

# LEGITIMACY OF THE SYSTEM: IMPLICATIONS OF GOVERNMENT-ENDORSED DISLOYALTY

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On April 3, 1996, after nearly eighteen years of bombings that left three dead and twenty-nine injured, federal agents arrested Ted Kaczynski, also known as “The Unabomber,” in his isolated cabin in Lincoln, Montana (Brooke). Despite being the longest and most expensive FBI manhunt to date with a record-setting \$1 million reward, the search for the mysterious Unabomber was brought to a close only after his younger brother, David Kaczynski, came forward with his suspicions that Ted could be the Unabomber (Graham). David had noticed striking similarities between the “Unabomber’s Manifesto,” published in 1995, and letters his older brother had sent him over the years (Graham).

The public was captivated by this modern betrayal-epic, a “benevolent Cain and Abel” (Glaberson). In an interview, David described the agonizing position he and his wife were placed in, forced to choose between his brother’s life and that of his next victim: “We found ourselves in a position where anything we did could lead to somebody’s death. I can’t tell you what that felt like” (Graham). His decision was praised by many. He was hailed for “doing the only honest thing any sane person could have done” and forty-four-year-old West Hills resident Barbara Frank remarked, “I don’t think I could live with myself knowing a relative was responsible for causing misery and destruction to other people” (Shuster). A somewhat surprised David reported that “not only haven’t we gotten a lot of angry or abusive letters, but we’ve really gotten a lot of letters from people who thanked us for having the courage to do what we did” (Graham). To most, the prospect of another dead victim was enough to justify the brotherly betrayal.

Even so, the actions of the younger Kaczynski were not universally hailed. David Letterman dubbed him “The Unasquealer” and on the Tuesday after the story broke, CNN’s “Talk Back Live” debated “whether he was saint or snitch” (Dowd). Others, like mechanic Dave Kubert, remarked that these situations are “still something to be resolved within the family” (Shuster). Explaining this kind of negative reaction to David Kaczynski’s actions, *New York Times* reporter Maureen Dowd wrote: “Many Americans subscribe to the sentiment expressed by E. M. Forster: ‘If I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country.’” This disapproving group placed the value of family loyalty—and their disdain for snitching—above not only the million dollar reward, but also above the potential consequences of remaining silent.

David Kaczynski quickly donated the FBI’s reward to the families of his brother’s victims (Brooke). David likely felt that keeping such a reward would be inappropriate,

as his actions were motivated by concern for potential victims rather than by personal gain. Imagine the public outcry against the younger Kaczynski had he accepted the FBI's proverbial thirty pieces of silver. Yet this purchase of betrayal is exactly the type of transaction that occurs every day within the criminal justice system. Criminal informants regularly "flip" on their associates in return for some type of reward—often consisting of heavily reduced sentences. By rewarding those criminals who provide information, the government is encouraging betrayal and sanctioning disloyalty. Regardless of the individual morality of David Kaczynski and of the more self-interested (and numerous) criminal informants, it is worth considering the implications of the justice system's endorsement of disloyalty and how this endorsement reflects on our societal values and the perceived legitimacy of the legal system.

The negative responses to David Kaczynski's decision to turn in his brother reflect not only the collective value we place on family loyalty, but also the extreme negative sentiment commonly felt for snitches and informants of all sorts. In the *Divine Comedy*, Dante reserves the ninth and lowest circle of hell for traitors and betrayers, who are damned instantly from the moment that "any soul becomes a traitor . . . then a demon takes its body away—and keeps that body in his power until its years have run their course completely" (207). At the center of the ninth circle, Dante describes the three-faced Satan who in each mouth "with gnashing teeth . . . tore to bits a sinner," specifically the infamous traitors Brutus, Cassius, and, worst of all, Judas Iscariot (210). Thus the betrayers of Dante's past and present (for he places many of his treacherous contemporaries in the frozen lake Cocytus, as well) are given a special place in Hell, closest to the Devil himself. This placement expresses a disdain for disloyalty that extends throughout history.

Columbia law professor George Fletcher acknowledges this deep, negative sentiment in his book, *Loyalty: An Essay on the Morality of Relationships*, when he writes: "Some of the strongest moral epithets in the English language are reserved for the weak who cannot meet the threshold of loyalty: They commit adultery, betrayal and treason" (8). Fletcher notes that these epithets for "the sin of betrayal" are "worse than murder, worse than incest" and invite "universal scorn" of the traitor (41). Why such a strong response to disloyalty? Fletcher argues that "loyalty enables individuals to grasp the humanity of their fellow citizens and to treat them as bearers of equal rights" (21). Thus, the heavy condemnation of disloyalty serves as a defense mechanism to protect the trust-based, interpersonal relationships that society is built upon. Any actions taken to jeopardize that trust must be considered carefully.

