LIFE IN THE LAW'S SHADOW: DUE PROCESS IN THE WORLD OF RULE BY THREAT

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"The value of a sword of Damocles is that it hangs, not that it drops."[1]

INTRODUCTION

Duarte Nursery cultivates vineyards and orchards throughout California.[2] In 2012, John Duarte plowed 450 acres north of Sacramento to plant a winter wheat crop.[3] He planned to replace it later with a walnut orchard.[4] Enter the Army Corps of Engineers, which handed Duarte a cease and desist order—a bare demand that the Duarte Nursery cease its farming operation unless it obtained a wetlands permit.[5] The Corps decided that Duarte had a wetland on his hands because the field sometimes developed small puddles when it rained.[6] And without any actual evidence, the Corps falsely accused Duarte of discharging fill or dredge materials into these small intermittent pools.[7]

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1 Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (White, J., concurring in part and dissenting in part).

2 Robin Abcarian, *A land-use case that's enough to furrow a farmer's brow*, L.A. TIMES, Jan. 15, 2016, http://www.latimes.com/local/abcarian/la-me-0115-abcarian-farmer-wetlands-20160115-column.html.

3 *Id.*

4 *Id.*

5 *Id.*; Tony Francois, *Feds' shutdown of a California farm threatens all farmers' rights*, CAPITAL PRESS, http://www.capitalpress.com/article/20140206/ARTICLE/140209921/1009. The Clean Water Act grants regulatory jurisdiction over "waters of the United States," which the EPA has defined to include wetlands. 33 C.F.R. § 328.3 (2015). A property owner must receive a federal permit before discharging fill or dredge material into any wetland on their property. 33 U.S.C. § 1344(a) (1987).

6 *See* Abcarian, *supra* note 2.

7 *Id.*; Francois, *supra* note 5.

Duarte faced a dilemma. He could try for a permit, which would take two years and $270,000.[8] He could abandon the walnut orchard project at a great loss. Or he could ignore the Corps' threat and risk fines of $37,500 per day for noncompliance if the Corps later sued and won.[9] What he could not do was obtain a hearing and set matters straight.[10]

Federal agencies conduct most of their enforcement activities through threats like this.[11] The threats vary. A federal agency might threaten to revoke a license, withdraw funding, change a privileged status, impose fines, or even imprison accused violators.[12] Agencies may make threats through any number of methods, including draft policy statements,[13] negative publicity,[14] warning letters,[15] or direct meetings.[16] An agency can wield penalties that would land most people in bankruptcy or prison.[17] So the threat's target usually bends to the demand without a fight.[18]

The target of a threat from a federal agency usually has no immediate recourse to challenge the accusation. The Administrative Procedure Act (APA) limits judicial review to only "final" agency action.[19] Most agency threats, however overbearing, do not unlock the court-

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8 Francois, *supra* note 5.

9 Civil Monetary Penalty Inflation Adjustment Rule, 74 Fed. Reg. 626, 627 (Jan. 7, 2009).

10 *See infra* Part III.A.

11 *See infra* notes 37-39 and accompanying text.

12 *See infra* notes 54-64 and accompanying text.

13 *See, e.g.*, Lars Noah, *Governance Through the Backdoor*, 93 NEB. L. REV. 89, 116-17 (2016) (describing how the FDA used draft policy statements regarding the promotion of off-label uses to threaten and pressure companies without enacting formal rules subject to challenge); Rachelle Holmes Perkins, *The Threat of Law: Regulatory Black Mail or an Answer to Congressional Deadlock*, GEO. MASON LEGAL STUD. RESEARCH PAPER NO. LS 16-17, 8 (forthcoming 2016) (observing that notices regarding potential new rules governing tax inversions prompted companies to change behavior to comply with the threatened rule change).

14 *See, e.g.*, Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 B.Y.U. L. REV. 1371, 1379 (2011) ("[Agencies] use the threat of adverse publicity to make up for their limited statutory enforcement authority and the difficulty of proving violations. Agencies also use adverse publicity as a more efficient pressure point to achieve goals authorized by statute. Adverse publicity—or simply the threat of it—often precedes or accompanies formal enforcement actions." (internal footnotes omitted)).

15 Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1844 (2011).

16 *Id.*

17 *See infra* Part I.C.

18 *See* Jerry Brito, *"Agency Threats" and the Rule of Law: An Offer You Can't Refuse*, 37 HARV. J.L. & PUB. POL'Y 553, 562-63 (2014) ("The fact is that threats do alter the behavior of targeted parties.").

19 5 U.S.C. § 704 (2012).

room.[20] Moreover, procedural protections generally do not extend to the threats and demands that make up most agency enforcement action.[21] Constitutional due process demands more.

This Article argues that procedural due process rights should attach when an agency threatens you, even if that threat is not sure to lead to legal consequences. Intimidation has become a fixture of agency practice, exceeding the use of administrative or civil actions that would trigger procedural rights under the APA.[22] The most fundamental protection against abusive government, the right to due process, must play a role in policing this most common of enforcement methods.

First, this Article will describe the modern enforcement culture of rule by threat—the process of enforcing regulation through threats that do not impose formal legal obligations but level accusations with demands for compliance.[23] This Article then turns to constitutional due process and its potential application to threats.[24] It argues for modest expansion in due process law that would create some procedural protection at the threat stage.[25] This expansion would fill a hole that would render due process law more consistent with other areas of constitutional law where courts are sensitive to the coercive power of threats.

Specifically, this Article argues that nonbinding threats by federal agencies can constitute deprivations of liberty or property within the meaning of the Due Process Clause of the Fifth Amendment.[26] This Article will discuss the kinds of procedural protections that should exist for the targets of federal agency threats. These include the decision-making process regarding whether to issue a threat, provisos and other information that should accompany a threat, and the right to a hearing once a threat has issued.[27]

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20 *See infra* Part III.A.

21 *See infra* notes 199-208.

22 *See infra* notes 37-38.

23 *See, e.g.*, *supra* notes 2-8 and accompanying text.

24 *See infra* Part II.

25 *See id.*

26 *See infra* Part II.B.

27 *See infra* Part III.

