the criminal process is centrally defined by stringent evidentiary and information rules and a commitment to public transparency. On the other, largely due to the dominance of plea bargaining, criminal liability is determined by all sorts of unregulated, non-public information that never pass through the quality control of evidentiary, discovery, or other criminal procedure restrictions. The result is a process that generates determinations of liability that are often unmoored from systemic information constraints. This phenomenon is exemplified, and intensified, by the widespread use of criminal informants, or “snitching,” in which the government trades guilt for information, largely outside the purview of rule-based constraints, judicial review, or public scrutiny. With a special focus on the Supreme Court’s decision in *United States v. Ruiz*, this Article explores the criminal system’s putative stance towards the proper use of information in generating convictions, in contrast with actual information practices that undermine some of the system’s foundational commitments to accuracy, fairness, and transparency. It concludes that the evolution of this deregulated information culture is altering the functional meaning of criminal guilt.*

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## INTRODUCTION

The criminal system is centrally defined by the way it handles information. First and foremost, information is the crucial ingredient in the official determination of liability. Underneath every conviction lies a body of information: the system-wide production and handling of that information reveals important structural aspects of the criminal process, including its capacity to be accurate and fair. The content and sufficiency of that information, in turn, shapes what we come to understand by the concept of “guilt” itself.

In recognition of the centrality of information, many of the system’s foundational doctrines are actually information rules, defining and constraining the ways that information moves through the criminal process. In many ways, the concept of due process itself can be seen as an informational construct, demanding that the system obtain and process information in ways that are deemed to promote fairness, accuracy, and governmental accountability. For example, the democratic requirement that the criminal process be transparent and politically accountable is typically effectuated by information rules

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governing public access to records and proceedings. The requirement that police conduct conform to the Fourth Amendment is enforced primarily through the exclusionary rule, an information rule restricting the admissibility of evidence.

And yet, the bulk of the criminal system's day-to-day operations are remarkably devoid of information constraints. Police investigations and arrests, prosecutorial charging decisions, and plea bargaining are only lightly regulated, if at all, with regard to the kinds of information that can be relied on or obtained, while much of the information driving these processes remains secret and unavailable to the public. In other words, while the system has numerous informational rules that it holds out as central to its own legitimacy, much of the system functions outside the constraints of these rules.

This Article is an effort to conceptualize the criminal system as an informational system, not only as prescribed through its doctrines and rules, but as it actually functions. Because information control is central to the normative task of attributing liability, it provides a powerful touchstone for evaluating the workings of the system, and reveals many of the ideological and pragmatic dynamics of criminal adjudication. Perhaps most fundamentally, it reveals how doctrines of investigative discretion, plea bargaining, and other informal criminal practices have shifted the meaning of criminal guilt: away from the traditional evidence-driven inquiry into whether there is proof that a suspect has committed a particular offense, toward a concession-based model focused on whether the suspect has acceded to governmental authority.

The criminal system consists roughly of three, interrelated informational spheres, each with its own distinctive culture. The first, and smallest, is occupied by the formal trial process and its attendant rules. This is the sphere of complex doctrine, and the possibility of fully litigated cases, skilled counsel, and well-resourced defendants. It is the best documented sphere, providing the most public data and access, and tends to serve as the model against which all other criminal processes are juxtaposed. It is the arena in which the Supreme Court articulates fundamental informational values underlying the entire system, including constitutional criminal procedure, discovery, and the appropriate limits to governmental control over information. Importantly, it is here that the twin commitments to the right against self-incrimination and to a heavy governmental burden of proof create the lopsided adversarial process as we know it: defendants who are innocent until proven guilty, constrained law enforcement actors, and the idea at the core of the procedural justice model that a key function of the Bill of Rights is to protect vulnerable individuals against official

overreaching.<sup>1</sup>

The second informational sphere is occupied by plea bargaining. Guilty pleas constitute approximately ninety-five percent of all criminal convictions, namely, the vast majority of publicly recorded liability outcomes. A growing chorus of scholars argue that plea bargaining should be considered the heart of the criminal system, operating not in the “shadow of trial” but on its own, quite independent terms.<sup>2</sup> Informationally speaking, plea bargaining is opaque, lightly regulated, and teeming with all sorts of informational irregularities and inequalities. While the ultimate outcomes of negotiations are recorded in the form of convictions, very little other information about the plea bargaining process is publicly available, and much of the government’s information that it uses to generate cases and convictions is not accessible to defendants during the process.

The third informational sphere is typically referred to as “investigative.” It includes official decisions to collect information, confront, arrest, negotiate, charge, release, and to keep records. While it captures the fluid, pre-formal qualities of this sphere, the term “investigative” is misleading because it implies a clear distinction between the government’s investigative and adjudicative functions. In particular, it suggests that during pre-adjudicative investigatory activities, the government has not yet made outcome-determinative decisions. Functionally speaking, however, the investigative sphere is the most powerful adjudicative arena, in which police and prosecutorial decisions about information and potential liability determine the circumstances under which individuals must confront the coercive powers of the state. While these decisions do not always generate formal convictions, they do lead to significant official determinations of liability and constraints on individual liberty. This sphere is secretive, barely regulated by constitutional or other rules, and permeated with information about race, class, power, and other criteria unrelated to individual guilt. This sphere is, of course, also the largest.

The general trend in American criminal justice can be understood as a shift away from first-sphere regulation towards second- and third-sphere deregulation, in which criminal liability is worked out between suspects and officials during investigations and bargains, long before it

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<sup>1</sup> See, e.g., Tracey L. Meares, *Everything Old is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105 (2005) (describing the “public-regarding” model of due process and fairness instituted by the Warren Court); Carol S. Steiker, *Counter-Revolution in Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2471-2503 (1996) (describing “relative constancy” of doctrinal protective norms).

<sup>2</sup> Stephanos Bibas, *Plea Bargaining in the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Robert Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) (“[Plea bargaining] is not some adjunct to the criminal justice system; it is the criminal justice system.”).

ever reaches the stage in which trial-centric values and doctrines would kick in. This shift permits the erosion of sphere-one values of rigorous factual accuracy, accountability, and public transparency, while at the same time making power imbalances between the individual and the government an increasingly acceptable basis for resolving criminal outcomes. Doctrinally, the relaxation of second and third sphere informational constraints is often justified by reference to the rigors of the trial sphere, on the theory that defendants and suspects who are dissatisfied with plea bargaining or official investigative tactics can air their grievances through first-sphere litigation. Or, as Darryl Brown describes it, “[s]trong regulation of adjudication permits weak rule-based investigative regulation because, as the Supreme Court repeatedly implies in its criminal procedure decisions, we believe that adjudication checks investigation.”<sup>3</sup> This shift towards deregulated information gathering and use alters relationships between individuals and law enforcement, the ways that suspects are identified and handled, and the ways that convictions are obtained. In other words, it alters how we produce and understand criminal guilt.

As a way of understanding the practical workings of the informational spheres, particularly the underappreciated third, this Article explores a longstanding, powerful, and secretive informational practice: the creation of criminal informants or “snitches.”<sup>4</sup> Informants are widely used in drug investigations, and have long been lauded as vital to law enforcement’s ability to penetrate conspiracies and other consensual crimes. Formally speaking, the creation of an informant involves trading liability in exchange for information. In practice, however, informant use is complex and challenging. Police and prosecutors create criminal informants using everything from threats to friendship to deceit to sex. In addition to lenience for past crimes, informants may obtain the ability to commit new offenses. As the innocence movement has made all too apparent, informants are often unreliable information sources and a leading cause of wrongful convictions.<sup>5</sup>

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<sup>3</sup> Darryl Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1588-89 (2005).

<sup>4</sup> For analyses of other kinds of specific information dynamics, see, for example, Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006) (focusing on media influence on public opinion); Brown, *supra* note 3 (focusing on improving accuracy of pre-trial evidence-gathering mechanisms such as DNA, eye-witness identification, and crime labs); Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 535 (2005) (“By rethinking Fourth Amendment rules in the context of digital evidence . . . [i]t reveals the Fourth Amendment as a mechanism for regulating the information flow between individuals and the state.”).

<sup>5</sup> ROB WARDEN, CTR. ON WRONGFUL CONVICTIONS, NORTHWESTERN UNIV. SCH. OF LAW, *THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH* ROW 3 (2004) (“[S]nitches [are] the leading cause of wrongful

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The clandestine practices of informant creation and deployment affect the broader information culture. Information, negotiations, and rule-breaking typically remain secret, known only to a handful of police and criminals themselves. This kind of informal adjudicatory negotiation process baldly contradicts many of the fundamental values articulated in the formal trial-centric sphere, including accuracy, procedural integrity, and public access. It is also a powerful phenomenon, exerting a surprisingly wide influence on outcomes, law enforcement, and judicial practices, including those of the United States Judicial Conference, as well as Supreme Court doctrine.

The Supreme Court's decision in *United States v. Ruiz* exemplifies the general shift towards deregulation. The Court modified its due process discovery jurisprudence to accommodate the government's desire to withhold information about its informants during plea negotiations.<sup>6</sup> In so doing, the Court quietly contributed to an information culture in which the bulk of the criminal system's work is permitted to take place in the deregulated arenas of spheres two and three, rather than meeting the more demanding standards of sphere one.

This piece thus begins with a traditional, doctrinal reading of *Ruiz*. It then surveys the three informational spheres—the formal trial-centric sphere, plea bargaining, and pre-adjudicative investigation—and charts the decreasingly rigorous ways that information (and thus guilt) is treated in each. The piece then explores the specific practice of using criminal informants, using it as a window into the practical culture of information management and the generation of criminal convictions.

Having charted the ways that the system handles traditional incriminating information, the piece considers a broader theory of “information” to better account for social data such as race, class, cultural perceptions, and all the other informational materials that, while unrelated to guilt, influence actual criminal decision-making. The fact that the system lacks mechanisms to account for such social data is itself an important aspect of the information culture, with special implications for socially vulnerable defendants. The piece concludes by returning to *Ruiz* to explore how the Court has put its weight down on the side of secrecy and the government's ability to negotiate convictions in ways that are disconnected from evidence of guilt.

## I. PROLOGUE: *UNITED STATES V. RUIZ*

*Ruiz* is a case about limiting criminal discovery, already a

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convictions in U.S. capital cases.”).

<sup>6</sup> *United States v. Ruiz*, 536 U.S. 622 (2002).

famously limited informational commodity.<sup>7</sup> The defendant, Angela Ruiz, was charged with possessing 30 kilograms of marijuana. Prosecutors offered her a so-called “fast track” plea bargain in which, in exchange for a recommendation of a downward departure under the U.S. Sentencing Guidelines, she would “‘waive the right’ to receive ‘impeachment information relating to any informants or other witnesses.’”<sup>8</sup> Such impeachment information typically would have included items such as the identity of any informants, their criminal history or history of perjury, and the benefits they received in exchange for inculcating Ms. Ruiz.

Ruiz rejected the offer and eventually pled guilty without a deal. On review, she argued that she should not have been required pre-plea to waive her rights to exculpatory impeachment material to which she had a constitutional entitlement under *Brady v. Maryland*<sup>9</sup> and *Giglio v. United States*.<sup>10</sup>

The Ninth Circuit reversed the conviction, reasoning that defendants must be entitled to receive from the government the same material exculpatory evidence before pleading guilty as they are before trial because “guilty pleas cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution.”<sup>11</sup> The Supreme Court disagreed. It ruled that although defendants are constitutionally entitled to exculpatory impeachment evidence if they proceed to trial, “the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.”<sup>12</sup> The Court worried in particular about the impact that disclosure could have on the government’s use of informants, noting that disclosure “could ‘disrupt ongoing investigations’ and expose prospective witnesses to serious

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<sup>7</sup> A few articles have explored *Ruiz*’s impact on existing discovery doctrine. See Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211 (2005) (discussing how *Ruiz* further erodes *Brady* disclosure principles); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541 (2006) (same); Bibas, *supra* note 2, at 2494 n.125 (briefly noting same).

<sup>8</sup> *Ruiz*, 536 U.S. at 625.

<sup>9</sup> 373 U.S. 83 (1963) (holding that due process and demands of a fair trial require prosecution to turn over “material evidence” that is “favorable to the accused”).

<sup>10</sup> 405 U.S. 150 (1972) (holding that exculpatory evidence under *Brady* includes “evidence affecting” witness “credibility” thereby requiring the disclosure of evidence impeaching informant).

<sup>11</sup> *United States v. Ruiz*, 241 F.3d 1157, 1164 (9th Cir. 2001). The Court further reasoned that “a defendant’s decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution’s case. . . . [Moreover,] if a defendant may not raise a *Brady* claim after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas.” *Id.* at 1164 (internal citations and quotation marks omitted) (quoting *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995) (holding that *Brady* rights are not automatically waived by entry of guilty plea)).

<sup>12</sup> *Ruiz*, 536 U.S. at 633.

harm.”<sup>13</sup>

In deciding *Ruiz*, the Court asserted two important propositions regarding the role of information in generating guilty outcomes. First, the Court reiterated its position that a defendant need not have full information about his or her case in order to waive the right to trial and against self-incrimination, but merely sufficient information to “fully understand[] the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.”<sup>14</sup> After *Ruiz*, a defendant must decide whether to plead guilty without information about the government’s key witnesses, their prior histories of testimony, perjury or criminality, or the benefits they may be receiving in exchange for assisting on that particular case.

Second, the Court defended its decision to permit the government to withhold material impeachment evidence by noting, twice, that the value of such information turns upon the defendant’s own knowledge: “[t]he degree of help that impeachment information can provide will depend upon the defendant’s own independent knowledge of the prosecution’s potential case,” and “the added value of the . . . ‘right’ [to such information] to a defendant is often limited, for it depends upon the defendant’s independent awareness of the details of the Government’s case.”<sup>15</sup> Implicit in this reasoning is the idea that it is fair to place the burden on the defendant to plumb her own knowledge of guilt and its potential weight at trial in order to estimate the constitutional value of such information.

Although the Court did not acknowledge it, the systemic implications of the decision are large.<sup>16</sup> Because approximately ninety-five percent of all criminal cases are resolved by plea, the effect of *Ruiz* is to declare a vast amount of information in such cases exempt from discovery. In particular, the decision means that key information about the government’s use of criminal informants will never come to light, either for defendants or for the public.<sup>17</sup> As described further below, *Ruiz* thus typifies the criminal system’s new information culture in which defendant weakness and public ignorance are increasingly

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<sup>13</sup> *Id.* at 631-32.

<sup>14</sup> *Id.* at 629.

<sup>15</sup> *Id.* at 630-31.

<sup>16</sup> A number of commentators have noted that *Ruiz* represents a significant retreat from the Court’s previous *Brady* jurisprudence, in that it permits the government to withhold material exculpatory evidence—“material” meaning that it is reasonably likely to affect the outcome—to which the defendant previously had a clear constitutional right. Cerruti, *supra* note 7; Bibas, *supra* note 2. Stephanos Bibas further predicts that *Ruiz*’s reasoning opens the door to an even greater retreat, namely, authorizing the prosecution to withhold material evidence that factually exculpates the defendant, prior to plea negotiations. *Id.* at 2494 n.125.

<sup>17</sup> See *infra* section IV (discussing relationship between defendant access to information and public transparency).

acceptable bases for determining guilt.

## II. THE SIGNIFICANCE OF INFORMATION CULTURE

Every social institution has its own informational structure and culture, the way it produces, reveals, and conceals data, and transforms it into accepted fact or knowledge.<sup>18</sup> The ability to control and characterize information is part of social authority, be it exercised by individuals, the government, the media, or other institutions. By looking at the ways that an institution handles information, we learn much about its goals and commitments. Conversely, a powerful way of changing an institution can be to alter its informational rules.

The inquiry into information culture is a micro version of more general inquiries common to systems theory or institutional design.<sup>19</sup> While these broader frameworks address the many processes and values that define systems and institutions, they often focus on the role of information, or knowledge production, as a key component of the grander inquiry.<sup>20</sup> Because the criminal system is centrally defined by the state-sponsored gathering of information and the transformation of that information into legal convictions, and because so many of its foundational rules are related to these tasks, an informational analysis goes to the heart of many of the system's doctrinal and theoretical commitments.