One such action is "snitching" or, more specifically, acting as a criminal informant. In 1999, Fordham law professor Ian Weinstein estimated that "twenty percent of all defendants ally themselves with the prosecutor (and many more try)" (617). Snitching alone destroys trust, but this type of widespread government endorsement of the practice has amplified and institutionalized its consequences. This practice does not

just undermine the trust of a single relationship; rather, entire communities are suffering the consequences. Loyola law professor and ex-Federal Public Defender Alexandra Natapoff chronicles this phenomenon in her paper, "Snitching: The Institutional and Communal Consequences." She argues that "criminally active informants exacerbate a culture in which crime is commonplace and tolerated" and, in communities where "approximately one in twelve men are active informants," it is no surprise that there is immense damage done to "the fabric of interpersonal trust and psychological security" (687-690). Not only does snitching destroy trust within a community, but its negative consequences also have a severe impact on citizens' views of the legal system and undermine their confidence that the government is acting in their best interest. Society must believe that institutions such as the legal system legitimately reflect their goals and values; otherwise, the only incentive to obey is fear of punishment.

Why is disloyalty encouraged and rewarded among criminals while elsewhere (e.g., playground tattletales or the police "blue wall of silence") it is so heavily condemned? Mostly because society fears the harm criminals pose. Due to heavy caseloads and minimal supplementary evidence, collecting informant testimony is often the only way that law enforcement officials can prosecute offenders (Richman 1). As harmful as snitching is to a community, it would be equally unacceptable to let unknown numbers of offenders go unpunished, which, unhelpfully, would also result in a decreased perception of the legal system's legitimacy.

The practice of using criminal informants clearly reflects the hierarchy of moral values in our society. In his paper, "When Morality Opposes Justice," American psychologist Jonathan Haidt describes his theory that there are "five psychological systems that provide the foundations for the world's many moralities" (1). Haidt believes that these five foundations are based on concerns for harm/care, fairness/reciprocity, in-group/loyalty, authority/respect, and purity/sanctity, and that different cultures and groups develop these virtues (2). If we take the legal system's practice of using criminal informants as an extension of our society's values (admittedly, a substantial assumption), we can uncover a moral hierarchy. Concerns for harm at the hands of criminals exceed the importance placed on loyalty to a community. The sphere of fairness presents a more complicated issue. On the one hand, informing is justified as it brings criminals to justice and makes them pay for their actions. On the other hand, "any system that rewards cooperation . . . can favor the most culpable defendants," a phenomenon known as "inverted sentencing" (Richman 1), which throws the fairness of the practice into question. Judging from these observations about our legal system, it seems that of Haidt's foundations, society's concern for preventing harm takes precedence over the moral spheres of loyalty and fairness.

Why is this so? And do these conclusions reflect society's true values, especially considering that a universal disdain for informants implies that loyalty is of no minor

significance? In his paper, “Coercive Sentencing,” Michigan law professor Steven Nemerson summarizes the utilitarian influences on our justice system and their use as justification for rewarding cooperating defendants. Nemerson argues that, in its simplest terms, “utilitarianism holds that an act is morally acceptable if it maximizes overall social well-being, measured in terms of people’s happiness” and that “the supplying of information and testimony by defendants and their use as active informants serves to detect and prevent crime,” which increases social well-being (684). With this utilitarian calculus in mind, it is easy to see how crime’s explicit immorality and its obvious negative effects on social happiness justify the overriding importance the legal system places on the moral principle of preventing harm, at the expense of personal loyalties.

However, as the controversy in the Unabomber case demonstrates, not all Americans agree with this ordering, and for them, the legal system fails to reflect their moral values, an extremely dangerous prospect to any society. Also, as Professor Natapoff demonstrates, there are less apparent damages that result from the practice of widespread informant use and the normative message that this practice sends by rewarding disloyalty. Not only does it run the risk of undermining Haidt’s core values of fairness and loyalty, but the communities that suffer from the practice also lose their respect for authority and law enforcement, and thus another of Haidt’s principles (authority/respect) is compromised. The practice of rewarding informants with reduced sentences may be a necessity to the prosecution of many criminals, but the dangers of undermining three out of Haidt’s five foundations for all social values cannot be ignored.

The practice of using criminal informants thus presents something of a moral paradox. Experimental psychologist and author Stephen Pinker observes that most people believe that “not only is it allowable to inflict pain on a person who has broken a moral rule; it is wrong not to, to ‘let them get away with it’” (2). Our justice system is designed to punish those guilty of breaking the law (society’s moral rules) and, in doing so, it employs a number of different tactics, including the rewarding of informants. However, in its efforts to “inflict pain” on criminal offenders, the justice system allows cooperators to “get away with it.” This type of self-defeating paradox is exactly what makes the use of informants such a dangerous practice. In attempting to defend communities from harm, the legal system undermines the interpersonal trust that those groups are based on. From a utilitarian view, it is not even clear if the crime prevented through informant testimony outweighs the informant’s own criminal activity that goes overlooked, or the aforementioned community harm. By striking deals with those criminals who are often the most culpable, the legitimacy of the justice system—which may not even reflect its constituents’ own moral values—is called into question.

The legal system is in many ways sensitive to the same forces as the economy; its power is ultimately based on citizens’ confidence that the system works. That

confidence weakens when snitching undermines the essential trust that, as Fletcher said, “enables individuals to grasp the humanity of their fellow citizens” (21). If the use of informants is indeed a necessary evil, it is one that must be handled carefully so that faith in the system does not dwindle.

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