I. THE WORLD OF RULE BY THREAT

The government does many threatening things. A court order, a lawsuit, an indictment—all of these actions threaten. But this Article is concerned with something else: pure acts of intimidation. Government agencies often make bare demands for compliance that may or may not be based on an actual violation of the law, and may or may not result in legal consequences if you do not buckle.[28] The threat does not need the formal trappings of a court order to carry a punch.

A. *What is an Agency Threat?*

Black's Law Dictionary defines a threat as, "[a] communicated intent to inflict harm or loss on another or on another's property, especially one that might diminish a person's freedom to act voluntarily or with lawful consent; a declaration, express or implied, of an intent to inflict loss or pain on another."[29] The agency threats that this Article addresses do not carry legal consequences of their own.[30] Failure to comply with such a threat is not illegal.[31] Technically, a recipient of an agency threat is free to ignore it: just as a cashier can ignore the gunman on the other side of the counter. Yet such threats may accomplish their purpose as effectively as legally binding action—such as a court order.

For the agency, threats work great. They are quick, cheap, and easy. They offer flexibility and a luxurious lack of accountability.[32] Threats take less time and resources than formal enforcement mechanisms such as administrative or civil action.[33] They offer an easy way

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[28] *See* Brito, *supra* note 18, at 561 ("[Favoring] 'threat regimes' places undue power in the hands of regulators unconstrained by predictable procedures.").

[29] Threat, BLACK'S LAW DICTIONARY (10th ed. 2014).

[30] Sometimes, a threat—by putting parties on notice that their activity allegedly violates a legal standard—creates legal consequences by changing a negligent violation into a willful one. *See* Rhea Lana, Inc. v. Dep't of Labor, 824 F.3d 1023, 1028-32 (D.C. Cir. 2016).

[31] Brito, *supra* note 18, at 562 ("Yes, that a threat is nonbinding means that the target of a threat regime can ignore or challenge it, but it would be naïve to think that ignoring threats systematically would have no consequences.").

[32] Wu, *supra* note 15, at 1851 ("The greatest advantage of a threat regime is its speed and flexibility."); *see also Rhea Lana*, 824 F.3d at 1028 (noting that agencies prefer warning letters over "expensive and demanding enforcement actions").

[33] *See* Wu, *supra* note 15, at 1851.

to confront minor violations[34] or emerging trends.[35] When addressing a new phenomenon, agencies can use threats to act quickly without committing the agency to a long-term policy that it may later regret.[36]

Agencies rely on threats to get much of their work done.[37] Federal environmental agencies, for instance, issue far more notices of violation than orders based on a formal adjudicatory hearing.[38] Most enforcement actions do not extend beyond the threat stage, either because the threat works or the agency decides not to pursue the holdouts.[39] The agency usually will not have to offer a hearing to those it threatens.[40] So until an agency later sues, targets of an agency threat cannot challenge agency accusations and demands.[41]

B. *How Rule by Threat Undermines the Rule of Law*

The advantages of a threat regime to regulatory agencies do not compensate for the damage done when agency threats become a fixture of law enforcement. Foremost, the pressure imposed by a threat curtails the liberty of innocent parties.[42] The fear of enforcement spooks the falsely accused into doing whatever will turn away the eye of regulators. Yet the recipient of a threat typically can do nothing to

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[34] *See* Christopher M. Wynn, Note, *Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Scheme under the Clean Air Act*, 62 WASH. & LEE L. REV. 1879, 1890 (2005) ("To effectively police environmental laws, the EPA needs streamlined, flexible, and efficient enforcement tools that avoid the necessity of constant litigation and are particularly well suited to minor violations.").

[35] Wu, *supra* note 15, at 1848-54.

[36] *Id.* at 1851; *see also Rhea Lana*, 824 F.3d at 1028 ("Agencies routinely use such letters to warn regulated entities of potential violations before saddling them with expensive and demanding enforcement actions.").

[37] *See* Wu, *supra* note 15, at 1841; *see also* Susan Hunter & Richard Waterman, *Determining an Agency's Regulatory Style*, 45 W. POL. Q. 403, 410-12 (1992).

[38] *See* Matthew D. Zinn, *Policing Environmental Regulatory Enforcement*, 21 STAN. ENVTL. L.J. 81, 93-94 (2002).

[39] *See id.* at 95 ("[I]t appears that the vast majority of reported enforcement actions stop after an NOV.").

[40] *See, e.g.*, Dietary Supplemental Coal., Inc. v. Sullivan, 978 F.2d 560, 563 (9th Cir. 1992); Air Cal. v. U.S. Dep't of Transp., 654 F.2d 616, 618-22 (9th Cir. 1981).

[41] *See Air Cal.*, 654 F.2d at 621 ("Administrative orders are not final and reviewable 'unless and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.'"); *infra* Part III.B.

[42] *See* Noah, *supra* note 13, at 123 ("Such 'arm-twisting' succeeds, and evades judicial or other scrutiny, in part because companies in pervasively regulated industries believe that they cannot afford to resist agency demands.").

establish her innocence until the agency actually sues her.[43] Under existing law, agencies have the power to bully their targets into compliance while dodging judicial review.[44] This unaccountable and unbridled bureaucracy casts a pool of shadow in which "those who live under it must never be able to relax, must never be quite sure if they have followed the rules correctly or not."[45] This shadow of fear extends the effective power of government agencies beyond the formal limits of their actual authority.[46] They can burden liberty through *ipse dixit* demands that never see a court, administrative or judicial.[47]

Agency threats can make demands that are based on neither law nor binding regulation. In the administrative world, agencies promulgate interpretations, opinions, policy statements, guidance documents, and the like that slip past the typical notice and comment process. [48] However, in the practical world of the agency officer, such nonbinding policies become the standard for action, including enforcement.[49] Without a hearing or other assurance of accountability, threats can rest on these nonbinding policies—or even pure whim.[50] Threats "place in the hands of regulators the power to strong-arm without any reference to law."[51]

This power to force compliance through freestanding threats allows agencies to act outside the typical restraints imposed by the Constitution and other laws. "Instead of our fundamental doctrine that government is to be carried on according to law we are told that

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[43] *See* 5 U.S.C. § 704 (2012); *infra* Part III.B.

[44] *See, e.g.*, Cortez, *supra* note 14, at 1441-42 (FDA practices of pressuring regulated parties through non-binding publicity allows it to '"effectively regulate industry without ever exposing itself to judicial review.'" (quoting Washington Legal Found. v. Kessler, 880 F.Supp. 26, 34 (D.D.C. 1995))).