An informational analysis can take place at varying levels of specificity. At the most general level sits Michel Foucault's insistence

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<sup>18</sup> I recognize that the terms "information," "data," "fact," and "knowledge" have different normative connotations. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (William Rehg trans., 1996); MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* (Colin Gordon ed., 1980). I do not mean to conflate them, but rather encompass them as potential subjects for discussion. See Wendy Chan & George S. Rigakos, *Risk, Crime and Gender*, 42 *BRIT. J. CRIMINOLOGY* 743, 747 (2002) (complaining that the conflation of "information" with "knowledge" hides the socially constructed and political nature of the latter). See also *infra* Part VII.

<sup>19</sup> Erik Luna has consistently advocated applying such analytic schema to the criminal process. Erik Luna, *System Failure*, 42 *AM. CRIM. L. REV.* 1201 (2005); Erik Luna, *Race, Crime, and Institutional Design*, 66 *LAW & CONTEMP. PROBS.* 183 (2003); see also Robert E. Goodin, *Institutions and Their Design*, in *THE THEORY OF INSTITUTIONAL DESIGN* 33 (Robert E. Goodin, ed., 1996) (relating theories of "institutional design" and "systems design").

<sup>20</sup> For example, as David Luban has explained, the public availability of information within an institution, what he terms "the publicity principle," is central not only to legal institutional design but to foreign policy and moral theory more generally. David Luban, *The Publicity Principle*, in *THE THEORY OF INSTITUTIONAL DESIGN*, *supra* note 19. When Erik Luna proposed a global systems analysis of the criminal process, he noted that an important issue would be "the quantity and quality of information admitted or denied entry into the system." Luna, *System Failure*, *supra* note 19, at 1210. Indeed, he further hypothesizes that in order to understand law enforcement discretion itself, it might be necessary to "consider the informational consequences of America's adversarial style of investigation and adjudication." *Id.* at 1211.

that the production and control of knowledge is precisely what social organizations do. For Foucault, the generation of information, and its transformation into accepted knowledge, is central to the task of social control and is indeed synonymous with power itself. As he puts it, “the exercise of power itself creates and causes to emerge new objects of knowledge and accumulates new bodies of information.”<sup>21</sup> Denying the distinction between knowledge and power, Foucault asserts that “[w]e should admit rather that power produces knowledge . . . that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.”<sup>22</sup> In this scheme, institutional knowledge of individual guilt, i.e., the kinds of information that are permitted to generate a criminal conviction, reflect and indeed comprise the power relations that shape the criminal system.

Along similar lines, some criminal justice scholars have begun to call for greater attention to empirical social evidence in the context of judicial decision-making. Tracey Meares and Bernard Harcourt have argued that the Supreme Court should rely explicitly on social scientific and empirical research—such as studies of police decision-making or the relationships between disadvantaged minorities and the police—as a way of making constitutional adjudication more transparent. In their terms:

[b]y more transparent, we mean to describe adjudication that expressly and openly discusses the normative judgments at the core of constitutional criminal procedure. Judicial decisions that address the relevant social science and empirical data are more transparent in that they expressly articulate the grounds for factual assertions and, as a result, more clearly reflect the interpretive choices involved in criminal procedure decision-making.<sup>23</sup>

The Meares-Harcourt argument rests in large part on the idea that such social data already shape judicial decision-making, but in a sloppy and clandestine way.<sup>24</sup> Their call for open empiricism is thus a call for more rigor and transparency in a process that is already and inevitably shaped by these types of social and empirical information. It is also an acknowledgment that non-legal social data powerfully shape criminal legal outcomes, not only for judges but for police, prosecutors, and other legal decision-makers.

More generally, legal scholarship is taking increasing note of the

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<sup>21</sup> FOUCAULT, *supra* note 18, at 51.

<sup>22</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 27 (1975).

<sup>23</sup> Tracey Meares & Bernard Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM L. & CRIMINOLOGY 733, 735 (2000).

<sup>24</sup> *Id.* at 736 (“[E]mpirical knowledge is most useful in unmasking the theoretical assumptions that undergird constitutional law.”).

constitutive role of information rules in a wide variety of contexts. Law and economics scholarship has long recognized the impact of information control on contractual bargaining and other legal outcomes.<sup>25</sup> The explosion of information technologies has generated jurisprudential concerns about information control and ownership.<sup>26</sup> There is also a new appreciation for the influence of the cognitive psychology of individual information processing on all forms of legal decision-making, from the rules of evidence<sup>27</sup> to mortgage applicants.<sup>28</sup> This legal focus on individual data processing acknowledges that the way information is processed is at least as important as the content of the information itself, and that both bear on the legitimacy and efficacy of the ultimate legal outcome.<sup>29</sup>

Finally, on a more philosophical level, attending to the full panoply of criminal information practices reflects the Wittgensteinian insight that the governing rules of a system lie not merely in the rules as stated but the rules as practiced. In order to understand what the criminal system authentically considers “guilt,” we must look at how guilt is constructed, practiced, and accepted, above and beyond the doctrinal rules governing its legal parameters.<sup>30</sup> This is particularly salient for our criminal system in which information about a defendant’s class, race, gender, or neighborhood can play a powerful role in shaping his or her criminal liability.<sup>31</sup> Understanding how the system evaluates information in these broader senses is thus a step towards ascertaining the system’s true workings and commitments.

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<sup>25</sup> See Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565 (2006) (surveying the challenges that information management poses for contract theory); Pauline Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997). See also GOODIN, *supra* note 19, at 32 (noting that the “major unsolved [design] problem” for economics “lies in the proper integration of the information and incentives aspects”).

<sup>26</sup> See Marci Hamilton & Clemens Kohlen, *The Jurisprudence of Information Flow: How the Constitution Constructs the Pathways of Information*, 25 CARDOZO L. REV. 267 (2003) (focusing on legislative information and copyright).

<sup>27</sup> Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241 (2006).

<sup>28</sup> Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707 (2006).

<sup>29</sup> More provocatively, Cass Sunstein has argued that democracies should consider new forms of information management. Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962 (2005). While acknowledging the many strengths of deliberative mechanisms such as legislative debate and juries, Sunstein argues that information markets and other forms of group prediction may offer better mechanisms for handling group information. *Id.*

<sup>30</sup> See Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

<sup>31</sup> Race, class, and gender are, of course, not traditional “information” in the same sense as admissible evidence. This more expansive use of the concept of information is discussed *infra* Part VI.

### III. SPHERE ONE: THE CRIMINAL SYSTEM'S FORMAL INFORMATION CULTURE

The criminal system's formal doctrinal sphere is characterized by a particular approach to information: a strong connection between systemic legitimacy and the ways that information is obtained and transformed into a legally acceptable finding of guilt. At their most elevated, information rules make the difference between the lynch mob and the trial, torture and interrogation, the Star Chamber and the public adversarial process. By following our information rules, the system purports to produce not only legally but socially acceptable pronouncements of guilt.<sup>32</sup>

#### A. *Producing Guilt*

What is legal guilt? At a minimum, legal guilt requires evidence: "it [is] a violation of due process to convict and punish a man without evidence of his guilt."<sup>33</sup> The construct of legal guilt is relatively narrow: it not enough that a suspect has a bad character,<sup>34</sup> or that he might have committed a crime,<sup>35</sup> or that he has committed a morally reprehensible act.<sup>36</sup> Rather, legal guilt presupposes a quite specific idea that there is documentable information that this person committed a legally prohibited act.

At trial, the paradigmatic definition of guilt is: that quantum of admissible evidence from which a reasonable jury could find guilt, on each element of the offense, beyond a reasonable doubt.<sup>37</sup> In other words, legal guilt produced by a trial process requires not only *enough* information, but enough information of a *certain kind*, determined by the *right process*. The quantum of evidence required for a legal

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<sup>32</sup> Of course, even this most regulated trial-centric sphere has become infamous for its inaccuracies and other fallibilities. See Warden, *supra* note 5 (documenting dozens of wrongful trial convictions); see also WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT (1999) (arguing that our systemic "obsession" with procedure and winning has compromised the trial system).

<sup>33</sup> Thompson v. City of Louisville, 362 U.S. 199, 206 (1960).

<sup>34</sup> See FED. R. EVID. 404(b); People v. Zackowitz, 254 N.Y. 192 (1930) (excerpted in SANFORD KADISH & STEPHEN SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 22 (7th ed. 2001)).

<sup>35</sup> *In re Winship*, 397 U.S. 358 (1970) (establishing constitutional requirement of the "beyond a reasonable doubt" standard).

<sup>36</sup> Keeler v. Superior Court, 2 Cal. 3d 619 (1970) (excerpted in KADISH & SCHULHOFER, *supra* note 34, at 294).

<sup>37</sup> See Jackson v. Virginia, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358.

conviction is large: the preponderance of evidence sufficient for civil liability is not enough, nor is a defendant's subjective belief that he is guilty. Rather, the government must persuade a neutral fact-finder of guilt under the highest evidentiary standard available to the legal system.

Trial-based guilt is procedural as well as evidentiary. The system does not find people guilty whose prosecution is based solely on illegally seized or inadmissible evidence, or who were themselves deprived of constitutionally guaranteed information during trial. As the Court once put it, "a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand."<sup>38</sup>

These heavy informational burdens shape the concept of legal guilt. In this sphere, guilt is a weighty social construct, difficult to create and powerful once in place, imbued with all the validating force of the rules and procedural hurdles that it had to overcome. Once this weighty and well-tested version of guilt attaches, criminal punishment as well as civil deprivations may justly and automatically follow. These hurdles, moreover, invite public confidence in the accuracy and fairness of these adjudications.<sup>39</sup>

### B. *Constitutional Criminal Procedure*

Criminal procedure rules—in particular the Fourth Amendment and the Fifth Amendment's prohibition against self-incrimination—are the primary regulations that restrict the government's investigation and production of information that can eventually become evidence of a defendant's guilt.<sup>40</sup> The limitations placed by these rules on governmental power are key to the legitimating aspirations of the criminal system. The Court has variously described the foundational role of the amendments as preserving the "indefeasible right of personal security, personal liberty and private property," as "great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land," that the breach of those rights is "cruel and unjust," and that the "duty of giving to [the amendments] force and effect is obligatory upon all entrusted under our

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<sup>38</sup> McNabb v. United States, 318 U.S. 332 (1943).

<sup>39</sup> Indeed, it has taken hundreds of exonerations to begin to shake this public trust, indicating the strength of the model. See Brandon Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 57-59 (2008) (describing increasing "[p]ublic distrust of the criminal system" as a result of exonerations).

<sup>40</sup> See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 385 (1974). The due process discovery requirements embodied in *Brady v. Maryland* are addressed separately below. See *infra* Part III.C.

Federal system with the enforcement of the laws.”<sup>41</sup>

More specifically, the Fifth Amendment’s restrictions on the government’s ability to procure information from the defendant lie at the heart of the adversarial process itself. As the Court explained decades ago, “this prohibition [against compelled self incrimination] is the mainstay of our adversarial system of criminal justice. Not only does it protect us against the inherent unreliability of compelled testimony, but it also ensures that criminal investigations will be conducted with integrity and that the judiciary will avoid the taint of official lawlessness.”<sup>42</sup> In his seminal historical account, John Langbein credits the emergence of the modern adversarial process to the defense bar’s insistence on this restrictive informational rule.<sup>43</sup>

The defendant’s right against self-incrimination goes hand-in-hand with the equally foundational precept that the government retains the burden of proving guilt beyond a reasonable doubt. Although the burden of proof flows from the due process clause rather than the Fifth Amendment, it serves purposes similar to the self-incrimination privilege, protecting the accuracy and integrity of the process. As the Court put it in *In re Winship*, “[t]hese rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions.”<sup>44</sup> More specifically, the heavy governmental burden embodies a recognition of the unique position of the defendant, the more general liberty interests at stake, and the concomitant appropriateness of applying different informational rules to defendants and to the government.

There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the factfinder of his guilt.<sup>45</sup>

In effect, the informational rules of the first sphere declare that defendants are presumed innocent and need provide no information,

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<sup>41</sup> *Mapp v. Ohio*, 367 U.S. 643, 646-48 (1961) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886), *Weeks v. United States*, 232 U.S. 383 (1914), and *McNabb v. United States*, 318 U.S. 332, 393 (1943)).

<sup>42</sup> *New York v. Quarles*, 467 U.S. 649, 687 (1984) (O’Connor, J., concurring in part and dissenting in part).

<sup>43</sup> John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994) (self-incrimination principles created by the emergence of the defense bar).

<sup>44</sup> 397 U.S. 358, 362 (1970) (quoting *Brinegar v. United States*, 338 U.S. 160, 174 (1949)).

<sup>45</sup> *Id.* at 364 (quoting *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958)).

while the government must provide and disclose a great deal. This informational imbalance reflects a more general judgment that defendants should be protected from governmental incursions into their liberty and privacy, that a fair criminal process is not evenhanded as between individuals and the state but rather handicaps the state to achieve larger values of individual protection and governmental restraint. As then, Justice Rehnquist wrote long ago about the exclusionary rule, such judgments have been longstanding despite the “high price society pays for such a drastic remedy.”<sup>46</sup>

Constitutional information rules thus comprise some of the most important characteristics of the system, redistributing power as between individuals and law enforcement, while acting as bulwarks against governmental overreaching and certain kinds of unfairness.<sup>47</sup>

While vital in principle, as a practical matter these constitutional rules leave a great deal of governmental information-gathering unregulated. The Fourth Amendment restricts the government’s ability to search for and seize evidence that is deemed private, at least absent a warrant, but there is a vast and increasing amount of information about which people have no “reasonable expectation of privacy” and to which the government therefore has free access.<sup>48</sup> Individuals who voluntarily remain where they are to talk to police are not deemed seized for Fourth Amendment purposes.<sup>49</sup> Similarly, the Fifth Amendment’s privilege against self-incrimination is inapplicable during many investigative interactions between police and individuals. Miranda warnings are not required until the individual is taken into “custody,”<sup>50</sup> and statements made during police-civilian interactions typically do not trigger the self-incrimination clause. In other words, while the criminal procedure of the first sphere offers the most comprehensive vision of a regulated

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<sup>46</sup> *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 413 (1971) (Rehnquist, J., dissenting).

<sup>47</sup> Of course, these values of governmental restraint and adversariality sometimes clash with the systemic need for accuracy and evidence gathering. See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 154 (1997) (constitutional restrictions on governmental action impede the collection and admissibility of otherwise reliable or accurate evidence of wrongdoing). Sometimes these clashes lead to modification of the rules. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984) (permitting the use of unconstitutionally seized evidence when police officers act in good faith based on an illegal warrant).

<sup>48</sup> See Timothy Zick, *Clouds, Cameras and Computers: The First Amendment and Networked Public Spaces*, 59 FLA. L. REV. 1 (2007) (chronicling pervasive scholarly concerns about the erosions of Fourth Amendment privacy due to new technologies); Dan Solove, *Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference*, 74 *FORDHAM L. REV.* 747 (2005) (arguing that privacy is no longer protected primarily by the Fourth Amendment but rather by information privacy legislation).

<sup>49</sup> *Florida v. Bostick*, 501 U.S. 429 (1991).

<sup>50</sup> *Berkemer v. McCarty*, 468 U.S. 420 (1984); Sara Ciarelli, *Pre-Arrest Silence: Minding the Gap Between Fourth Amendment Stops and Fifth Amendment*, 93 *J. CRIM. L. & CRIMINOLOGY* 651 (2003).

relationship between individuals and the state in the quest for incriminating information, its coverage remains partial.

### C. *Discovery*

Criminal discovery rules reveal important contours of the adversarial process because they delineate the minimal informational rules deemed necessary for fair play. Not only do the discovery rules protect defendants, by extension they also open the government's files to public scrutiny insofar as defendants choose to place discovered information on the public record.