[45] CHRISTOPHER HITCHENS, HITCH-22: A MEMOIR 51 (2010).

[46] *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 751 ("[P]enumbral government power is, indeed, likely to be greater than the sum of the granted powers.").

[47] *See infra* Part I.G.

[48] Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974).

[49] *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use them To Bind the Public?*, 41 DUKE L.J. 1311, 1364 (1992) ("Staff members acting upon matters to which the guidance documents pertain will routinely and indeed automatically apply those documents, rather than considering their policy afresh before deciding whether to apply them. Staffers generally will not feel free to question the stated policies, and will not in practice do so."); Noah, *supra* note 13, at 104-05 ("[I]n spite of their explicitly 'nonbinding' character, [FDA's] draft or final guidance still often operate [sic] as de facto requirements."); *see also* 5 U.S.C. § 553 (2012).

[50] *See* Anthony, *supra* note 49, at 1327-30.

[51] *Brito*, supra note 18, at 568.

what the government does *is* law."[52] And agencies have the gall to call this shadowy web of extortion nothing more than "cooperative" enforcement.[53]

C. *Agency Weaponry*

A threat's power depends in part on the threatened consequence. And agencies typically have plenty of knuckles they can crack to inspire "cooperation."

Excessive fines are one example. The Environmental Protection Agency (EPA) or Army Corps of Engineers, who have shared responsibility for enforcement of the Clean Water Act, can bully property owners with the threat of $37,500 for each day of noncompliance with the agencies' demands.[54] That is the fine John Duarte faced over his winter wheat crop. [55] By comparison, the Clean Air Act's penalties are a mere wrist slap at $25,000 a day.[56] The leverage imposed by these threats is enough to make even multibillion dollar corporations flinch.[57] Yet the EPA and Corps apply this staggering threat against individuals and small businesses across the country. [58] For many victims of regulatory zeal, incurring such fines would mean dissolution and bankruptcy.

Withdrawal of government privileges has a similar cowing effect. The Federal Communications Commission (FCC), for instance, can pressure media outlets by threatening to revoke their licenses to broadcast on the public airwaves.[59] Additionally, for the many institutions relying on tax exempt status as a key part of their funding,

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[52] ROSCOE POUND, ADMINISTRATIVE AGENCIES AND THE LAW 26 (1946).

[53] PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 335 (2014) ("[A]gencies . . . exercise a profound under-the-table power . . . and agencies thuggishly use it to secure what they euphemistically call 'cooperation.'").

[54] 74 Fed. Reg. 626, 627-29 (2009).

[55] *Supra* notes 2-8 and accompanying text.

[56] 42 U.S.C. § 7413(d)(1) (2012).

[57] *See* Noah, *supra* note 13, at 124-29.

[58] *See, e.g.*, Jack Healy, *Family Pond Boils at Center of a 'Regulatory War' in Wyoming*, N.Y. TIMES, Sept. 18, 2015, http://www.nytimes.com/2015/09/19/us/regulatory-war-fought-over-a-wyoming-familys-pond.html?_r=0 (EPA threatens small-time Wyoming rancher with massive fines for building a stock pond); Abcarian, *supra* note 2 (EPA threatens nursery with massive fines over treatment of soil).

[59] Brigham Daniels, *When Agencies Go Nuclear*, 80 GEO. WASH. L. REV. 442, 458-59 (2012).

threats to withdraw that status can inflict significant pressure.[60] Increased reliance on federal funding also serves as convenient leverage for the agencies that control that purse.[61] And there are always straightforward threats of criminal prosecution.[62]

Even the powerful rarely resist agency threats. Threats against big businesses have induced mass recalls, inhibited innovation, and run businesses aground.[63]

Of greater concern, though, is the individual or small business owner, unfortunate enough to stumble into an agency's crosshairs. A striking feature of the modern regulatory state is the increased use of a heavy regulatory arsenal on small regulatory targets.[64] These vulnerable parties are not repeat players; they have no power to retaliate; they do not know how to fight back or assess liability; and they cannot muster the resources that might otherwise fortify their stomach for risk.[65] As agencies train weapons designed for big game on smaller prey, the threat regime becomes ever more menacing and coercive.

D. *The Problem of Uncertainty*

The severity of agency threats is compounded by uncertainty as to whether or not the threat has validity. In a system of certain rules, a target of an agency threat could assess with some confidence what risk they may face from ignoring it. But the real world of vague stat-

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[60] *Id.* at 456-58.

[61] The Obama Administration offered a current example of the power this threat can hold while it is now considering whether to pressure North Carolina to repeal its transgender bathroom law by threatening to withhold federal funding. Matt Apuzzo & Alan Blinder, *North Carolina Law May Risk Federal Aid*, N.Y. TIMES, Apr. 1, 2016, http://www.nytimes.com/2016/04/02/us/politics/north-carolina-anti-discrimination-law-obama-federal-funds.html?_r=0. Such a maneuver could thrust North Carolina into a budget crisis because of the profound reliance of the states on federal funding for numerous essential services. *Id.*

[62] For a painful chronicle of the innocent lives ruined because of agencies' overzealous prosecutions, *see generally* HARVEY A. SILVERGATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2009).

[63] *See* Noah, *supra* note 13, at 124-129.

[64] *See, e.g.*, Sackett v. E.P.A., 132 S.Ct. 1367, 1369-71 (2012) (discussing one instance where the EPA threatened individuals owning only a 2/3 acre residential lot); Healy, *supra* note 58.

[65] *See* Michael Cottone, *Rethinking Presumed Knowledge of the Law in the Regulatory Age*, 82 TENN. L. REV. 137, 163-64 (2014) (arguing that those exposed to risk of enforcement often do so unknowingly and "seem to be those who have fewer resources available to divert to becoming informed").

utes, nebulous regulations, and fuzzy deference standards makes accurate risk assessment difficult.[66]

The Clean Water Act demonstrates this uncertainty problem at work. The scope of the kinds of waters and lands that fall within the jurisdiction of the Clean Water Act's prohibitions remains famously opaque.[67] In fact, whether the Act even applies to a particular property is a case-by-case decision called a "jurisdictional determination."[68] Confusion abounds, making risk assessment in light of an agency threat difficult and imprecise.[69] "[T]he combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune."[70] The uncertainty regarding a threat's viability—and therefore the risk of ignoring the threat—tends to herd more threat targets toward compliance.

E. *How Threats Deter More Effectively than the Written Law*

The cowing effect of agency threats does not just flow from the law itself. The act of threatening changes the dynamics of risk for regulated parties. There are at least two reasons that an agency threat creates a risk independent of the law that the agency is enforcing: (1) the agency threat creates a far more immediate danger than the abstract existence of the law, and (2) regulated parties may be unaware that their conduct violates the law until an agency threatens them.

A direct threat of enforcement carries much more power than the distant presence of the law itself. It is the difference between an abstract fear of guns and the visceral terror of facing a gunman. Deterrence based on punishment is calculated not just by the severity

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66 *See* RANDY BARNETT, THE STRUCTURE OF LIBERTY 85-86 (2d ed. 2014).

67 *See* U.S. Army Corps of Eng'rs v. Hawkes, 136 S.Ct. 1807, 1817 (May 31, 2016) (Kennedy, J., concurring) (The Clean Water Act "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."); *See Sackett*, 132 S.Ct. at 1375 (Alito, J., concurring) (calling the scope of the Clean Water Act jurisdiction "hopelessly indeterminate").

68 *See* Hawkes Co. v. U.S. Army Corps of Eng'rs, 762 F.3d 994, 999-1000 (2015).

69 *Id.* at 1003 (Kelly, J., concurring) (the Clean Water Act is so uncertain that it requires "the hiring of expert consultants to determine if [it] even appl[ies] to you or your property").

70 *Sackett*, 132 S.Ct. at 1375 (Alito, J., concurring).

of the punishment laid down in the books.[71] The actions of enforcers play a major role in deterrence. Regulated parties perceive risk based on three primary factors: the likelihood that their actions will have legal consequences, the potential severity of those consequences, and the perceived proximity of enforcement.[72] Agencies that enforce the laws influence each of these factors through their enforcement techniques.

When an agency issues a threat, the likelihood and proximity of enforcement shift dramatically. Regulated parties estimate their risk partly by the perceived likelihood of enforcement. A law that is neglected by its enforcers is one that regulated parties have little reason to fear.[73] But, when an agency issues a threat, the likelihood of legal consequences rises sharply.[74] So too does the perceived proximity of enforcement. Proximity refers to how distant or hypothetical punishment is considered to be.[75] We all tend to discount the future.[76] Accordingly, the possibility of distant punishment is less likely to influence present behavior than the likelihood of imminent punishment. A direct agency threat pushes the risk far up the time horizon.

Threats also uniquely affect regulated parties because of uncertainty or ignorance. The growth of the regulatory state has brought with it increased ignorance of what this behemoth demands of us—mostly because it demands so much, and demands it in obtuse ways.[77] Regulated parties may very well think that they remain deep within the realms of the law until an agency threatens them.[78] The underlying law with which the agency threatens regulated parties provides less

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71 *See* Barnett, *supra* note 66, at 230.

72 *See id.*

73 *See* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, n.143 ("[I]n the enforcement process, prosecutors may achieve most of the benefits of a repeal through refusal to enforce.").

74 *See* Dombrowki v. Pfister, 380 U.S. 479, 486 (1965) (noting that threat of sanctions can deter and chill conduct because of the increased risk of prosecution).

75 *Id.*

76 *Id.*

77 Cottone, *supra* note 65, at 151-59.

78 Examples of this problem abound. The Sacketts had no suspicion that their residential lot ensconced within a suburban neighborhood contained waters of the United States, or that rocks and dirt constituted discharges of pollutants into such waters. *See* Richard Epstein, *The Supreme Court Finally Clamps Down on the EPA*, RICOCHET (Mar. 23, 2012), https://ricochet.com/archives/the-supreme-court-finally-clamps-down-on-the-epa/. For a litany of stories about surprise enforcement of ambiguous laws against people acting in good faith, see generally HARVEY A. SILVERGLATE, THREE FELONIES A DAY (2009).

deterrent effect in itself, because relatively few persons may understand how it applies to them.[79] And yet, this ignorance increases the deterrent effect of the threat because targets cannot easily assess the threat's validity. The divide therefore grows between the deterrent effect of the law and the deterrent effect of the threats to enforce it. The result: increasing aggregation of power in the agencies that enforce the law.

In short, threats from agencies—even though they carry no legal consequences by themselves—have a much stronger likelihood of changing the regulated parties' conduct than the law alone. Agencies cannot wash their hands of the power they wield with a threat. Agencies that become overzealous or abusive in the issuance of threats lengthen the shadow of the law beyond its intended reach. And those who live and work within that shadow suffer for it.

F. *How Threats Encourage Overzealous Enforcement*

Low-cost enforcement methods like threats may encourage overzealous enforcement.[80] Because agencies need not follow through on a threat with administrative or civil action, they have little reason to exercise moderation. No binding laws limit the discretion of agencies in the issuance of threats.[81] When agencies can act with confidence that their threats cannot be challenged in court because of the limits of APA review, and the cost of issuing threats is modest, they have little incentive to limit their own discretion.[82]

If a lawless or mistaken threat does not induce compliance, nothing is lost—the agency can simply abandon the matter.[83] This power to force concessions out of citizens by mere command becomes "a nearly freestanding coercive power, only distantly limited by the

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[79] *See Dombrowski*, 380 U.S. at 486 ("For the threat of sanctions may deter almost as potently as the actual application of sanctions.") (internal quotation marks omitted); Cottone, *supra* note 65, at 155 ("Filled with terms of art, legalese, and unexpressed assumptions, regulatory text is notoriously hard to understand.").

[80] *See* Wynn, *supra* note 34, at 1896-97 (A threat's "powerful incentive to comply can be created at a relatively modest cost . . . because the agency's decision to prosecutor or initiate any kind of formal adjudicatory proceedings is completely discretionary.").

[81] *See* Brito, *supra* note 18, at 561.

[82] *See, e.g.*, Wynn, *supra* note 34, at 1896-97.