Unlike civil cases, there is no general right to criminal discovery.<sup>51</sup> Rather, in *Brady v. Maryland*, the Court held that as a matter of fundamental due process, the government must provide the defendant with "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment."<sup>52</sup> Evidence is considered "material" if it is reasonably likely to affect the outcome.<sup>53</sup> The Court has variously referred to the *Brady* rule as necessary to prevent an "unfair trial,"<sup>54</sup> protecting "element[al] fairness"<sup>55</sup> and part of the prosecutorial obligation to ensure that "justice . . . be done,"<sup>56</sup> the violation of which is "inconsistent with the rudimentary demands of justice."<sup>57</sup>

In *Giglio v. United States*, the Court held that impeachment material regarding government witness credibility constitutes a form of Brady material and therefore must be disclosed as well.<sup>58</sup> The specific impeachment material at issue in *Giglio* was the government's undisclosed promise to its criminal informant witness not to prosecute him in return for his testimony.<sup>59</sup> Typical impeachment material also includes: the informant's identity, his prior criminal record, the benefits conferred on the informant by the government in exchange for

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<sup>51</sup> *United States v. Ruiz*, 536 U.S. 622, 629 (2002) ("There is no general constitutional right to discovery in a criminal case."). See *United States v. Bagley*, 473 U.S. 667 (1985) ("[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.").

<sup>52</sup> 373 U.S. 83, 87 (1963).

<sup>53</sup> *Bagley*, 473 U.S. at 668.

<sup>54</sup> *Brady*, 373 U.S. at 87.

<sup>55</sup> *United States v. Agurs*, 427 U.S. 97, 110 (1976).

<sup>56</sup> *Id.* at 111.

<sup>57</sup> *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

<sup>58</sup> 405 U.S. 150, 154 (1972) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule [of *Brady v. Maryland*].").

<sup>59</sup> 405 U.S. at 151.

information in the instant case, and the informant's history of testimony and rewards in other cases.<sup>60</sup> Until *Ruiz*, material tending to factually exculpate the defendant and impeachment material regarding material witness credibility were treated as constitutionally indistinguishable.<sup>61</sup> After *Ruiz*, the government need not produce *Giglio* material to a defendant prior to the entry of a plea, but only if the defendant decides to proceed to trial.<sup>62</sup>

In keeping with the lopsided nature of the formal adversarial process, the government has no constitutional right to discovery against the defendant, although various state and federal rules require disclosures.<sup>63</sup> Rule 16 of the Federal Rules of Criminal Procedure imposes disclosure requirements, such as the defendant's obligation to make documents, objects, and expert witness summaries available to the government pretrial, or, under Rule 12.1, to put the government on notice of the intent to raise an alibi defense.<sup>64</sup>

The limited nature of criminal discovery has been much discussed. It has been said to embody the systemic commitment to an adversarial rather than a "truth seeking" process.<sup>65</sup> It also respects the defendant's privilege against self-incrimination. Insofar as it delays or withholds from the defendant potentially useful material, it has been called unfair.<sup>66</sup>

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<sup>60</sup> See, e.g., *United States v. Villarman-Oviedo*, 325 F.3d 1, 13 (1st Cir. 2003) (describing impeachment material); see also *Roviaro v. United States*, 353 U.S. 53, 62 (1957) (In deciding whether government can withhold identity of confidential informant, the court must "balance[e] the public interest in protecting the flow of information against the [defendant's right] to prepare his defense.").

<sup>61</sup> See *United States v. Bagley*, 473 U.S. 667, 676 (1985) ("This Court has rejected any such distinction between impeachment evidence and exculpatory evidence."); see also Cerruti, *supra* note 7 (examining the collection of cases).

<sup>62</sup> Congress has further restricted the federal government's obligation to disclose an additional form of impeachment material: prior witness statements. Under the Jencks Act, the government need not produce a witness's prior statements in its possession until after the witness has actually testified. 18 U.S.C. § 3500 (2006); see Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651 (1999). Such prior statements might include admission of perjury or recantations of prior assertions, admissions of the falsity of other statements, or statements regarding the defendant. Under the Jencks Act, defendants are not entitled to see these prior impeaching statements of witnesses before trial and typically do not have access to them during plea negotiations. Despite the Jencks Act, however, some federal prosecutor offices have an informal policy of producing Jencks material prior to trial.

<sup>63</sup> Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567 (1986) (describing numerous state defense disclosure requirements); see also Cerruti, *supra* note 7 (arguing that the Court has eroded prosecutorial *Brady* obligations precisely in order to level perceived inequities in the adversarial playing field).

<sup>64</sup> FED. R. CRIM. P. 16(b)(1); FED. R. CRIM. P. 12.1.

<sup>65</sup> But see Brown, *supra* note 3, at 1622-23 (noting that some states have broader reciprocal discovery rules that require both sides to disclose information).

<sup>66</sup> See R. Michael Cassidy, "Soft Words of Hope:" *Giglio*, *Accomplice Witnesses*, and the Problem of Implied Inducements, 98 NW. U. L. REV. 1129 (2004); Hon. Lee Sarokin & William E. Zuckermann, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie*

The impact of the discovery rules is further limited by the fact that most informational exchanges between the parties are triggered by litigation, be it through motions or trial.<sup>67</sup> Because plea bargaining is the norm, in the vast majority of cases the defendant will not see much of the evidence underlying the government's factual basis for the charge. As a result, neither will the public. In other words, although criminal discovery is the primary mechanism through which the government reveals its evidence, the rules provide at best a narrow window through which defendants—and potentially the public—may glimpse the workings of the official information-gathering machine. As trials all but disappear from the criminal landscape, so does the salience of these disclosure rules.

#### D. *Public Access*

The commitment to public access is an informational principle vital to the self-conception of the criminal system. The idea that criminal procedures, records, and outcomes should be public, and that the public and the media should have access to trial proceedings, or what the Court has referred to as the “right to gather information,”<sup>68</sup> is part of a larger democratic commitment to public accountability and responsiveness. In discussing “the therapeutic value of open justice,” the Court quoted Jeremy Bentham:

Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.<sup>69</sup>

In establishing the public's right to observe criminal proceedings, moreover, the Court expressly linked access to information to political freedom: “[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”<sup>70</sup>

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*this Presumption*, 43 RUTGERS L. REV. 1089 (1991); see also Cerruti, *supra* note 7.

<sup>67</sup> Defense counsel will sometimes use motions to trigger discovery and obtain information early.

<sup>68</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980).

<sup>69</sup> *Richmond Newspapers*, 448 U.S. at 569-70 (establishing right of public access to trial proceeding). See also *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) (establishing right of public access to voir dire proceeding); *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986) (establishing public access right to preliminary hearings). *But see* *Wilson v. Layne*, 526 U.S. 603 (1999) (finding that police officer's decision to bring reporters on ride-along to execute warrant violated Fourth Amendment).

<sup>70</sup> *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

At the same time, the public access principle is not absolute. Even with respect to paradigmatic open court proceedings, it can give way to the need for a fair trial, witness protection, or law enforcement investigatory needs.<sup>71</sup> At other stages in the criminal process, such as investigations or plea bargaining, the demands for openness take weaker forms.<sup>72</sup> The “presumption of openness,” however, demands that secrecy be publicly justified.<sup>73</sup> As the Court put it: “The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”<sup>74</sup>

The criminal process shares the presumptive commitment to publicity with the rest of the legal system. As David Luban explains, “many contemporary writers accept the proposition that every legal claim must be capable of publicity, because they regard public promulgation of laws as a defining condition of the rule of law.”<sup>75</sup> The general idea is that the public needs information about the rules of the system, its operations, and outcomes in order to understand and accept the legal system itself. In this sense, public access to information is central to systematic legitimacy.

In the criminal context, an important assumption underlying the Court’s publicity jurisprudence is that the adversarial process produces enough information to satisfy the public demand for transparency.<sup>76</sup> As the Court puts it, “[i]n an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation.”<sup>77</sup> The public only gets to watch trials that the parties actually decide to conduct. By permitting public access to record information produced by actual cases, the Court assumes that the public will obtain a sufficiently full and accurate picture of how the

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<sup>71</sup> See *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (need for fair trial trumped media desire to observe pre-trial hearing); *Roviaro v. United States*, 353 U.S. 53 (1957) (articulating balancing test to evaluate witness protection and investigatory needs against defendant’s right to know informant’s identity); *CBS, Inc. v. United States Dist. Court for Cent. Dist. of California*, 765 F.2d 823 (9th Cir. 1985) (articulating standard for sealing a proceeding).

<sup>72</sup> See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006) (arguing for more public access to information about official discretionary decision-making such as plea bargaining).

<sup>73</sup> *Richmond Newspapers*, 448 U.S. at 581 (reversing judicial decision to close courtroom for lack of reasoning). See also *Nixon v. Warner Comm’n, Inc.*, 435 U.S. 589 (1978) (articulating common-law right of public access to all judicial records and documents, subject however to the court’s supervisory power over its own records and files).

<sup>74</sup> *Press-Enterprise Co.*, 464 U.S. at 501; see also *CBS, Inc.*, 765 F.2d at 826 (ordering that records regarding cooperating witness be unsealed because sealing court and government had failed to justify secrecy).

<sup>75</sup> David Luban, *The Publicity Principle*, in *THE THEORY OF INSTITUTIONAL DESIGN*, *supra* note 19, at 178.

<sup>76</sup> *Gannett*, 443 U.S. at 383; see also *New York v. Hill*, 528 U.S. 110 (2000) (holding that public interest in speedy trial did not preclude defendant’s waiver of time limits).

<sup>77</sup> *Gannett*, 443 U.S. at 383.

criminal system works to satisfy underlying First Amendment free speech and information-gathering values.

The assumption that litigating parties will protect the public interest is increasingly false. This is due in part to the shift away from sphere-one trial-centric practices. Much of the information used and produced by the criminal process during plea bargaining and investigation (spheres two and three) never appears on any record, and accordingly cannot be publicly accessed. Investigation tactics, plea negotiations, and charging decisions, to name but a few, are highly discretionary, undocumented, undiscoverable processes to which defendants and the public have little or no access. The Court, moreover, has been highly protective of the information associated with such processes. For example, its holding in *United States v. Armstrong*<sup>78</sup> restricting discovery of prosecutorial charging decisions has been described as imposing an almost “insuperable” burden on defendants seeking information.<sup>79</sup>

Scholars have criticized various aspects of this shift away from sphere-one transparency values. Stephanos Bibas has described broadly the reduction in systemic transparency that flows from the turn away from trial and towards plea bargaining. He points out that while criminal system insiders such as judges and especially prosecutors have access to a great deal of information and understand the rules and reasons governing criminal cases, members of the general public—victims in particular—do not. Arguing that the public experiences the criminal system as “opaque, tangled, insulated, and impervious to outside scrutiny and change,” he argues for more transparency, in particular for public information about prosecutorial charging decisions, plea bargaining, and sentencing.<sup>80</sup> Others have similarly challenged the system’s increasing opacity in charge bargaining<sup>81</sup> and in policing.<sup>82</sup>

Defendants’ diminished access to information is a lynchpin of this systemic trend, precisely because defendants function as proxies for public access to government information. To put it another way, one of the reasons that the public lacks access to and understanding of the criminal process is that defendants lack tools to access information held by the government about their own cases. In this sense, the Court is correct in its assertion that litigant and public interests coincide, but not in the way it originally meant. Rather, the Court’s own tendency to resist giving defendants government-held information about their cases

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<sup>78</sup> 517 U.S. 456 (1996).

<sup>79</sup> Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Race*, 73 CHI.-KENT L. REV. 605 (1998).

<sup>80</sup> Bibas, *supra* note 72.

<sup>81</sup> See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

<sup>82</sup> See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000).

absent a trial renders the entire system more unresponsive and publicly inaccessible.

The first informational sphere offers the system's most comprehensive articulation of the parameters of the relationship between the individual suspect and the prosecuting state. It is a world in which defendants—even guilty ones—may properly shield themselves from conviction, and in which governmental power to collect and use information is heavily regulated. Even in this sphere, however, regulation is not absolute. Defendant protections often give way in the face of law enforcement needs. Fourth and Fifth Amendment protections do not cover many individual-state interactions. Discovery obligations are partial, and public access to information is negotiable. Perhaps most importantly, these regulations presuppose the availability of trial in a world in which trials are rapidly disappearing.

#### IV. SPHERE TWO: NEGOTIATING GUILT AND THE POWER OF UNREGULATED INFORMATION

While the formal trial sphere is characterized by at least a theoretical commitment to robust information control and publicity, those values are sharply curtailed in the sphere of plea bargaining. Although the guilty plea is a complete substitute for a trial finding of guilt, the Supreme Court takes a very different view of the kinds and amount of information that are legally necessary or permissible in connection with plea bargaining.

Unlike the trial sphere's demand for admissible evidence and the heavy burdens placed on the government, the validity of a guilty plea turns heavily on the single decision by the defendant: the knowing, intelligent, and voluntary waiver of the right against self incrimination and the rights associated with trial.<sup>83</sup> The true power of information in this process turns not on its relevance to guilt, but on its ability to influence the negotiating parties to agree to a disposition.<sup>84</sup> In contrast with the first sphere's insistence on remedying the perceived power imbalance between the individual and the state, in the second sphere the parties are treated approximately as bargaining equals.

While there is still a need for evidence in this sphere, it is sharply curtailed. A guilty plea must be "factually justified,"<sup>85</sup> supported by a

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<sup>83</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970); FED. R. CRIM. P. 11.

<sup>84</sup> See Bibas, *supra* note 72, 911-12 (describing how some kinds of information can influence defense counsel to support plea bargains to the detriment of their clients); see also Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L. J. 69 (1995) (describing the influential role of knowledgeable counsel in determining plea bargains and cooperation deals).

<sup>85</sup> *United States v. Ruiz*, 536 U.S. 622, 631 (2002).

“factual basis,”<sup>86</sup> or otherwise based on some information that indicates actual guilt.<sup>87</sup> In *United States v. Benboe*, for example, the guilty plea was vacated because the record established only that the defendant kept a loaded weapon in or around his furniture and that he had “possessed” it, but not that he had “used or carried” it as required by statute.<sup>88</sup> Even the exception—the so-called “Alford plea” in which a defendant is permitted to plead guilty while asserting factual innocence—requires information. The Alford court noted that the guilty plea in that case was acceptable in part because the trial court had before it a “strong factual basis for the plea” and “telling evidence” of guilt.<sup>89</sup> In other words, even where a defendant declines to invoke the adversarial process in order to contest the government’s information, waiver is not enough: guilt still requires some supporting information. However, the factual basis requirement is a light one: information may be minimal or circumstantial, and because it is uncontested, the burden on the government is slight.<sup>90</sup>

In addition, a defendant may have very little information about her case and still enter a valid plea. Doctrinally, this flows from the Court’s definition of knowing and intelligent waiver, in which a defendant need only know the abstract contours of her rights and the applicable rules in order to plead guilty.<sup>91</sup>

At the same time, the Court broadly construes the kinds of information that the government can introduce into the process in order to persuade a defendant to enter a guilty plea. For example, the Court has held that the government can introduce the threat of the death penalty or new and more serious charges without rendering the plea involuntary.<sup>92</sup> Unlike the first sphere with its ruthless insistence on admissible evidence, the second sphere contemplates a permeable negotiating process in which all sorts of information can influence and shape the process of arriving at a conviction.

The scholarship is replete with criticisms of the Court’s plea jurisprudence. The longstanding complaint is that the Court’s definition

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<sup>86</sup> FED. R. CRIM. P. 11.

<sup>87</sup> See *Guilty Pleas*, 35 GEO. L.J. ANN. REV. CRIM. PRO. 381, 390 n.1299 (2006) (collecting cases on factual basis for pleas).

<sup>88</sup> 157 F.3d 1181, 1185 (9th Cir. 1998).

<sup>89</sup> *North Carolina v. Alford*, 400 U.S. 25, 38, 32 (1970)

<sup>90</sup> See *Guilty Pleas*, *supra* note 87, at 398 n.1298 (listing cases with satisfactory factual bases); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223 (2006) (proposing a heightened factual basis requirement in order to reign in prosecutorial discretion and the bringing of weak cases).