[83] *See, e.g.*, FOOD & DRUG ADMINISTRATION, REGULATORY PROCEDURES MANUAL § 4-1-1, http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/ (stating that warning letters do not commit the FDA to any further enforcement action).

external formalities of authorizing statutes and deferential judicial decisions." [84]

Internal agency procedures do not adequately protect against the problem of over-enforcement. For example, the Food and Drug Administration's (FDA) regulatory procedures manual says threat letters should be "issued only for violations of regulatory significance."[85] These are "violations which may lead to enforcement action if not promptly and adequately corrected."[86] But the manual scrambles to remind readers that such letters do not "commit the FDA to taking enforcement action."[87] Although these guidelines pay nominal tribute to the problem of over-enforcement, such guidance documents do not bind anyone[88] and do not limit discretion over how to define "regulatory significance." The lack of binding standards encourages overzealous enforcement and erroneous issuance of threats.

The deterrent effect of a threat has no time limit. Unlike administrative or civil actions, accusations settle upon their victims like an eternal fog. By simple inaction, the agency can curse a threatened party to drift in limbo by neither absolving the party nor pursuing enforcement of the threat. Recipients of an agency threat fail to modify their behavior at their peril, watching potential fines piling up while the agency prepares the strongest possible case against them—which the agency will file at its convenience. Or not.[89]

Most threat recipients would hesitate to defy a threat of accruing $37,500 in daily fines solely on the hope of receiving some possible future opportunity to make their case. Defenders of agency threats seem estranged from both sympathy and reality when they say things like, "A party unhappy with the substance of a threat regime can challenge the threat by ignoring it, thus forcing enforcement of some kind

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[84] HAMBURGER, *supra* note 53, at 335.

[85] FOOD & DRUG ADMINISTRATION, REGULATORY PROCEDURES MANUAL § 4-1-1, http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/.

[86] *Id.*

[87] *Id.* Because of the non-committal nature of a warning letter, the FDA "does not consider Warning Letters to be final agency action on which it can be sued." *Id.*

[88] Guidance documents are the perfect tool—agencies claim (often successfully) that such guidance documents are due deference (making them effectively binding) when it serves their interests, but can also (successfully) disclaim any binding force when agencies wish to deviate from them.

[89] *Sackett*, 132 S.Ct. at 1375 (Alito, J. concurring) ("Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable.").

and opening the threat to judicial review."[90] This sunny disdain ignores the tremendous risk and uncertainty that a recipient of a threat encounters. Innocent parties often would rather fold than face the risk of enforcement action, even if the agency has it wrong, and even if it knowingly has it wrong.[91]

G. *Threats and the Evasion of Judicial Review*

Under the current regulatory framework, threats offer a means for agencies to advance their mission while bypassing the inconvenience of judicial review. Often, agencies can reach the same results with threats as with formal proceedings that offer procedural safeguards for the regulated parties.[92] Thus, they have strong incentives to avoid a path that will trigger judicial review. These paths have increased with the help of the Supreme Court, but they may not be meaningful in practice. For example, in *Sackett v. EPA*,[93] the Supreme Court held that an EPA administrative compliance order was subject to judicial review under the APA.[94] An administrative compliance order is a demand for compliance, but, unlike the threats that are the subject of this Article, failure to comply with the order is itself illegal and results in additional fines.[95]

The Sacketts began building a house on an empty lot when the EPA showed up insisting that the Sacketts were discharging into wetlands without a permit, in violation of the Clean Water Act.[96] The EPA issued a formal compliance order and refused to grant the Sacketts a hearing.[97] The Sacketts sued, but the trial court refused to review the order.[98] The Ninth Circuit affirmed, holding that the order was not subject to judicial review under the APA.[99] Neither court raised the concern that the EPA might use such orders to evade judi-

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[90] Wu, *Agency Threats*, *supra* note 15, at 1853.

[91] *See* Brito, *supra* note 18, at 565-66 (comparing the extreme pressure to comply with agency threats to coercive threats by mafia).

[92] Turner Smith & Margaret Holden, *Sackett v. EPA*, 37 HARV. ENVTL. L. REV. 301, 308 (arguing that threats are about as effective as formal enforcement action that would trigger judicial review).

[93] 132 S.Ct. 1367.

[94] *Id.* at 1374.

[95] Wynn, *supra* note 34, at 1880.

[96] *Sackett*, 132 S.Ct. at 1370-72.

[97] *Id.* at 1371.

[98] *Id.*

[99] *Id.*

cial scrutiny. The Sacketts, however, carried their claim that the order was subject to judicial review all the way to the Supreme Court and got a unanimous decision in their favor.[100] These compliance orders can now be immediately challenged in federal court.[101]

Some argue, however, that this victory meant little because the EPA can still get the same work done through simple warning letters that do not trigger judicial review.[102] Indeed, the head of EPA's water enforcement division said, "What's available after Sackett? Pretty much everything that was available before Sackett."[103] Agency leverage thus allows them to step around judicial and congressional efforts to grant regulated parties a hearing.

Property owners achieved another recent victory similar to *Sackett* in *Army Corps of Engineers v. Hawkes*.[104] There, the Corps issued a jurisdictional determination to several peat mining businesses stating that their property contained waters subject to the Clean Water Act.[105] As in *Sackett*, a unanimous Supreme Court held that such jurisdictional determinations trigger a right to judicial review under the APA.[106]

But *Hawkes* probably does not rescue John Duarte. When the Corps threatens property owners rather than issuing a formal jurisdictional determination, the agency can still often evade judicial review while achieving its enforcement objectives. Thus, although we should applaud expansion of the APA's judicial review provisions, due process concerns with agency threats remain.[107]

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100 *Id.* at 1374.

101 *See id.*

102 *See* Smith & Holden, *supra* note 92, at 308 (concluding that *Sackett*'s impact would be "extremely minimal" because the "EPA will simply circumvent judicial review by using simple warning letters in lieu of formal orders"). Agency attempts to engage in informal actions to avoid judicial review and APA requirements are not limited to the EPA. *See* Noah, *supra* note 13, at 91 ("In addition to avoiding the need to follow requirements under the APA, agencies may shy away from issuing legislative rules in order to dodge judicial review.").

103 Smith & Holden, *supra* note 92, at 309.

104 136 S.Ct. 1807 (2016).