<sup>91</sup> See *United States v. Broce*, 488 U.S. 563 (1989) (holding that defendant’s ignorance of potential double jeopardy defense did not defeat plea); *United States v. Ruiz*, 536 U.S. 622, 625 (2002).

<sup>92</sup> See *Brady v. United States*, 397 U.S. 742, 747 (1970) (death penalty); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (harsher charge).

of voluntariness is unfairly formalistic, permitting defendants to be coerced in fact even as their decisions are labeled “voluntary.”<sup>93</sup> But a growing literature focuses on the more specific problem of information inequalities in the bargaining process itself, recognizing the crucial role that information—or lack thereof—plays in shaping convictions.

Plea bargains have long been conceptualized in large part as a process of prediction—two sides predicting the possible outcomes of a trial and then bargaining over the difference.<sup>94</sup> There is growing recognition, however, that guilty pleas are manifestations of informational and bargaining power differentials.<sup>95</sup> Twenty years ago, Kenneth Mann famously wrote in his manifesto on white collar crime that the central task of the zealous defense attorney is information control.<sup>96</sup> The ingredients that go into a plea bargain, moreover, are so varied that the issue of actual guilt often recedes into the background. Rather, outcome determinants include the amount of information hidden or revealed by the government, the defendant’s wealth, the skill and resources available to her attorney, and the defense’s subjective expectations about how the system will treat her.<sup>97</sup>

Albert Alschuler has long argued that plea bargaining abdicates the factual inquiry over guilt for an inequitable power struggle between defendant and the state. Over thirty years ago, he offered up the proposition that “[o]ur entire system of criminal justice is organized to avoid the difficult task of determining guilt or innocence on the evidence.”<sup>98</sup> As he pointed out then, “[t]here are no rules of evidence in plea negotiation; individual prosecutors may be influenced not only by a desire to smooth out the irrationalities of the criminal code but by thoroughly improper considerations that no serious reformer of the

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<sup>93</sup> Albert W. Alschuler, *The Supreme Court, The Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 58 (1975) (“Brady suggests that the principal function of a competent attorney in the guilty-plea system is exactly the opposite of the function suggested by the Supreme Court. Rather than dispel the coercive impact of a promise of leniency, the attorney must make the defendant realize with full clarity the coercive power of the alternatives that he faces.”).

<sup>94</sup> See *Alford*, 400 U.S. at 37 (validating defendant’s decision to plead guilty to lesser charge as “quite reasonabl[e]” “[b]ecause of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired”); see also Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983); Bibas, *supra* note 2, at 2465 n.2 (collecting predictive scholarship).

<sup>95</sup> See Scott & Stuntz, *supra* note 2; Bibas, *supra* note 72; Alschuler, *supra* note 93.

<sup>96</sup> KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 5 (1985).

<sup>97</sup> The vast majority of defendants—over 80%—are represented by overworked appointed counsel who lack the time and resources to fully engage either the factual or doctrinal possibilities of a case. See William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 570 n.242 (2001). For that small percentage of defendants who have fully-resourced, highly skilled attorneys, these extraneous non-legal determinants will be less powerful, although as Bibas points out, still operative.

<sup>98</sup> Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 69 (1968) (quoting Chicago attorney David Long).

penal code would suggest.”<sup>99</sup>

More recently, Stephanos Bibas has comprehensively described the kinds of factors that affect plea bargaining positions: “agency costs, attorney competence, compensation and workloads, resources, sentencing and bail rules, and information deficits all skew bargaining.” As a result, plea bargain outcomes derive, not from the weight of the evidence, but from the “wealth, sex, age, education, intelligence, and confidence” of the defendants. More specifically, Bibas demonstrates the role of information deficits and inequalities in exacerbating the effects of these legally extraneous factors. As he says: “The result of inadequate discovery is that the parties bargain blindfolded. They bargain in whatever shadow of trial they can discern, but they can easily go astray based on bluffing, puffery, fear, and doubt.”<sup>100</sup> This is more true for the majority of defendants who lack the fully-resourced counsel contemplated in Mann’s white-collar model, for whom information deficits not only skew the bargaining process in the government’s favor, but reduce the defense’s ability to deploy the procedural tools of the first sphere.

The second sphere thus effectuates two major shifts in the information culture: one having to do with the source of the information underlying convictions, and the other having to do with its content. First, plea bargaining grounds guilt in the defendant’s knowledge and belief and risk-aversion, rather than in the government’s information. At the same time, sphere two retracts the defendant’s access to information, even as it makes her knowledge legally dispositive. The decision to permit the government to withhold information from the defendant at this stage is thus doubly significant, instrumentally because the defendant’s knowledge at this stage is so influential on her judgment, and substantively because this information, or lack thereof, becomes the validating basis for the conviction.

Cases like *Ruiz* go further and sever the plea process from accurate predictions about likely trial outcomes. The impeachment material withheld from Angela Ruiz could have greatly influenced her trial: if she could have discredited the government’s main witness, she would have been more likely to prevail. By contrast, a defendant’s subjective knowledge of guilt is information of a different ilk, having little to do with the strength of the government’s case. As Bibas points out, innocent defendants will lack any knowledge of the strength of the government’s case at all, and therefore be in a poor position to predict their chances of conviction at trial.<sup>101</sup> In this way, *Ruiz* widens the gap

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<sup>99</sup> *Id.* at 78.

<sup>100</sup> Bibas, *supra* note 2, at 2495.

<sup>101</sup> See Bibas, *supra* note 2, at 2493-96 (noting that the Supreme Court’s discovery rules hurt innocent, mentally disabled, and intoxicated defendants most).

between the trial sphere and the plea bargaining sphere, making it an important extension of the Court's plea jurisprudence which has long held that a defendant need not have all relevant information in order to enter a knowing, intelligent, and voluntary plea.<sup>102</sup>

To be sure, a defendant also has information that the government does not. For example, she may know that she has committed a crime. She may also believe that she has committed a crime when she has not,<sup>103</sup> or believe that her actions were justified or legal when the law would find her culpable.<sup>104</sup> The first sphere considers the subjective knowledge and belief of the defendant nearly irrelevant to the determination of guilt: it is the government's admissible evidence, not the knowledge of the defendant that matters. This position is fundamental: it flows from the privilege against self-incrimination, the insistence that the government bears the burden of proof, and the more general commitment to an adversarial process. By contrast, in the second sphere the Court increasingly relies on the defendant's own knowledge, belief, and predictions as the appropriate basis for conviction.

The second shift in plea bargaining information culture is the influx and influence of bargaining information that is not guilt- or evidence-related: potential sentence length, the government's alternative offers, the defendant's own resources that she can devote to fighting the case, her fear, and her belief that the adversarial system will work for her if she does invoke it. These kinds of information are often socially dependent, subject to strictures such as class, race, and gender.<sup>105</sup> By permitting them to drive guilty pleas, the system implicitly accepts their validity as determinants of liability. In other words, as the system spends less effort testing and regulating information about guilt, it gives personal and cultural information a greater role in determining liability.<sup>106</sup>

## V. SPHERE THREE: ADJUDICATION THROUGH INVESTIGATION

*At the very beginning of the [criminal] process—or, more properly, before the process begins at all—something happens that is [] seldom recognized by the public: law enforcement policy is made by*

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<sup>102</sup> See, e.g., *United States v. Broce*, 488 U.S. 563, 573-74 (1989).

<sup>103</sup> See description of Dallas sheetrock scandal *infra* Part VI.

<sup>104</sup> See *United States v. Abcasis*, 45 F.3d 39, 42-43 (2d Cir. 1995) (in which informants alleged that their drug dealing was authorized and promoted by their DEA handlers as part of their cooperation agreement).

<sup>105</sup> See *infra* Part VI.

<sup>106</sup> This aspect of information culture is discussed at more length in Part VII.

*the policeman.*<sup>107</sup>

Criminal scholarship traditionally distinguishes between investigation and adjudication. The general idea is that “investigation” is pre-adjudicative, comprised of fact-finding, the selection of targets, charging decisions, and other law enforcement choices that lead to the creation of a legal case, while “adjudication” then resolves the outcome of that case, either through a plea bargain or trial.<sup>108</sup>

In practice, however, the line between pre-adjudicative investigation and adjudication itself is blurry. Many pre-adjudicative choices made by police and prosecutors exert a powerful influence on legal outcomes, constituting in effect de facto forms of adjudication. Choices about where to investigate, which suspect to arrest, or which one to use as a witness, what charges to bring, or whether to bring a case in state or federal court, can effectively determine whether a defendant will plead guilty and even what his approximate sentence will be. As Stuntz puts it, “[a]s criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long.”<sup>109</sup>

This influential realm of pre-adjudicative decision-making is almost completely unregulated and nearly invisible to the public. As Brown points out, “[i]n our adversarial system, the reliability and thoroughness of investigation—meaning not just police activity but all efforts, by both sides, to generate an accurate factual account of relevant events—is governed indirectly by the incentives arising from highly regulated trial adjudication.”<sup>110</sup> And sometimes this theory works, at least in part: when the results of police and prosecutorial investigative decisions surface in the creation of an actual case resulting in a public conviction, this permits some retroactive scrutiny of those decisions. But often the system does not reveal these decisions at all. Police decisions to arrest and release without charges, frisks and other searches that reveal no evidence, or evidence that is never used in court, or decisions to postpone or withhold charges in order to make a deal, can powerfully influence ultimate liability outcomes although the public, and even defendants may never learn about them. There is thus a vast realm of pre-adjudicative law enforcement decision-making that never reveals itself, either because the process does not result in a formal

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<sup>107</sup> *President’s Commission on Law Enforcement and the Administration of Justice* (1967), reprinted in KADISH & SCHULHOFER, *supra* note 34 (emphasis added).

<sup>108</sup> See, e.g., Brown, *supra* note 3.

<sup>109</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

<sup>110</sup> Brown, *supra* note 3, at 1588.

charge or conviction, or because the process of plea bargaining and deal-making hides those decisions from public view.

This third realm of pre-adjudicative investigative law enforcement decision-making constitutes the largest sphere of the criminal system. It is where the bulk of the work of investigation and crime prevention takes place. It is also the most discretionary, opaque, and unregulated. The information rules that characterize and legitimize the trial-centric sphere are almost non-existent. This fact creates some well-recognized tradeoffs. On the one hand, flexibility and discretion permit police to investigate a wide variety of crimes, and to make crucial judgments about resource allocations and targeting. Yet, on the other hand, they also permit error, official overreaching, racial and ethnic profiling, and secrecy that can lead to misconduct and unaccountability.<sup>111</sup> The workings of the third sphere are thus an important factor in evaluating the strengths and failures of the criminal system overall.

There are numerous informational dynamics within the investigative sphere that can strongly influence the rest of the criminal system. Perhaps the most famous is the advent of DNA testing. The availability of DNA identifications permits many new developments, from the ability to avoid wrongful convictions, to the establishment of databases that can track a large number of suspects, to the de-emphasis of other forms of evidence.<sup>112</sup> A similar dynamic flows from the development of new surveillance technologies and techniques. Public video cameras, radio frequency identification (RFID), scanners, and other technologies not only permit the government to obtain more information about targets, but also expand the pool of individuals who may become targets in the first place. Likewise, the growing ability of the government to use third-party data from internet service providers, libraries, phone companies, or commercial vendors is changing the nature of some kinds of criminal investigations, the kinds of cases that can be brought, and the kinds of suspects that can be identified.<sup>113</sup>

The remainder of this piece focuses on the use of criminal informants, a low-tech law enforcement technique that has become

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<sup>111</sup> See Luna, *supra* note 82 (arguing that opaque, discretionary policing undermines democratic values); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1566 (1981) (arguing that with respect to prosecutorial discretion generally, “[w]e presently tolerate a degree of secrecy in one of our most crucial decisionmaking agencies that is not only inconsistent with an open and decent system of justice, but that may not even be efficient in avoiding the additional effort necessary to make the system accountable”). See also *id.* at 1525 (“[P]rosecutors’ unlimited control over charging [i]s inconsistent with a system of criminal procedure fair to defendants and to the public.”).

<sup>112</sup> See, e.g., Kenworthy Bilz, *Self-Incrimination Doctrine is Dead; Long Live Self-Incrimination Doctrine: Confessions, Scientific Evidence, and the Anxieties of the Liberal State*, 30 CARDOZO L. REV. 807 (2008) (arguing that DNA and other new technologies will render confessions increasingly irrelevant).

<sup>113</sup> See Kerr, *supra* note 4; Brown, *supra* note 3.

increasingly influential in the investigation of drug and street crime, conspiracy, corporate fraud, and, most recently, terrorism. The practice dramatically illustrates the difficult trade-offs inherent in law enforcement discretion, and has altered many aspects of investigation as well as plea bargaining and sentencing. Informant use spans all three informational spheres and affects numerous aspects of the criminal system's information culture: from its significance as an investigative tool, to its use as a plea bargaining technique, as well as its impact on Supreme Court doctrine. Taken together, these characteristics reveal a complex and troubling informational dynamic in tension with many of the system's legitimating precepts of informational regulation.

## VI. CRIMINAL INFORMANTS: THE DEREGULATION OF GUILT

The dominance of plea bargaining in conjunction with the war on drugs has made the use of criminal informants a central engine of the criminal justice system.<sup>114</sup> Nearly every drug case involves a snitch, and drug cases represent an ever larger proportion of both state and federal dockets. As U.S. District Judge Marvin Shoob once complained, "I can't tell you the last time I heard a drug case of any substance in which the government did not have at least one informant. . . . Most of the time, there are two or three informants, and sometimes they are worse criminals than the defendant on trial."<sup>115</sup> Moreover, informants are used in the investigation, prosecution, and/or sentencing of every type of offense, from child pornography to antitrust to burglary.<sup>116</sup> As the use of informants becomes an increasingly common investigative and case management tool, the impact of the official practice of trading information for liability with criminals becomes of central importance for understanding the system's changing information culture.<sup>117</sup>

Criminal informants—i.e., criminal offenders who receive lenient treatment because of their cooperation with the government<sup>118</sup>—are a

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<sup>114</sup> See Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 654-57 (2004) (describing pervasiveness of snitching practices).

<sup>115</sup> Mark Curriden, *Secret Threat to Justice: There are Few Controls Over the Hidden Alliance of Agents and Informers*, NAT'L L. J., Feb. 20, 1995, at A1.

<sup>116</sup> Bureau of Justice Statistics, *Federal Pretrial detention hearings and defendants ordered detained in U.S. District Courts*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.5.14 (2001), <http://www.albany.edu/sourcebook/pdf/t514.pdf>.

<sup>117</sup> See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2559 (2004) ("The goal of academics who write about plea bargaining should be to identify local patterns, tendencies that might apply to some kinds of criminal cases but not others.").

<sup>118</sup> I am not including in this discussion other kinds of informants, for example those who work solely for money, or out of altruism, or who merely provide information about crimes they

longstanding and important part of the criminal system. Certain kinds of cases—drug conspiracies, antitrust, corporate fraud, terrorism—are difficult to investigate or prosecute without them, as the government is in a poor position to obtain incriminating information without inside help. Some kinds of information, for example, are only possessed by participants. Moreover, informants are procedurally simple and cheap. For example, while the government can apply for a wiretap order under Title III, it needs to show probable cause, and the resulting order will include time and other limitations. Alternatively, the government can skip the warrant process altogether and get an informant to wear a wire, without having to show probable cause and without temporal or spatial restrictions.<sup>119</sup> Their usefulness and ease have thus made informants a staple of drug and other investigations.

Notwithstanding their investigative value, informants pose significant challenges. The informant deal is the antithesis of the trial-centric, regulated, due process information model. It proceeds in secret, with almost no constraints on the parties' ability to use information or to bargain. Police have nearly unfettered discretion both to seek information from suspects and to decline to arrest them in exchange, while prosecutors have similarly unfettered discretion to trade charging and sentencing concessions for cooperation. The secrecy surrounding the practice enables the government to use almost any information it wants to pressure a deal, including illegal evidence, racial profiling, and personal information about the suspect or his/her intimate relationships.

One reason for these developments is that the use of criminal informants falls squarely between the gaps of informational doctrine. Street-corner interactions between police officer and informant are largely unaffected by search and seizure or self-incrimination law.<sup>120</sup> Many seminal criminal procedure cases turn on the inapplicability of the Bill of Rights to interactions with informants.<sup>121</sup> Even in more

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have witnessed with no benefit to themselves.

<sup>119</sup> See 18 U.S.C. § 2511(2)(c) (2006) (one-party consent to electronic surveillance obviates the need to obtain a warrant).

<sup>120</sup> See *California v. Hodari D.*, 499 U.S. 621, 625-26 (1991) (finding no seizure where there was no physical force and suspect did not submit to police authority); *Berkemer v. McCarty*, 468 U.S. 420, 435-42 (1984) (finding no custody for Fifth Amendment purposes where defendant was not under arrest during Terry stop); see also *Alexander v. DeAngelo*, 329 F.3d 912, 918 (7th Cir. 2003) (“[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 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.”).

<sup>121</sup> *United States v. White*, 401 U.S. 745, 749-53 (1971) (finding no Fourth Amendment bar to using wired informant to record conversation in defendant’s home); *Illinois v. Perkins*, 496 U.S. 292 (1990) (finding no Fifth Amendment bar to using jailhouse snitch to obtain incriminating information).

regulated settings, a defendant's decision to cooperate will eviscerate many constitutional restraints on governmental information gathering, not only against the informant himself<sup>122</sup> but also against third parties. Perhaps the most dramatic consequence is the ability of the government to evade Fourth, Fifth and Sixth Amendment restrictions by persuading an informant to obtain information that government agents could not obtain on their own.<sup>123</sup> The gaps in information doctrine thus create a zone of procedural permissiveness that naturally promotes the use of informants.<sup>124</sup>

Once the deal is struck, the information obtained from informants is problematic in its own right. Not only is it famously unreliable, but it is colored by the choices made by informants themselves, who may identify others in order to further their own criminal or personal desires. For example, a suspected drug dealer who told Atlanta police that they would find a kilogram of cocaine at Kathryn Johnston's address was released in exchange for that tip, even though the tip was inaccurate and led to the death of the 92-year old grandmother.<sup>125</sup>

Despite these flaws and biases, informant information drives a great deal of official decision-making. Police design investigations and prosecutors select targets based on their informant sources. The kinds of information that informants tend to give become an important determinant shaping law enforcement.<sup>126</sup> The symbiosis between source and handler, moreover, becomes an informational force to be reckoned with.

There are numerous examples of productive informant deals.

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<sup>122</sup> For example, cooperation agreements typically contain waivers of the right to counsel's presence so that a represented defendant can communicate with the police without his attorney. Cf. *Massiah v. United States*, 377 U.S. 201 (1964) (finding that the government's elicitation of information from represented defendant violated Sixth Amendment right to counsel).

<sup>123</sup> See John G. Douglass, *Jimmy Hoffa's Revenge: White Collar Rights Under the McDade Amendment*, 11 WM. & MARY BILL RTS. J. 123 (2002). In *Hoffa*, the criminal informant was able to enter the defendant's private hotel room, and listen in on privileged conversations between the defendant and counsel. In *White*, the Court approved the use of a wired informant, giving the government the ability to record the defendant's conversation without a warrant or wire tap order. *United States v. White*, 401 U.S. 745 (1971). See also Mona R. Shokrai, *Double Trouble: The Underregulation of Surreptitious Video Surveillance in Conjunction with the Use of Snitches in Domestic Government Investigations*, 13 RICH. J. L. & TECH. 3 (2006).

<sup>124</sup> See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (arguing that restrictive criminal procedure shifts law enforcement activity toward less regulated arenas).

<sup>125</sup> Rhonda Cook, *Chain of Lies Led to Botched Raid*, ATLANTA J. CONST., Apr. 27, 2007, at D1.

<sup>126</sup> The use of informants has a measurable racial impact. For example, informants are used more heavily in minority neighborhoods to obtain warrants, a practice that in turn focuses police attention in those same neighborhoods. Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. WEST. L. REV. 221, 230-33 (2000) (80-90% of informant-based warrants issued in minority zip codes). See generally Natapoff, *supra* note 114 (discussing racial impact of informant use).

From Sammy the Bull to Edward Partin<sup>127</sup> to Jack Abramoff, using informants often produces important investigations and convictions. The fact that approximately fifteen percent of all federal defendants—and one-quarter of drug defendants—receive sentencing credit for “substantial assistance” indicates that federal prosecutors and courts believe that cooperating defendants provide valuable investigative resources.<sup>128</sup>

The costs and dangers of informant use are more difficult to document, in part because there are few mechanisms for recording cases where informants give bad information, or commit new crimes, or lead to corruption. Anecdotal evidence, however, suggests the nature of some of the problems.

For example:

### 1. The Prison Snitch Factory

Ann Colomb and her three sons were federally indicted for allegedly running the largest crack ring in Louisiana out of their home. They were convicted in jury trials and served four months in prison before they were released and all charges dismissed. Their wrongful convictions were based on fabricated information obtained from a ring of jailhouse informants who bought and sold information about the Colomb family so that inmates could offer testimony and reduce their own sentences. The government identified 31 informants that it planned to use in this way, before the scheme was revealed. The presiding judge, U.S. District Judge Tucker Melancon, said afterwards: “It was like revolving-door inmate testimony. The allegation was that there was in the federal justice system a network of folks trying to get relief from long sentences by ginning up information on folks being tried in drug cases. I’d heard about it before. But it all culminated in the Colomb trial.”<sup>129</sup>

### 2. Switching Sources

Atlanta police planted drugs on Fabian Sheats and then pressured him for information. He told them that they would find a kilogram of

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<sup>127</sup> Partin was the informer whose information formed the basis for Jimmy Hoffa’s conviction for jury tampering. *Hoffa v. United States*, 385 U.S. 293 (1966).

<sup>128</sup> Bureau of Justice Statistics, *Sentences within and departing from U.S. Sentencing Commission guidelines in U.S. District Courts*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.5.36.2006 (2006), <http://www.albany.edu/sourcebook/pdf/t5362006.pdf>.

<sup>129</sup> Radley Balko, *Guilty Before Proven Innocent*, REASON, May 2008, at 43-55.

cocaine at a particular address. The police let Sheats go, and then invented an imaginary informant in their application for a no-knock warrant. When they broke down the door at that address, police shot and killed the 92-year-old grandmother who lived there. There were no drugs. The police then called a long-time snitch, Alex White, and told him to say that he had bought drugs at that address. They offered White \$130 for this information.<sup>130</sup>

### 3. Sex for Lenience

Amy Gepfert was suspected of participating in a conspiracy to deal cocaine. The police told her that she was facing a forty year sentence, although in fact her maximum sentence would have been ten years. Police also discouraged her from calling a lawyer. In exchange for avoiding prosecution, the police required her to engage in oral sex with another suspect and to ask him for money. That suspect was then charged with soliciting a prostitute.<sup>131</sup>

### 4. Fabricating Evidence

In Dallas, police made an arrangement with a group of informants in which the informants planted fake drugs on Mexican immigrants. The police then arrested the immigrants and fabricated or failed to conduct the drug tests that would have revealed that the alleged cocaine was actually gypsum, the substance found in wallboard. The informants were paid thousands of dollars, while the police used the arrests to inflate their drug-bust statistics. Numerous immigrants pleaded guilty and were deported before the scheme was discovered.<sup>132</sup>

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<sup>130</sup> Cook, *supra* note 125, at D1; *see also* Bill Torpy, *Big Score Holy Grail for Drug Officers*, ATLANTA J. CONST., Jan. 13, 2007, at A1. This incident triggered a federal investigation into Atlanta police practices and a congressional hearing on law enforcement confidential informant practices. *See Joint Oversight Hearing on Law Enforcement Confidential Informant Practices: Hearing Before the Subcomm. On Crime, Terrorism and Homeland Security and the Subcomm. On the Constitution, Civil Rights and Civil Liberties*, 110th Cong., 1st Sess. (2007), 2007 WL 2084166 (statement of Alexandra Natapoff).

<sup>131</sup> *Alexander v. DeAngelo*, 329 F.3d 912 (7th Cir. 2003) (holding that informant stated a civil rights claim under 42 U.S.C. § 1983 when police forced her to engage in oral sex with a suspect in exchange for avoiding prosecution); *see also* Susan S. Kuo, *Official Indiscretions: Considering Sex Bargains with Government Informants*, 38 U.C. DAVIS L. REV. 1643 (2005) (analyzing police practice at issue in *Alexander* of pressuring female informants to use sex to obtain incriminating information about others in order to avoid their own prosecution as a form of gender subordination).

<sup>132</sup> DallasNews.com, *Fake Drugs: Evolution of a Scandal*, <http://www.dallasnews.com/s/dws/spe/2003/fakedrugs/fakedrug1103.html>; *see also* Ross Milloy, *Fake Drugs Force an End to 24 Cases in Dallas*, N.Y. TIMES, Jan. 16, 2002, at A1.

## 5. NYPD Trading Drugs for Information

In New York, Brooklyn police officers paid informants with drugs taken from dealers who were arrested after the informants pointed them out. One officer bragged about the practice on tape, explaining that officers would seize drugs but report a lesser amount, keeping the unreported drugs to give to informants later on.<sup>133</sup>

## 6. Witness Intimidation

“For real, little sis, you better not be snitching,” Franklin M. Thompson told 14-year-old Jahkema Princess Hansen in Washington, D.C. A witness said that Thompson made the remark after the teenager demanded to be paid in exchange for saying nothing about a killing she had witnessed five days earlier. Hours later, Princess Hansen was shot dead.<sup>134</sup> Police and prosecutors in numerous cities have complained of witness intimidation, stating that it is difficult to get witnesses to serious crimes to come forward.<sup>135</sup>

Such examples—which represent just the tip of the iceberg<sup>136</sup>—illustrate the myriad potential influences of informant use on the criminal process. They reveal not only the potential unreliability of the practice, but the often corrupting personal relationships established between police and snitches, particularly the power inequalities that characterize this method of gathering information. They demonstrate the reversal of means and ends implicit in the trading of information for liability, and the potential increase in crime and violence that can accompany it. Finally, they suggest the impact of the practice on the meaning of guilt itself. These aspects are considered briefly below.

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<sup>133</sup> Al Baker, *Drugs-for-Information Scandal Shakes Up New York Police Narcotics Force*, N.Y. TIMES, Jan. 23, 2008, at B1.

<sup>134</sup> See, e.g., Henry E. Cauvin, *Witness Says Slain Girl Was Warned*, WASH. POST, Feb. 11, 2004, at B-1.

<sup>135</sup> Todd Richmond, AP, *Witness Protection Programs Hurting: Programs Don't Have Enough to Keep Witnesses Safe*, WIS. ST. J., May 1, 2008, at A1.

<sup>136</sup> On the same day that the New York Times reported the drugs-for-information scandal, the Cleveland Plain Dealer reported the decision of a federal judge to release 15 men from prison because their convictions were based on the perjury of a DEA informant. Fourteen of the fifteen men now adjudged innocent had pled guilty, after the first defendant to refuse a plea and go to trial received a ten year sentence. John Caniglia, *Judge to Free 15 Convicted on Drug Informant's Tainted Testimony*, CLEV. PLAIN DEALER, Jan. 23, 2008.

A. *Unreliability and Secrecy*

*What is the truth? Truth is very different when you have lived your life as part of an organization that commits crimes and lived life through deceit. Truth equals what I know or what I can be caught at. Truth depends on how you characterize events in your life. Truth also depends on using the right language. Once I asked [an informant] how many times a week, on average, were you in a particular drug spot? He asked: How long is a week? When I explained I meant seven days, he explained that some weeks are three days, some are nine days.*<sup>137</sup>

The most infamous and best documented hallmark of snitching is its unreliability. Both in theory and practice, information obtained from criminal informants who are compensated for their information is often wrong. According to one recent report, nearly half of all wrongful capital convictions are a result of a lying informant witness.<sup>138</sup> Numerous cases and media stories reveal the extent to which informants lie in exchange for lenience, and the extent to which police and prosecutors rely on their information knowing it to be problematic or outright false.<sup>139</sup>

These threats to informational integrity flow from the general move toward informal negotiated liability and information gathering. The traditional adversarial mechanisms for checking unreliability such as discovery, trial, and public disclosure are unavailable in the investigative and plea bargaining context. In other words, as liability is resolved earlier in the process, the more likely it is that informant information will generate wrongful guilt determinations.

The fact that the criminal system routinely produces and relies on inherently unreliable information reflects a cavalier attitude toward guilt. It suggests that the main decision-makers—police and

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<sup>137</sup> Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 954 (1999) (quoting from an interview with prosecutor describing his/her experiences with cooperators) (emphasis added).

<sup>138</sup> WARDEN, *supra* note 5.

<sup>139</sup> See generally Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 *FORDHAM L. REV.* 1413 (2007). See also *Goldstein v. City of Long Beach*, 481 F.3d 1170 (9th Cir. 2007) (holding that defendant stated a claim against District Attorney for maintaining office procedures that permitted unreliable informant information to be used), *cert. granted sub nom Van De Kamp v. Goldstein*, 128 S. Ct. 1872 (2008); *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (finding that the prosecutor violated due process by knowingly presenting the false testimony of an informant); *United States v. Connolly*, 341 F.3d 16 (1st Cir. 2003) (documenting FBI agents' complicity in and cover up of their mafia informants' criminal activities). See also Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 *GOLDEN GATE L. REV.* 107 (2006); Caniglia, *supra* note 136.

prosecutors—care less about accuracy than productivity.<sup>140</sup> It also reflects how the notion of guilt as the product of a negotiation rather than a question of fact has permeated the culture of law enforcement. Police and prosecutors who bargain while relying on obviously flawed investigative tactics have implicitly accepted the possibility that innocent people will plead guilty under pressure to avoid harsher punishments.<sup>141</sup>

Informant unreliability is exacerbated by secrecy, making mistakes harder to discern and errors easier to conceal after the fact. Nevertheless, the pressure to keep informant identity and information secret has been a powerful force in criminal procedure.

For example, informants exacerbate the trend towards constricted discovery. The *Ruiz* Court explicitly held that one of the reasons the government may withhold *Giglio* impeachment material during plea negotiations is to protect the identity of government sources and ongoing investigations.<sup>142</sup> At the same time, the very existence of discovery rules causes information creators—police and prosecutors—to act in more clandestine ways. As Jerome Skolnick described decades ago, police truncate their written, discoverable reports to hide the existence of their informants.

For example, police will not say in an arrest report that they cajoled, or, in rare instances, threatened a suspect to get information. More importantly, they will not, if possible, reveal that an informant was utilized at all. Indeed, this concealment is a major task of the police. . . . [I]t almost never happens that an informant is not used somewhere along the line in crimes involving “vice,”. . . . Nevertheless, of the five hundred and eight cases in the narcotics file of the Westville police during [a 15-month year period], less than 9 per cent [sic] mentioned the use of an informant.<sup>143</sup>

More recent studies confirm that police routinely decline to mention informants in reports or to prosecutors, or decline to arrest them, in order to avoid a paper trial.<sup>144</sup> Prosecutors likewise avoid making overt promises to informants in order to escape Brady disclosure requirements.<sup>145</sup>

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<sup>140</sup> See Brown, *supra* note 3, at 1612 (“The system’s acceptance of th[e] risk [that innocent defendants will plead guilty] evinces a priority for case resolution over truth-finding.”).

<sup>141</sup> See Caniglia, *supra* note 136 (documenting how 14 innocent men pled guilty to charges instigated by a DEA informant).

<sup>142</sup> United States v. Ruiz, 536 U.S. 622, 632-33 (2002).

<sup>143</sup> JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 133 (1966).