105 *Id.* at 1812-13. For more on jurisdictional determinations, see *supra* note 67 and accompanying text.

106 *Id.* at 1811, 1816.

107 The D.C. Circuit recently held that a warning letter did constitute final agency action because it exposed the regulated party to increased penalties by making subsequent violations willful rather than ignorant or negligent. *See* Rhea Lana, Inc. v. Dep't of Labor, 824 F.3d 1023, 1031 (D.C. Cir. 2016). However, that court clarified that such letters typically did not constitute final agency action. *Id.* at 1028.

When agencies can deny hearings and avoid judicial review through threats, federal law enforcement leans toward ad hoc determinations rather than the rule of law. Without procedures in place to ensure that threats have a sound basis, agencies begin to resemble a schoolroom bully more than a legitimate arm of federal law enforcement.

II. DUE PROCESS IN THE CONTEXT OF AGENCY THREATS

Due process ought to protect the target of an agency threat. The Fifth Amendment promises that no one will "be deprived of life, liberty, or property, without due process of law."[108] Regardless of whether the government has imprisoned you, taken your property, defamed you, or forbidden your activities, you are helpless unless you can access someone in authority who is required to listen to you and respond. Habeas Corpus exemplifies this ideal by granting a prisoner the procedural right to challenge the grounds for his confinement.[109] Known as the "Great Writ," Habeas Corpus is "the greatest of the safeguards of personal liberty embodied in the common law."[110] Its greatness lies in its status as a gatekeeper for the practical exercise of any other right for the imprisoned.

Due process is a more general embodiment of the Great Writ. It promises a chance to defend one's self and demand proof of the case against you. In this sense, due process is the law that governs government. "In its English origin the guarantee of due process . . . was a restraint on the sovereign: before King John or his royal officers could take action against a person, certain procedures had to be followed, procedures designed to ensure fairness."[111] We give the government power to command and back its commands with force. Due process is a prerequisite to preventing the abuse of that force.[112] It thus stands as an essential precursor to liberty.[113]

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108 U.S. CONST. amend. V.

109 LEGIS. RES. SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 312-13 (Edward Corwin ed., 1952).

110 *Id.* at 312.

111 *See* JOHN V. ORTH, DUE PROCESS: A BRIEF HISTORY 8 (2003).

112 *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring) ("Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.").

113 *See* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting) ("Procedural fairness and regularity are of the indispensable essence of liberty.").

At minimum, the process due to everyone entails "notice of the case against him and an opportunity to meet it."[114] If government officials can enforce laws against you with no procedures to guarantee accuracy and no forum to present a timely defense, then other rights become what the founders called "parchment barriers"—promises on paper that never leave the page.[115] As a means of summoning rights forth from paper to practice, due process "is perhaps the most majestic concept in our whole constitutional system."[116]

In practice, due process issues break into three primary questions. First, what constitutes "life, liberty, or property"?[117] Next, what amounts to a "deprivation" of one of these three?[118] And finally, if a deprivation of a constitutionally protected interest has occurred, what process is due?[119] This Article addresses each of these questions in the context of agency threats. However, the most novel thesis presented here is that a threat from a federal agency without direct legal consequences can constitute a deprivation within the meaning of the Due Process clause of the Fifth Amendment.[120]

A. *Constitutional Interests Affected by Agency Threats*

A threat can inhibit the exercise of liberty and property interests. Both "liberty" and "property" enjoy broad definitions under the Due Process Clause. Liberty embraces the generous right "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[121] The Supreme Court, however,

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114 Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (quoting *McGrath*, 341 U.S. at 171-72 (Frankfurter, J., concurring)).

115 *See* THE FEDERALIST NO. 48 (James Madison).

116 *McGrath*, 341 U.S. at 174 (Frankfurter, J., concurring); *see also* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (describing Due Process as a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

117 Kerry v. Din, 135 S.Ct. 2128, 2132 (2015) ("The first question we must ask, then, is whether the denial of Berashk's visa application deprived Din of any of these interests.").

118 *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 328 (1986) (grappling with the question of what constitutes a "deprivation").

119 *See generally* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (discussing this issue at length).

120 The Due Process Clause of the Fourteenth Amendment applies the same legal standard to the states. As the thrust of this Article focuses on federal action, it only directly discusses the Fifth Amendment due process guarantee, though the same analysis would apply for the Fourteenth Amendment.

121 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

has dialed back the scope of liberty interests.[122] The courts now look to liberty interests that rank as "fundamental" in light of history and tradition,[123] that are implied from the language of the Constitution itself, or that come from "an expectation or interest created by state laws and policies."[124]

Property shares close quarters with the notion of liberty, as "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."[125] Due Process protects a wide and flexible range of property interests, embracing "the free use, enjoyment, and disposal of all [of one's] acquisitions."[126] Property interests not only extend to the traditional recognition of freedom to use chattels and real estate, but also statutorily created property interests that do not resemble traditional property.[127] This nouveau property ranges from welfare checks to government jobs.[128]

Agency threats affect the exercise of liberty and property rights in countless ways. The point of an agency threat is to alter behavior, and when government seeks to alter or constrain behavior, liberty and property interests are frequently affected. John Duarte, for example, enjoyed a property interest in his ability to cultivate the land he had purchased.[129] The Army Corps of Engineers' unwarranted threat imposed a cost on the exercise of that property interest—the real risk of severe Clean Water Act penalties of up to $37,500 per day.

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122 *See Kerry*, 135 S.Ct. at 2134.

123 *Id.*

124 Wilkinson v. Austin, 545 U.S. 209, 221 (2005) (citing Wolff v. McDonnell, 418 U.S. 539, 556-58 (1974)).

125 Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

126 *Kerry*, 135 S.Ct. at 2133 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 134 (1769)).

127 Goldberg v. Kelly, 397 U.S. 254, 262-64 (1970) (property right in government entitlement).

128 *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576-77 (1972) (recognizing property interests can exist in a government job); *Kelly*, 397 U.S. at 263-64 (1970) (recognizing property interest in welfare assistance).

129 *Compare supra* note 126 and accompanying text *with supra* notes 2-8 and accompanying text.

B. *Deprivation Caused by Agency Threats*

The question of what constitutes a deprivation has received sparse attention in scholarship and case law. [130] In particular, none have addressed the question of whether government pressure to refrain from exercising liberty or property rights can deprive that person of liberty or property within the meaning of the Due Process Clause.