<sup>144</sup> Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. WEST. L. REV. 221 (2000); see also ACLU REPORT TO CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE (documenting police practices designed to conceal informants) (on file with author).

<sup>145</sup> See Cassidy, *supra* note 66; Yaroshefsky, *supra* note 137, at 962 (describing how

The practice of using criminal informants has also eroded more general publicity principles. For example, as it did in *Ruiz*, the government often asserts that it needs to keep information about cooperators and investigations secret so as to protect informants from threats, and to shield investigations. This has led to dockets and court records being sealed or removed from public docketing systems, even as the system trends generally toward broader public access to docket information through internet access and the digitization of court records.

In November 2006, the U.S. Judicial Conference sent a memorandum to the entire federal bench, recommending “that judges consider sealing documents or hearing transcripts . . . in cases that involve sensitive information or in cases in which incorrect inferences may be made.” The recommendation was made in response to the website Whosarat.com that publishes information and court records of individuals believed to be informants.<sup>146</sup> In its report on public access to electronic case files, the Judicial Conference recommended against making criminal court records electronically available to the public primarily because of the risk of exposing informants.<sup>147</sup>

In 2007, federal courts for the Eastern District of Pennsylvania and the Southern District of Florida adopted a new protocol that eliminates public website access to docket entries and to all plea agreements in all criminal cases. The purpose of the new protocol is to make it impossible to discern (without physically going to the courthouse) whether a defendant is cooperating. It works by restricting access to all plea agreements and sentencing documents in all criminal cases, and by preventing the public from seeing whether court documents are sealed—considered a red flag that indicates cooperation.<sup>148</sup>

A 2006 investigation by the Associated Press revealed the existence of widespread sealing and “secret dockets” in the federal court system for Washington, D.C. Nearly 5,000 criminal cases remain sealed long after the case is completed, and for hundreds of those cases,

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prosecutors avoid taking notes when debriefing informants to avoid creating discoverable material).

<sup>146</sup> Memorandum from John R. Tunheim and Paul Cassell, *Website Posting Information on Criminal Case Cooperation* (Nov. 9, 2006) (on file with author).

<sup>147</sup> The Federal Judiciary, *Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files* (Dec. 2006), available at <http://www.privacy.uscourts.gov/Policy.htm> (“Routine public remote electronic access to documents in criminal case files would allow defendants and others easy access to information regarding the cooperation and other activities of defendants. Specifically, an individual could access documents filed in conjunction with a motion by the government for downward departure for substantial assistance and learn details of a defendant’s involvement in the government’s case. Such information could then be very easily used to intimidate, harass and possibly harm victims, defendants and their families.”).

<sup>148</sup> Shannon Duffy, *Pa. Courts Move to Protect Informants from ‘Who’s A Rat’ Web Site*, THE LEGAL INTELLIGENCER, July 17, 2007, available at [law.com/jsp/law/LawArticleFriendly.jsp?id=1184576795741](http://law.com/jsp/law/LawArticleFriendly.jsp?id=1184576795741).

the system falsely indicates that there is “no such case” if the case number is entered into the system. Most of the cases involved cooperating government witnesses.<sup>149</sup>

Protecting informants from violence is obviously an important governmental responsibility. But in its first-sphere doctrine, the Supreme Court has made clear that the presumption of public access should not give way to general assertions, but rather that secrecy must be justified by actual findings and effectuated by narrowly tailored means.<sup>150</sup> Indeed, in a 1985 decision, then-Judge Kennedy unsealed an informant’s file because the government had failed to justify the need for secrecy in that particular case.<sup>151</sup> By contrast, the examples above reveal a less critical judicial acceptance of widespread secrecy, based on the general possibility of threats or investigative need.

In these ways, not only do informants evade traditional disclosure and information controls, but their widespread use exerts pressure on the entire system to become more secretive and less publicly accessible. This is particularly ironic because of the competing general trend toward digitization and better public access to information. As the internet and the information revolution make it ever easier to access public data, the criminal system is constricting its own longstanding public access principles to hide what would otherwise be public information. Such dynamics draw a thicker veil over the ways that the system obtains information and resolves guilt, making it more difficult to ensure accuracy.<sup>152</sup>

### B. *Cultivating Informants: Getting Personal*

“[T]he informant is the life blood of the good detective.”<sup>153</sup>

The criminal system’s formal information culture purports to be deeply concerned with tempering the government’s ability to extract information from individuals. Whether it is through Miranda warnings or the ministrations of the neutral detached magistrate, information rules constrain the relationship between police and individual. When it

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<sup>149</sup> Michael J. Sniffen & John Solomon, AP, *Thousands of Federal Trials Kept Secret*, Mar. 5, 2006.

<sup>150</sup> See text and notes *supra* Section III.

<sup>151</sup> *CBS, Inc. v. U.S. Dist. Court*, 765 F.2d 823 (9th Cir. 1985).

<sup>152</sup> See Samuel R. Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So Little and New Data on Capital Cases*, (Univ. of Mich. Law Sch. Pub. Law Research Paper No. 93 & Mich. St. Univ. Coll. of Law Legal Studies Research Paper No. 05-14, 2007), available at <http://ssrn.com/abstract=996629> (describing how lack of transparency in criminal process impedes analysis of wrongful convictions).

<sup>153</sup> SKOLNICK, *supra* note 143, at 124 (emphasis added).

comes to the cultivation of informants, however, negotiations between the state and the individual are not only unmediated by the usual constraints, they can get deeply personal.

I learned-early in my career . . . the value of sympathy for a crook. A small gesture of kindness . . . brought me a good deal of kudos and set my career on the upward path. After that I began to cultivate thieves. I made friends with them, listened to their troubles, and shut my eyes to their minor misdeeds.<sup>154</sup>

The typical beat police inhabit communities in which they are constantly collecting bits of personal and social information.<sup>155</sup> When police believe they have enough leverage to create an informant, they will confront the individual and negotiate for more information. The leverage might consist of evidence of a crime, but it might also consist merely of the police's considerable ability to make that person's life miserable. Once the individual agrees to cooperate, he or she then enters into a power-fraught relationship with the police in which information is provided in exchange for liberty, or sometimes more mundanely, the ability to remain temporarily free from police pressure.<sup>156</sup>

Some snitching arrangements are straightforward exchanges. One sociologist interviewed street criminals who described the typical deal as follows:

'I want these new shoes, I want this or I want drugs to sell,' or something like that . . . 'and the police asked me for information.' I'm just gonna give it them to get what I want, even if they gonna give me some drugs or give me some money, or whatever, whatever they gonna give me I'm still gaining. . . . I'm gaining to get something in my pocket. . . . And in another way, I could fucking well get caught with a gang of cocaine and I know the man they want, they'll tell me 'I'm gonna let you stay on the street a little bit longer if you tell me where he is.' Sure I'm gonna tell him, he's right over there.<sup>157</sup>

The study also described how police sometimes purposely endanger their own informants as a way of instilling fear and enhancing control:

[Y]ou start informing then you got to keep informing cause if you stop [the police] . . . gonna talk to the person that you told on and then they gonna wind up killing you . . . [The police] have you

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<sup>154</sup> *Id.* at 131 (quoting a detective).

<sup>155</sup> By which I mean that police participate in communal life, not that they necessarily reside there. See David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1798 (2005) (examining the decline of police residency rules).

<sup>156</sup> See, e.g., ROD SETTLE, POLICE INFORMERS: NEGOTIATION AND POWER 245 (1995) (documenting police's "gross and often violent manipulation" of criminal informants).

<sup>157</sup> Richard Rosenfeld, Bruce Jacobs & Richard Wright, *Snitching and the Code of the Street*, 43 BRIT. L. CRIMINOLOGY 291, 303 (2003).

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riding in the car . . . then let [others] know you're the snitch. . . . Get my head blown off! . . . [T]he police come and get you . . . and drop you off in the middle of the fucking neighbourhood [sic] where everybody's at. 'Thank you!' They ride the fuck off and throw \$50 out the window.<sup>158</sup>

The researchers concluded that "a reasonable supposition is that most street criminals give information to the police. The police control access to the streets and can make life miserable and unprofitable for offenders they want to put out of business. At some point, offenders who want to remain free and active will have to come to terms with these pressures."<sup>159</sup> The researchers note the irony that this police practice exacerbates both crime and social instability: "the police may play a major role in intensifying reliance on informal (and illegal) mechanisms of dispute resolution by using snitches to achieve the ends of formal social control."<sup>160</sup>

More specifically, police reliance on addicts for information requires both chemical and psychological manipulation. Not only do police routinely provide addicts with money and/or drugs to feed their habits, but they try to "build [the addict's] dependence upon particular police handlers [by] bolstering . . . the informer's low sense of self-esteem."<sup>161</sup>

Using informants changes the nature of police work. As police rely more heavily on snitches, their ability to work with, retain, and protect informants becomes central to their own professional success. One former police trainer and narcotics bureau director described the importance of maintaining an officer's personal reputation among criminals. As he put it:

The criminal elements of a community know who the fair, productive and professional investigators are in a police organization. They know who to trust, whose word is good, and who will demonstrate persistence toward solving crimes. They also know who has influence with prosecutors, judges, and other law enforcement agencies. In other words, they know who to 'weigh in' with. . . . After a successful prosecution, my telephone would begin to ring. . . . These informants may be seeking help with their charges, calling out of fear of being charged, or just in need of money.<sup>162</sup>

This same official also describes handling informants as a form of

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<sup>158</sup> *Id.* at 304.

<sup>159</sup> *Id.* at 305.

<sup>160</sup> *Id.* at 307.

<sup>161</sup> Steven Greer, *Towards a Sociological Model of the Police Informant*, 46 BRIT. J. SOC. 509, 514 (1995); Jay Williams & L. Lynn Guess, *The Informant: A Narcotics Enforcement Dilemma*, 13 J. PSYCHOACTIVE DRUGS 235 (1981) (noting that law enforcement provision of drugs to addict informants creates an ethical conflict); *see also* Baker, *supra* note 133.

<sup>162</sup> STEPHEN L. MALLORY, INFORMANTS: DEVELOPMENT AND MANAGEMENT 18-19 (2000).

employee management, dependent on “motivation, leadership style, and job satisfaction.” “Informants, like other productive people, must be motivated to reach their potential. . . . Once the investigator’s positive reputation has become known in the community, informants will be more easily recruited and controlled by the investigator. He will be known as a police officer who understands and works with people.”<sup>163</sup> This may even involve delegating power to the informant to enhance his job satisfaction. “The investigator may use empowerment to motivate a potential informant. Although care must be used when allowing informants to exercise too much control or to have too much input into case planning, participat[ion] by the informant does seem to produce more cooperation.”<sup>164</sup>

In other words, using snitches blurs the line between police and criminal. Part of this dynamic is to change the role of incriminating information: it becomes part of a larger, often long term relationship between police and informant in which the production of incriminating evidence is merely one facet that can give way to managerial needs.

As described above, the interactions between police and suspect are typically unregulated by the system’s informational or adversarial rules. Indeed, at the extreme, the relationship between informant and handler can render the adversarial process nearly irrelevant. The following anecdote describes the beginning stages of my representation of a long-time informant, although I did not know it at the time.

\* \* \*

Russell<sup>165</sup> sat next to me at counsel table, polite but quiet, waiting for the arraignment to begin. We had just met in the lock-up, and as his newly-appointed public defender I was puzzled by his case. On the one hand, it looked relatively simple. Russell was charged with being a felon-in-possession of a gun, a common federal offense. On the other hand, it was an old state case that had been hastily transferred to federal court, and before I had even met my client, the prosecutor had rushed up to me in the courthouse hallway waving an already drafted plea agreement, offering significant concessions if Russell would just hurry up and sign. I had only had a brief chance to ask Russell about his understanding of the case, but he had just shrugged his shoulders. I suspected his reticence was due to his manic-depression since he had not had access to his medication for a few days. As I sat musing over the situation, I felt Russell perk up in his seat. I turned, hoping for more

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<sup>163</sup> *Id.* at 52.

<sup>164</sup> *Id.* at 43.

<sup>165</sup> The names in this actual case have been changed to protect the attorney-client privilege. The incident was reconstructed from my memory and notes taken during the case.

insight, but he wasn't looking at me.

"Bobby!" he cried out, swiveling his body towards the police officer who had just entered the courtroom. As Bobby headed for our table, Russell rose to meet him, waving his hands. "How could you do this to me? You know I didn't have nothin' to do with that gun!"

I quickly reached for Russell's arm, reminding him in urgent tones that he shouldn't discuss his case with the government. He ignored me.

The officer shook his head sadly. "I'm sorry Russell, I know. I just needed you for this case." Russell struck his thigh in frustration. "You know I would'a testified! You know I would'a done that for you. You didn't have to go and ARREST me!"

Bobby looked rueful. "I'm sorry, man. I had to be sure." He jerked his head toward the prosecutor sitting across the room. "They made me do it this way." The two men stood in silence for a moment. "How's Monica and the kids?" Russell had five children; his wife was pregnant with their sixth.

Russell sighed. "They alright. But they scared now. Can you at least go check on 'em?"

Bobby grasped Russell's shoulder. "I will, man. I promise." Satisfied for the moment, Russell slumped back down in his seat as Bobby walked over to the prosecution's table.<sup>166</sup>

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Russell's behavior suggests how an informant's perception of the adversarial process can diverge sharply from traditional doctrinal descriptions. Russell believed, quite rightly, that the police officer had far greater power to protect him, shape his life, and alter his legal alternatives than his lawyer did, even in the courtroom itself. In his eyes, my central function was to facilitate his cooperation and to obtain for him the greatest possible benefit.

Margareth Etienne describes this marginalization of counsel for cooperators in the federal sentencing context as the "declining utility of the right to counsel."<sup>167</sup> Etienne's "declining utility" extends beyond

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<sup>166</sup> Russell eventually pled guilty to the gun charge and testified at the trial that Bobby wanted him to. Prior to sentencing, a correctional officer reported that another inmate shouted at Russell: "There goes that rat! We're going to kill you when you get into the system." Russell was subsequently placed in protective custody.

<sup>167</sup> See Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CAL. L. REV. 425, 465 (2004).

Etienne zeroes in on the role of cooperation as an engine of defense counsel marginalization. While some defense attorneys interviewed by Etienne thought that their advocacy role in court did not suffer as a result of their client's cooperation, others described significant changes. "One attorney observed feeling 'more restrained' in the types of arguments he could make while representing a cooperating defendant." *Id.* at 464. Another attorney opined

defense counsel to the rules of the adversarial process itself. For example, Russell saw little value in maintaining his right to remain silent; indeed, he believed that his greatest chances for benefit depended on maintaining his dialogue with Bobby. At the same time, Bobby, who had been aware of Russell's potential federal liability for the gun in question for a long time, and possibly for other potential offenses as well, had temporarily suspended the usual rules of liability to protect his source.

The intimacy of the handler-informer relationship affects all participants. While prosecutors tend to have more arms length dealings with informers, they may also develop personal—and compromised—relationships in pursuit of information. Ellen Yaroshefsky has interviewed federal prosecutors who describe the phenomenon of “falling in love with your rat”:

You are not supposed to, of course. You are trained to maintain your objectivity. But you spend time with this guy, you get to know him and his family. You like him. You believe that he has come clean. His cooperation is the first step toward a new life. Hopefully, the assistant has a skeptical mind set, but the reality is that the cooperator's information often becomes your mind set. Typically, he won't lie to you on big things. It's the little things. It's a phenomenon and the danger is that because you feel all warm and fuzzy about your cooperator, you come to believe that you do not have to spend much time or energy investigating the case and you don't.<sup>168</sup>

More dramatically, an increasing number of cases reveal prosecutors who invest so heavily in their informants that they conceal evidence, make secret deals, and suborn perjury.<sup>169</sup> In such instances, the informant is no longer merely an information source, but rather becomes the motivational force behind police and prosecutorial decisions about cases, governmental priorities, and even law enforcement misconduct.

### C. *From Means to Ends: Tolerating Crime in Exchange for Information*

Twenty years ago, sociologist Gary Marx worried that the government's increasing use of undercover tactics, including the use of informants, was shifting governmental priorities away from fighting

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that “[i]f the defendant wants the departure in such instances, ‘at a certain point [the defense lawyer] just kind of [has] to shut up.’” *Id.* at 465.

<sup>168</sup> Yaroshefsky, *supra* note 137, at 944.

<sup>169</sup> See *supra* note 139 (collecting sources).

crime towards surveillance and social control as an end in itself.<sup>170</sup> Today, as police seeking information give millions of dollars worth of cash and drugs to drug addicts, purportedly in the name of conducting the “war on drugs,” Marx’s fears seem more prescient than ever.<sup>171</sup> The practice of letting known criminals walk away in exchange for information, and even facilitating their criminality in order to enhance their informational value, calls into question the very purpose of the law enforcement endeavor in the first instance.

Perhaps most fundamentally, the use of informants demands that law enforcement ignore or even facilitate crime and violence. On an individual level, informants commit crimes that are forgiven or ignored in exchange for information. On a systemic level, the policy of using informants can exacerbate street level violence, violence in prison, and the disruption of social networks. When this happens, it means that the goal of obtaining information is competing with other goals such as prosecuting crimes and maintaining community safety and stability.

This reversal of means and ends works its way down into the details of law enforcement. Police often conceal exculpatory information about their informants from prosecutors in order to protect their sources, while prosecutors may dismiss cases to protect the identity of a snitch. From the government’s perspective, the relationship between information and liability is literally stood on its head: rather than using information to produce guilt, the government uses its considerable discretion over guilt to protect its information.

Stuntz describes another aspect of the reversal—its effect on allocations of guilt and punishment:

In most cases, the point of threatening a harsh post-trial sentence is to induce a guilty plea. In drug cases, the government often has another goal: to get information. Something important follows from that goal: defendants who have to most information to sell get the biggest discount. . . . Trading plea concessions for information means giving the biggest breaks to the worst actors. [W]orse, . . . [i]n order to make their threats credible, prosecutors must punish defendants who fail to give them the information they want. . . . 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

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<sup>170</sup> See GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA (1988) (describing shift in law enforcement purposes toward surveillance for its own sake). This shift characterizes the entire criminal system, not merely informant use. See, e.g., JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); DAVID GARLAND, THE CULTURE OF CONTROL (2001).

<sup>171</sup> See Baker, *supra* note 161 (documenting police practice of keeping drugs from busts to give to informants as payment); see also Matt Lait & Scott Glover, *2 Officers Allegedly Gave Drugs to Informant*, L.A. TIMES, Feb. 13, 2000, at A-1 (documenting same practice).

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working at high levels of criminal organizations.<sup>172</sup>

In other words, by prizing information control so highly, the systemic deployment of informants quietly shifts liability away from one class of offenders—those with information—to those without it. The old-fashioned goal of tracking down the most culpable offenders gives way to an informational and instrumental goal of preserving relationships with information sources.

#### D. *Rethinking Guilt*

How should the informant deal be understood in relation to legal guilt? I have argued previously that snitching should be understood as a radical kind of plea bargain, in which “[t]he government (provisionally) agrees to reduce or eliminate a suspect’s liability, while the suspect (temporarily) forswears his right to contest liability and promises to provide information.”<sup>173</sup> While this description captures the legalistic contours of the deal, it is at best a partial picture. It does not describe the potentially coercive nature of the bargain, the irregular law enforcement practices that contribute to it, or the raw inequalities that often drive the bargain.

As with all plea bargains, informant deals take place along a spectrum of formality. At the most formal end, a represented defendant negotiates through well-heeled counsel the relatively precise terms of his cooperation in exchange for known benefits.<sup>174</sup> Such deals—typical of white collar and political corruption cases—adhere closely to the formal plea bargain model and tend to be treated in the scholarly literature as (somewhat problematic) variations on that theme.<sup>175</sup>

But the majority of informant deals, particularly in street crime and drug enforcement, do not look like this. Rather, the typical street snitch deal involves face-to-face negotiation between suspect and police, in the street or the lock-up, often without counsel or any other witnesses. Because charging papers may not have been filed, the possible extent of the informant’s liability is uncertain. The promises demanded from the informant may also be non-specific, and can extend indefinitely.

Such deals also resemble plea bargains, but in a different way than formal cooperation agreements do. Here, a suspect’s decision to provide information is his way of waiving his rights to the protections of the adversarial process altogether. By choosing to cooperate, in

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<sup>172</sup> Scott & Stuntz, *supra* note 2, at 2565.

<sup>173</sup> Natapoff, *supra* note 114, at 665.

<sup>174</sup> See Richman, *supra* note 84.

<sup>175</sup> See *id.*; Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1 (1992).

effect, the suspect is expressing his conclusion that the system will not vindicate or protect him, and that it is in his best interest to concede the government's authority over him at that moment.

This kind of conclusion is in some ways a familiar one in plea bargaining; it reflects the same kind of cost-benefit analysis validated in *Alford*. When the Court accepted the plea in that case over the defendant's assertion of actual innocence, it reasoned that "[w]hether [Alford] realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading."<sup>176</sup> Likewise, a cooperating suspect, regardless of his realization or belief in his own guilt, may perceive that he has nothing to gain by opposing the police and much to gain by providing information.

But these kinds of informal snitch deals cannot simply be accepted on the same terms as plea bargains, because they violate many of the legitimating precepts of plea bargaining itself. In *Brady v. United States*, the Court considered the coercive effect of the threat of the death penalty on a defendant contemplating a plea. In validating the plea, the Court wrote as follows:

The agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant. . . . [T]here [is no] evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty.<sup>177</sup>

The Court distinguished *Brady's* "rational weigh[ing]" of the situation with that of the defendant in *Bram*. In that case, the Court invalidated a confession because the defendant was caught between "hope and fear," and the Court recognized that the power exerted by the government over the suspect's mind was too powerful and unfair. As the Court put it,

*Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess.<sup>178</sup>

Uncounseled snitch deals that take place on the street or in jail are a product of the rawest sort of power imbalance between the state and

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<sup>176</sup> *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

<sup>177</sup> *Brady v. United States*, 397 U.S. 742, 750 (1970).

<sup>178</sup> *Id.* at 754.

the individual. Moreover, it is an imbalance—or in Bram’s terms, a “sensitivity”—that the police purposely exploit. As one officer describes the methodology:

It is a widely accepted fact that individuals are most vulnerable to becoming cooperative immediately following arrest. . . . The author [a former narcotics agent and Bureau Director] has learned to ‘strike’ while the ‘iron is hot.’ Informants will often rethink their exposure and decide not to cooperate if given too much time to contemplate their decision. However, a night or two in jail can work for the investigator to help the informant decide to cooperate.<sup>179</sup>

In addition, “[another] method that can be effective for recruiting informants is an ‘informed bluff.’ If the investigator . . . has failed to produce an indictable case . . . a bluff may be his only alternative. . . . When a potential informant believes that a case is pending on his activities, he/she may agree to cooperate.”<sup>180</sup>

Alternatively, “[c]ase initiation is often done for the purpose of creating an informant.”<sup>181</sup> A police or prosecutor may go after a suspect in order to pressure him or her to give information. A particularly infamous example was the case of Kemba Smith, in which Smith was prosecuted in order to pressure her to inform on her dealer boyfriend. When she refused, Smith, who had no prior record and who never handled or sold drugs, received a 24-year prison sentence for conspiracy.<sup>182</sup>

As one sociologist puts it, the creation of an informant “is not a paradigm of simple bargaining between equals but, rather, a complex interaction between personnel of the criminal justice system and vulnerable people.”<sup>183</sup> The individual’s decision to cooperate, self-incriminate, and incriminate others, is often made under circumstances of fear, incarceration and official deceit, alone, under time pressure, and without counsel.

To accept such decisions as a valid way of resolving liability, even temporarily, represents a radical transformation of the idea of guilt itself. It unmoors the concept of guilt from evidence and the informational rules that the system erected to protect the integrity of the guilt-producing process. Instead, it treats the suspect’s own sense of powerlessness as adequate indicia of liability, and accepts the government’s considerable ability to threaten, deceive, and manipulate

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<sup>179</sup> MALLORY, *supra* note 162, at 21, 37-39.

<sup>180</sup> *Id.* at 23.

<sup>181</sup> *Id.* at 23.

<sup>182</sup> Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 90 (Marc Mauer & Meda Chesney-Lind eds., 2002). Smith was eventually pardoned by President Bill Clinton.

<sup>183</sup> SETTLE, *supra* note 156, at 250.

as appropriate means for extracting such decisions.<sup>184</sup>

## VII. INFORMATION AS THE BASIS FOR DECISION

The recognition that information management is intimately connected to the distribution of power raises a definitional problem: what precisely do we mean by “information”? The criminal doctrines considered here treat the concept of information relatively narrowly, more or less as discrete data that could support or contradict a finding of guilt. But, as described above, there are many other kinds of information that flow through the criminal system on which law enforcement officials, as well as defendants, base their decisions: information regarding race, class, and neighborhood, stereotypes and cultural assumptions, and all the other sorts of socially constructed data that drive actual human decision-making.

The criminal system has few mechanisms for governing or even acknowledging this sort of material, what I will call “social information.” With the exception of information about a defendant’s race,<sup>185</sup> the many factors considered by an official in deciding whom to arrest or charge remain unregulated. Likewise, defendants make decisions based on all sorts of social and cultural information such as their personal and peers’ experiences with the criminal system, their perception of the government’s or potential jury’s hostility, or images purveyed by the media, which are not encompassed by the Court’s information doctrines. Insofar as the importance of information turns on its power to drive liability decisions, social information is arguably the most important of all because it can influence outcomes as much (if not more) than does evidence of a crime.<sup>186</sup>

Considering such material—racial biases, social perceptions, cultural expectations, and other psycho-social material—in this context thus requires an expansion of the concept of information. Racial bias, after all, differs considerably from the kinds of “information” typically considered by criminal rules such as confessions or fingerprints, and traditional discovery or evidentiary rules are likewise ill-suited to regulate such matters. But there are, nevertheless, reasons to treat information culture broadly as inclusive of social information, even if that information does not fit neatly into the system’s official doctrinal

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<sup>184</sup> See also Brown, *supra* note 3, at 1612 (“The system’s acceptance of this risk [that innocent defendants will plead guilty] evinces a priority for case resolution over truth-finding.”).

<sup>185</sup> See *United States v. Armstrong*, 517 U.S. 456 (1996) (holding intentional discrimination based on race in prosecutorial decisions constitutes an equal protection violation).

<sup>186</sup> See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (documenting the reduced impact of evidence of actual innocence); Gross & O’Brien, *supra* note 152.

framework.

For one, social information has increasingly been recognized—and criticized—as a central determinant of criminal liability processes and outcomes. Class and gender affect the way poor people and women respond to interrogation and exercise their criminal rights.<sup>187</sup> Race affects the decisions that police make to stop and/or search drivers.<sup>188</sup> Judges make decisions based on personal and institutional bias. An important aspect of the system’s information culture is precisely its refusal to acknowledge the power of this material in shaping criminal liability.<sup>189</sup>

More broadly, as legal realists are fond of pointing out, reams of social, political, and personal information infiltrate and shape criminal processes and outcomes. From Court TV to “CSI” to the local news, people are bombarded with information about crime and justice that seeps into their legal decision-making.<sup>190</sup> Moreover, the intellectual frameworks used by decision-makers are shaped, often unbendingly, by decidedly non-legal influences such as cognitive biases, heuristics, and social norms, all of which shape the way the system chooses its targets and what eventually happens to them.<sup>191</sup> This information and these processes are neither controlled nor even acknowledged by the system’s internal doctrinal rules that are supposed to manage information flow and, most importantly, regulate the kinds of information that lead to findings of guilt.

The fact that legal information is socially constructed has implications for the meaning of “criminality” itself. Thirty years ago, Foucault argued that the criminal system does not judge a criminal’s

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<sup>187</sup> Janet Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogations*, 103 YALE L.J. 259 (1993).

<sup>188</sup> Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 24-25 (2007) (documenting higher stop rates and higher search rates for African American drivers).

<sup>189</sup> This point is reflective, of course, of larger complaints about the legal system as a whole. See Charles Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2278 (1992); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1 (1990); Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1990); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 154.

<sup>190</sup> See Sara Sun Beale, *The News Media Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (arguing that local news broadcasting is a purveyor of negative racial stereotypes); Naomi Mezey & Mark Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM J.L. & ARTS 91 (2005).

<sup>191</sup> See Keith Findley & Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (describing pervasive impact of cognitive biases and heuristic on criminal outcomes); Dan Kahan, *Gentle Nudges v. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

actions, but rather all the social information regarding him: “something . . . which is not juridically codifiable: the knowledge of the criminal, one’s estimation of him, what is known about the relations between him, his past and his crime, and what might be expected of him in the future.”<sup>192</sup> More recent “law and culture” scholarship rejects any clear-cut distinction between criminal/legal categories of information and the broader cultural constructs that give them meaning, choosing rather to explore the power that each exercises over the other.<sup>193</sup> Some conclude that it is impossible to segregate legal and non-legal information from each other at all.<sup>194</sup> In the criminal context, the consequence of this cultural-legal connection is not merely to re-label “legal” information as “social.” It is to recognize that inequitable, power-laden, socially contested kinds of information determine inputs, choices, and bargaining— and therefore legal outcomes.

Perhaps the most infamous variety of social information, at least for the American criminal system, is race. Racial information determines a wide range of criminal justice outcomes, from police decisions to stop and arrest,<sup>195</sup> to longer sentences,<sup>196</sup> to the skewing of the death penalty.<sup>197</sup> One study found that a defendant’s physical Afrocentric features directly increase the harshness of his sentence.<sup>198</sup> The impact of racial information on cognitive processes is so powerful that one scholar advocates placing witnesses behind screens to prevent jurors from being influenced by the witness’s race.<sup>199</sup>

In addition to race, many other kinds of informational forces shape criminal decisions and outcomes in ways that entirely escape regulation. Sociological studies of police decision-making reveal the powerful

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<sup>192</sup> FOUCAULT, *supra* note 22, at 18.

<sup>193</sup> See Pierre Schlag, *The De-Differentiation Problem*, (Univ. of Colo. Law Legal Studies Research Paper No. 07-09, 2007), available at <http://ssrn.com/abstract=975810>; Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001).

<sup>194</sup> Schlag, *supra* note 193 (arguing that the law and cultural project make it impossible to articulate what is uniquely “legal”).

<sup>195</sup> See, e.g., Andrew Gelman, Alex Kiss, & Jeffrey Fagan, *An Analysis of the NYPD’s Stop-And-Frisk Policy in the Context of Claims of Racial Bias* (Columbia Pub. Law Research Paper No. 05-95, 2006), available at <http://ssrn.com/abstract=846365> (demonstrating tendency of police to stop minority pedestrians disproportionately).

<sup>196</sup> Tushar Kansal, *Racial Disparity in Sentencing: A Review of the Literature*, The Sentencing Project, Washington, D.C. (Jan. 2005).

<sup>197</sup> Charles J. Ogletree, *Black Man’s Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15 (2002).

<sup>198</sup> William Pizzi, Irene Blair, & Charles Judd, *Discrimination in Sentencing Based on Afrocentric Features*, 10 MICH. J. RACE & L. 327 (2005) (finding that “those defendants who have more pronounced Afrocentric features . . . [such as] darker skin, fuller lips, or a broader nose . . . tend to receive longer sentences than others within their racial category who have less pronounced Afrocentric features”).

<sup>199</sup> Chet K.W. Pager, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373 (2005); see also Kang, *supra* note 190 (surveying the literature on cognitive racial biases).

impact of police expectations and informational screening on the way cases are handled.<sup>200</sup> David Sklansky has documented the debate over what he calls “the complex dynamics of race, gender and sexuality that shape and give meaning to policing” by examining the effects of changing police demographics on policing practices. While the evidence is conflicted, Sklansky surveys studies indicating that minority and female police may bring special knowledge to the job that influences the way they arrest, deploy violence, or handle domestic violence cases.<sup>201</sup> Other scholars have documented the skewing influence on prosecutors of bias, professional incentives, and other extrinsic factors on the composition of cases that actually end up being prosecuted.<sup>202</sup>

In her study of sexual assault cases, for example, Lisa Frohmann describes how prosecutors rely on class, gender, race, and neighborhood stereotypes to characterize the evidentiary value of a case and to decide whether to pursue cases at all.