The law has long recognized that threats cause injury. The common law tort of assault, for instance, creates a cause of action when an aggressor "acts intending to cause . . . an imminent apprehension of [harmful or offensive] contact, and the other is thereby put in such imminent apprehension."[131] The United States Supreme Court has also recognized First Amendment exceptions for certain threats causing intimidation and fear—thus allowing governments to punish some threatening speech.[132]

A failure to recognize the real harms caused by a threat returns to an age in which the law had a blind spot for meaningful but less tangible interests. "The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition . . . ."[133] That legal recognition should extend to how we understand deprivations of liberty or property under due process.

The harms imposed by an agency threat can so burden the exercise of liberty and property interests as to constitute a de facto deprivation of those interests.[134] Threats deter, chill, and alter behavior.[135] "[T]hat a threat is nonbinding means that the target of a threat can ignore or challenge it, but it would be naive to think that ignoring

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130 *See* Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 191 (1991) ("The threshold question of whether a 'deprivation' has occurred is conceptually interesting, but of relatively limited practical importance.").

131 RESTATEMENT (SECOND) OF TORTS § 21(1) (Am. Law Inst. 1965).

132 *See, e.g.*, Virginia v. Black, 538 U.S. 343, 363 (2003).

133 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

134 *See, e.g.*, *Sackett*, 132 S.Ct. at 1375 (Alito, J., concurring) (stating that threats to enforce uncertain laws with harsh penalties effectively force property owners to refrain from making full use of their property rights).

135 *See supra* notes 71-78 and accompanying text.

threats systematically would have no consequences."[136] Although threats lack direct legal consequences, the coercive force of the threat can effectively deprive its victim of liberty or property.

The meaning of deprivation is illuminated by the fundamental purpose behind due process: "to prevent government from abusing its power, or employing it as an instrument of oppression."[137] With that purpose in mind, cases regarding deprivation focus on whether the deprivation was intentional. For example, a negligent deprivation of liberty or property does not constitute a deprivation within the meaning of the Fifth and Fourteenth Amendments.[138] And failure to protect a crime victim does not, in most cases, constitute a deprivation either.[139] However, an overbearing and unfounded threat fits the profile of the kind of abuse of power that due process exists to prevent.

Threats in other areas of constitutional law bear comparison. The First Amendment has developed a complex and robust doctrine regarding threats that chill the exercise of speech. [140] The fear that government threats will stifle speech has motivated courts to lower procedural barriers to suit, invalidate laws, and enjoin abusive enforcement.[141] Likewise, the plea bargaining system and other laws regarding coerced confession reveal how pressure and coercion bear on constitutional rights.[142] These analogies illuminate how coercion and deprivation fit together with regard to agency threats.

1. Free Speech and the Chilling Effect

Courts have long fretted over the deterrent effect of laws and their enforcement on the exercise of First Amendment rights.[143] This "chilling effect" doctrine harbors lessons for due process and agency threats.

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136 Brito, *supra* note 18, at 562.

137 DeShaney v. Winnebago Cty. Dep't of Soc. Services, 489 U.S. 189, 196 (1989) (citations omitted) (internal quotation marks omitted) (brackets omitted).

138 Daniels v. Williams, 474 U.S. 327, 328 (1986).

139 *DeShaney*, 489 U.S. at 195-97.

140 *See generally* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969) (describing the First Amendment's chilling effect jurisprudence).

141 *See infra* notes 143-161 and accompanying text.

142 *See infra* Part II.B.2.

143 *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965) (addressing the chilling effect caused by laws suppressing communist speech and association).

The chilling effect rationale arises in many First Amendment contexts.[144] It reflects the worry that people will not engage in protected speech out of fear for overzealous law enforcement. Courts apply various remedies when a law chills speech. A court may outright enjoin any enforcement of a law because its vagueness or overbreadth chills protected conduct on the outer rim of the law's scope.[145] For example, the Supreme Court, in *Ashcroft v. Free Speech Coalition*, worried that a vague or overbroad definition of child pornography could discourage movies that address contemporary issues like teenage sex.[146] The doctrine may also have a "door-opening effect," leading courts to ease procedural barriers to suit.[147] For example, courts have relaxed the standing requirements in chilling effect cases, allowing claimants to assert claims that a statute is vague even if it was not vague as applied to them.[148]

Enforcement methods also trigger the protective instincts of the courts. If over-enforcement occurs, "People will be deterred from protected conduct by the fear of being taken to court even though they are clearly innocent under the written law."[149] This recognizes the reality that "[t]hreatened prosecution does increase the deterrent effect of written law."[150]

Threats of prosecution that chill speech receive stern treatment. In *Dombrowski v. Pfister*,[151] the Supreme Court invalidated Louisiana's anticommunist laws as vague and overbroad and enjoined their enforcement.[152] The Court said threatened prosecutions under these laws chilled speech by casting a shadow over protected activity.[153] The Court first held that the prosecutorial threat constituted an "irreparable injury" such that federal courts need not abstain while any state proceedings ran their course.[154] In doing so, the Court noted the

144 *See generally The Chilling Effect in Constitutional Law, supra* note 140.

145 *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002) ("With these severe penalties [for a ban on materials that are neither obscene nor produced through exploitation of real children], few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law.").

146 *See id.* at 248.

147 *See The Chilling Effect in Constitutional Law*, *supra* note 140, at 820.

148 *See id.* at 809.

149 *Id.* at 814.

150 *Id.* at 812.

151 380 U.S. 479 (1965).

152 *Id.* at 497-98.

153 *Id.* at 487.

154 *Id.* at 489-90.

"imponderables and contingencies" involved in prosecution that could "inhibit the full exercise of First Amendment freedoms."[155]

The Court also invalidated and enjoined the anticommunist laws.[156] It said, "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights."[157] It did not matter whether such prosecutions would ultimately meet with success or failure. "For the *threat* of sanctions may deter almost as potently as the actual application of sanctions."[158] The threat alone was unconstitutional because of the pressure to refrain from engaging in protected conduct.