[The prosecutors’] categorizations are informed by their typifications of area activities, residents and their lifestyles, and cultural images and ideologies of specific race/class groups. Mapped onto place descriptions are sets of attitudes, behaviors, values, and norms that are attributed to those who reside in, use, or pass through these areas. Through the interaction of place and person descriptions, prosecutors constitute the moral character of persons.<sup>203</sup>

Basing their decisions on the construct of “case convictability,” prosecutors in the Frohmann study routinely rejected cases based on their perceptions of the moral unworthiness of the victims or their perception that jurors would reject the victim’s credibility. In their official case rejection reports, these complex normative judgments were often characterized simply as a finding of “insufficient evidence.”<sup>204</sup>

Current criminal doctrines of information management do not acknowledge the impact of these kinds of extrinsic information. With respect to race in particular, the Supreme Court has made clear that absent evidence of intentional discrimination, the impact of racial information on criminal justice decision-making and outcomes will not

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<sup>200</sup> See, e.g., Loretta J. Stalans & Mary Finn, *How Novice and Experienced Officers Interpret Wife Assaults: Normative and Efficiency Frames*, 29 LAW & SOC’Y REV. 287 (1995); SKOLNICK, *supra* note 143. See also Ron Levi & Mariana Valverde, *Knowledge on Tap: Police Science and Common Knowledge in the Legal Regulation of Drunkenness*, 26 LAW & SOC. INQUIRY 819 (2001).

<sup>201</sup> See David A. Sklansky, *Not Your Father’s Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209 (2006) (discussing the role of police institutional culture and demographics on policing decisions).

<sup>202</sup> See Bibas, *supra* note 2.

<sup>203</sup> Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC’Y REV. 531, 552 (1997).

<sup>204</sup> *Id.* at 553.

be considered in relationship to the validity of actual case outcomes. In *Armstrong v. United States*, the Court refused to permit discovery regarding prosecutorial charging decisions, even where it was shown that all the crack cocaine prosecutions in that district had been levied against black defendants.<sup>205</sup> In *McClesky v. Kemp*, the Court refused to invalidate a conviction in the face of empirical data showing that race plays a statistically significant role in determining whether a defendant will receive the death penalty.<sup>206</sup> Indeed, the decision implicitly acknowledged the power of such information—the Court expressed its fear that because such information is pervasive throughout the criminal system, it could not be accounted for without threatening the entire edifice.<sup>207</sup>

In sum, criminal outcomes are driven by a wide range of unregulated information that has little or nothing to do with individual guilt and a great deal to do with the biases, preconceptions, fears, and normative commitments of police and prosecutors as well as defendants. While the trial-centric model asserts the dominance of certain forms and categories of information—admissible evidence, discoverable material, constitutionally seized evidence—in the majority of cases these rules never come into play, or do so only weakly, in the shadows of far more powerful kinds of information. The limited reach of the rules leaves the most powerful kinds information unregulated and unacknowledged.

In the end, we worry about informational inputs into the criminal system not for their own sake, but because we are concerned about the integrity of the decisions that will be made based upon them. Because the Court has deregulated the information culture everywhere except the trial sphere, we lack doctrinal rules and precepts to address unreliable or socially biased information driving decision-making in plea bargaining and investigation. In effect, this lack of rules and scrutiny frees decision-makers to import personal and cultural information into the

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<sup>205</sup> *Armstrong v. United States*, 517 U.S. 456 (1996).

<sup>206</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>207</sup> *Id.* at 314-15 (“McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system.”). Numerous scholars have noted the disjuncture between the reality that racial and social information affect outcomes and the Court’s failure to acknowledge or incorporate that empirical reality in its doctrines. Randall Kennedy wrote that the *McClesky* Court “repressed the truth and validated racially oppressive official conduct.” Randall Kennedy, *McClesky v. Kemp: Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388 (1988). Richard McAdams has argued that the Court’s decision in *Armstrong* ignored evidence of prosecutorial racial bias. McAdams, *supra* note 79. More generally, David Cole has described the Court’s jurisprudence as “creat[ing] a system-wide double standard under which minorities and the poor, and especially poor minorities, are routinely denied the constitutional protections that privileged whites enjoy.” David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Law*, 3 U. PA. J. CONST. L. 455 (2001) (describing how doctrines of consent, jury selection and right-to-counsel ignore the role of race).

determination of criminal guilt.

### VIII. REREADING *RUIZ*

#### A. *Driving Guilt Underground*

The foregoing analysis reveals the deeper implications of *Ruiz*'s holdings and reasoning. They permit defendants to plead out of ignorance and fear rather than self-knowledge of guilt. They widen the gap between the shrinking trial sphere and the rest of the criminal system. And they validate the secretive governmental use of its unregulated negotiating power to pressure informants to put defendants in this position, all under cover of secrecy.

The decision shows the Court's willingness to leave a vast amount of police investigatory power and discretion behind a veil of nondisclosure. By treating informant deals merely as "impeachment material," rather than recognizing them as a form of plea bargain, *Ruiz* permits the government to trade guilt for information in secrecy. This takes place at the expense of other defendants who lack the discovery tools to learn about it, and at the expense of the public who can no longer count on defendants to bring the practices to light through litigation.

*Ruiz* also takes the entire system one further doctrinal step away from understanding guilt as something predicated on evidence, and towards accepting guilt as a product of a defendant's ignorance and powerlessness. The *Ruiz* Court reasoned that material impeachment evidence—evidence that could change the outcome of the case because it challenges the credibility of a key government witness—can be withheld from a defendant during plea negotiations because the value of that evidence turns on the defendant's own knowledge of her guilt. In other words, it is the defendant's ignorance or knowledge that defines the government's constitutional obligations and that ultimately validates the plea.

Bibas points out that the Court's reasoning ignores the possibility that the defendant is innocent and therefore knows absolutely nothing about the government's case.<sup>208</sup> More fundamentally, Judge Sarokin has observed that defining *Brady* obligations in terms of the defendant's knowledge effectively eliminates the presumption of innocence.<sup>209</sup> *Ruiz* does this in a particularly destructive way because it eliminates the defendant's access to material information while she is in her most

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<sup>208</sup> See Bibas, *supra* note 2.

<sup>209</sup> See Sarokin & Zuckermann, *supra* note 66.

uncertain, vulnerable position during plea bargaining, and when her confidence, state of mind, and access to information is most important.

Because the *Ruiz* Court ignored the institutional role played by informants in generating information, cases, and guilty pleas, it failed to acknowledge the potential public costs of withholding material impeachment evidence. The Court's cursory treatment of impeachment material prevented it from considering whether the government should be able to hide the fact that it traded away liability in exchange for information. *Ruiz* thus permits this secretive practice rife with unreliability, criminality, and even corruption to remain undisclosed, thereby ensuring that its effects on law enforcement, defendants, and criminal outcomes will be more difficult to scrutinize.<sup>210</sup>

#### B. *Justifying Information Deregulation in the Name of a Fair Trial*

*Ruiz* also exemplifies the widening chasm between first-sphere values and second- and third sphere practices. The criminal system's many formal information rules—evidence, burdens of proof, and trial practices such as cross examination—are lauded variously as the guarantors of fairness, the foundations of the adversarial process, and truth-seeking engines. But these rules are tied to the increasingly rare event of the trial. The Court has handled the divergence by assuming that the highly regulated trial sphere provides sufficient procedural protections to satisfy system-wide demands for accuracy and fairness, thereby justifying deregulation of the non-trial spheres of plea bargaining and investigation.<sup>211</sup>

This phenomenon is particularly powerful with regard to the creation and use of criminal informants because so much of that process remains secret and unregulated. While trials are infrequent as a general matter, they are more so for informants because the government often uses its plea bargaining authority to shield informant identities.<sup>212</sup> The mechanisms by which informants are created likewise rarely surface in court: plea negotiations are inadmissible,<sup>213</sup> and informant identity and

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<sup>210</sup> I have proposed to the House Judiciary Committee that Congress consider legislatively superseding *Ruiz* by requiring federal prosecutors to turn over impeachment material as a matter of criminal procedural rule rather than constitutional obligation. See *Joint Oversight Hearing*, *supra* note 130.

<sup>211</sup> Brown, *supra* note 3, at 1589 (“Strong regulation of adjudication permits weak rule-based investigative regulation because, as the Supreme Court repeatedly implied in its criminal procedure decisions, we believe that adjudication checks investigation.”).

<sup>212</sup> See, e.g., Benner & Samarkos, *supra* note 126 (documenting how informants used to obtain warrants rarely appear in court).

<sup>213</sup> FED. R. EVID. 410; *United States v. Barrow*, 400 F.3d 109 (2d Cir. 2005) (informant proffers statements inadmissible under Rule 410).

negotiations are protected by investigative privilege either completely or until the very last minute.<sup>214</sup>

Because informants largely escape the system's trial-centric informational rules, it exacerbates the conceptual chasm between the trial sphere and the majority of cases where informal adjudication is the norm. The Supreme Court's original authorization of the use of criminal informants is a classic example of trial-sphere reasoning. In *Hoffa*, the Court established that the governmental use of undercover compensated criminal informants does not violate the due process rights of defendants.<sup>215</sup> Specifically, the Court held that informant propensity to lie does not pose due process problems because informants are eventually vetted in open court. "The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury."<sup>216</sup>

In other words, the Court assumed that the trial model, with its procedural attention to accuracy, would cure the irregularities inherent in informant use.<sup>217</sup> Because in practice this almost never happens, informants evade the principal guarantees of accuracy and accountability that regulate other witnesses and forms of evidence, although it was precisely these guarantees that comforted the Court when it first approved this clandestine law enforcement practice.<sup>218</sup> Moreover, by focusing only on the trial-centric value of accurate testimony, the Court precluded examination of other potential problems raised by the official practice of secretly trading liability for guilt.

The dynamic is repeated in *Ruiz*. The Court reasoned that because *Giglio* impeachment material is a guarantor of a fair trial, it need not be produced if the trial is not going to happen.<sup>219</sup> In so doing, the Court concluded that a defendant's anticipation of how a trial might go is irrelevant to the voluntariness of her plea. It also ignored other values served by the disclosure of a potentially lying criminal informant. The Court thus reaffirmed the trial right to *Giglio* material at the expense of accuracy, adversarial fairness, and governmental accountability in less formal non-trial arenas.

This doctrinal dynamic is an important feature of our criminal

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<sup>214</sup> See *Roviaro v. United States*, 353 U.S. 53 (1957).

<sup>215</sup> *Hoffa v. United States*, 385 U.S. 293 (1966).

<sup>216</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 419 (1967).

<sup>217</sup> Darryl Brown makes this point more generally, identifying the systemic assumption that strong adjudicative rules will check investigative inaccuracies, and arguing that the dominance of plea bargaining invalidates this assumption. See Brown, *supra* note 3.

<sup>218</sup> See, e.g., *Alexander v. DeAngelo*, 329 F.3d 912 (7th Cir. 2003) (noting that government use of informants rarely constitutes impermissible "outrageous government conduct" and that there are few constitutional limits on the government's ability to use informants).

<sup>219</sup> *United States v. Ruiz*, 536 U.S. 626, 630 (2002).

system's information culture. The protections and assumptions governing the narrow trial sphere are used to validate the outcomes of the far less regulated spheres of guilty pleas, investigations, and informant negotiations. As a result, most criminal decision-making and its results remain lightly regulated if at all, even as the Court maintains its purported adherence to strict informational norms and controls.

#### CONCLUSION

The foregoing analysis depicts a criminal system in which information management and the production of guilt go hand in hand, and in which both are being deregulated and depublicized in important respects.<sup>220</sup> It also reveals the influential role of criminal informants in advancing trends toward secrecy and deregulation. The implications emerge at several levels.

At the most pragmatic level, we should rethink the appropriate weight to be accorded the standard governmental claim that witness protection and the need to protect ongoing investigations justify increased system-wide secrecy. While witness protection is vital in some instances, and ongoing investigations deserve respect, this claim has ballooned into a force in its own right that deserves more critical treatment. The claim motivates *Ruiz's* restrictions on *Brady* disclosure, the Judicial Conference's recommendation for the routine sealing of documents and cases, as well as the wholesale withholding of federal criminal records from public databases. It also bolsters deference to police and prosecutorial decisions to trade criminal liability for information in secret, a species of discretion that deserves more scrutiny.

Rather than accepting the protection claim at face value as the Court did in *Ruiz*, the government should have to demonstrate concretely the dangers of disclosure and the values of secrecy, to be balanced against fairness to defendants, the ongoing need for accountability, and the system's general commitment to public disclosure. Indeed, the Court has already asserted, in its trial-centric sphere jurisprudence, that such justification is required when the government seeks to keep its operations secret.<sup>221</sup> When it comes to

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<sup>220</sup> There are, as acknowledged above, areas of the criminal system in which procedural information protections function comparatively well, particular for better-resourced defendants. Cf. Brown, *supra* note 3, at 1591, 1616-21 (arguing that recent reforms in investigatory reliability compensate for weak procedural protections).

<sup>221</sup> *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."); see also *CBS, Inc. v. United States Dist. Court for Cent. Dist. of California*, 765 F.2d 823 (9th Cir. 1985)

informants, however, additional measures are needed. For example, following the Meares/Harcourt call for more rigorous and transparent empirical decision-making, the government should have to actually gather and produce data on its use of criminal informants, their dangers and their benefits.<sup>222</sup> In other words, when law enforcement asserts that secrecy is necessary to produce a social benefit, in order for courts to accept that assertion, the state should have to provide some empirical justification for that claim by demonstrating that forgiving criminals in exchange for information actually produces a net systemic good. Absent such a showing, the information culture will continue its tilt toward self-justifying secrecy and the unregulated production of guilt.

More broadly, this analysis suggests the need to attend closely to the relationship between information and power when regulating the criminal process. Our system's informational rules are the foundation on which much of the legitimacy of our criminal process depends. These rules validate the all-important outcome—the legal declaration of guilt—and explain why the system's answers about guilt should be accorded weight and respect. When these rules and principles are devalued, the outcomes are devalued as well. The system is still staggering from the loss of faith triggered by DNA exonerations, yet this represents just one facet of a broader erosion of informational legitimacy.<sup>223</sup> As our criminal system grows larger, more powerful, more expensive, and increasingly tilted towards the punishment of poor people of color, such erosions will become increasingly costly.<sup>224</sup>

Because we live in an age of explosive informational change, the information-guilt matrix is likely to grow more complex. From the internet to RFIDs to DNA databases, personal information is becoming easier for the government to obtain.<sup>225</sup> The future of the criminal system will be, in part, a story of its responses to these new informational challenges and the ways we permit this ocean of information to determine criminal liability. The present-day challenges of plea bargaining and criminal informant use have led to curtailed public transparency, weakened informational controls, and increased pressure on the most vulnerable suspects. This bodes ill for the future when public access to and thoughtful regulation of information will be

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(Kennedy, J.) (ordering that records regarding cooperating witness be unsealed because sealing court and government had failed to justify secrecy).

<sup>222</sup> See *Joint Oversight Hearing*, *supra* note 130.

<sup>223</sup> See Garrett, *supra* note 39.

<sup>224</sup> See, e.g., TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 204-08 (2002) (arguing that weak procedural justice mechanisms and practices diminish public acceptance of legal outcomes).

<sup>225</sup> Radio frequency identification tags are small emitters that contain personal and other information. The government and commercial entities such as Wal-Mart are developing the technology to use RFIDs widely to track people and their information. See Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059, 1143 (2006).

more vital than ever. At the very least, it suggests that we should take the pathologies of the current informational culture more seriously.