The First Amendment chilling effect is grounded in the theory that imposing risk or fear that inhibits liberty can violate the Constitution.[159] It thus offers a foothold for understanding how an agency threat can constitute a genuine deprivation of a due process interest.

Like in the context of the First Amendment chilling effect, agency threats raise the costs of engaging in protected conduct. Take John Duarte as an example: the threat of fines upwards of $37,500 per day cast a shadow upon his right to use and enjoy his property. This threat imposed a deterrent effect beyond that of the written law, specifically by burdening his lawful enjoyment of a constitutionally protected property interest.[160]

Just as safeguards are needed to avoid chilling speech, we should offer due process protections that ensure agencies are "deterred from restraining the liberty of the individual for light cause."[161] The chilling effect of agency threats upon due process interests carries the same force as threats of prosecution in the context of speech. Courts should not hesitate to apply comparable protections outside that context.

2. Plea Bargains and Voluntariness

The world of plea bargaining and confession offers another fruitful analogy. Constitutional limits imposed during plea bargaining and

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155 *Id.* at 486.

156 *Id.*

157 Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

158 *Id.* (emphasis added).

159 *See id.*

160 *See supra* notes 2-8 and accompanying text.

161 *The Chilling Effect in Constitutional Law*, *supra* note 140, at 835.

interrogation demonstrate how agency threats violate due process through the exertion of undue pressure.

Around ninety-five percent of criminal defendants plead guilty in exchange for concessions offered by a judge or prosecutor.[162] On the most conservative estimates, tens of thousands of innocent persons since 1970 have pled guilty out of fear that trial will result in a harsher sentence.[163] One scholar has complained, "Our criminal justice system, as presently practiced, is basically a plea bargain system with actual trials of guilt or innocence a bit of showy froth floating on top."[164]

Everyone who winds up in the criminal justice system will face the chance to plead.[165] The "bargains" vary. A prosecutor may offer to recommend a lower sentence in exchange for a guilty plea.[166] Or he may offer to indict the defendant on a lesser charge, such as battery rather than aggravated battery.[167]

Plea bargaining serves administrative interests. It saves the government the time, money, and risk of trial. [168] The pressure placed on the defendant, regardless of their guilt, is tremendous.[169]

Plea bargaining was uncommon in the early Republic.[170] As the practice grew in popularity following the Civil War, courts presented a united opposition.[171] They shared a consensus that pleas violated due process and the right against self-incrimination enshrined in the Con-

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162 Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 84.; *see also* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 3 (1979) ("Plea bargaining consists of the exchange of official concessions for a defendant's act of self-conviction.").

163 Dervan, *supra* note 162, at 85-86.

164 Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process when Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 107 (2013).

165 *See* Alschuler, *supra* note 162, at 1.

166 *See id.* at 3 ("[Plea bargains] may relate to the sentence imposed by the court or recommended by the prosecutor, the offense charged, or a variety of other circumstances.").

167 *See id.* at 4.

168 *Id.* at 5.

169 Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 34 (2013) (empirical study of how many innocent defendants will plead under pressure found that "the rate at which such false pleas occurred exceeded our estimations and should lead to a reevaluation of the role and method of plea bargaining today.").

170 Dervan, *supra* note 162, at 58.

171 *Id.*

stitution.[172] Through the end of the nineteenth century, American courts held that "the least surprise or influence causing [the accused] to plead guilty, when he had any defense at all," should suffice to invalidate the plea.[173] This high bar meant that very few plea bargains could ever satisfy constitutional scrutiny.

This early treatment of plea bargains stemmed from a long tradition of skepticism toward coerced confessions in general. In fact, early English common law courts frowned upon guilty pleas of any description, even the clearly voluntary ones.[174] The earliest English treatise on criminal law, published in 1560, said courts should reject any guilty plea inspired by "fear, menace, or duress."[175] The plea bargaining system, in its genesis, was condemned as a species of forced confession.[176]

Nonetheless, plea bargaining began to flourish in the twentieth century.[177] It grew with the increasing complexity and size of the criminal justice system.[178] Yet the Supreme Court of the mid-20th century still denounced the practice: "A plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession."[179]

Then, in 1970, the Court gave the plea bargaining system a hesitant embrace.[180] Plea bargaining was allowed, the Court held, but the government still could not push too hard for the plea when the defendant's guilt was in question.[181] Courts still do not allow pleas "induced by promises or threats which deprive [the plea] of the character of a voluntary act."[182] Too much overt pressure to plead discourages the

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172 See *id.* ("With resounding frequency, . . . early experiments with bargained justice were rejected by the judiciary.").

173 State v. Williams, 45 La.Ann. 1356, 1357 (La. 1893).

174 Alschuler, *supra* note 162, at 12.

175 *Id.*

176 *See id.* at 13 ("Although some modern courts and scholars have [suggested] distinctions between guilty pleas and out-of-court confessions, there was apparently no distinction in history.").

177 *See id.* at 24-26.

178 *See id.* at 34-35.

179 Waley v. Johnston, 316 U.S. 101, 104 (1942).

180 *See generally* Brady v. United States, 397 U.S. 742 (1970) (holding that a voluntarily and intelligently made plea is sufficient, even if the defendant may have plead guilty in order to avoid the death penalty).

181 *Id.* at 747-48, 757-58.

182 Machibroda v. United States, 368 U.S. 487, 493 (1962).

accused's assertion of the Fifth Amendment right against self-incrimination and the Sixth Amendment right to a jury trial.[183]

This involuntariness or coercion model bears on the meaning of deprivation of property or liberty. A guilty plea is a presumptively voluntary action taken by the defendant. That action, nonetheless, is not voluntary when a severe threat induced it.[184] The same is true of actions taken in response to overbearing agency threats.[185] In these circumstances, we can shift accountability to the source of the threat, transforming the victim's capitulation into an act of deprivation by the threatening party.[186]

The plea bargaining system itself shares some general characteristics with agency threats. Like plea bargaining's innocence problem, agency threats are ubiquitous, and most people comply regardless of whether the threats are legally justified. Just as in the plea bargaining world, many regulated parties will avoid lawful conduct just to avoid the heightened dangers of enforcement.[187]

The poor excuses used to justify coercive pressure—such as administrative convenience—also have parallels between plea bargaining and agency threats. The courts that dealt with the emergence of plea bargaining saw grave danger in the prosecutorial motives behind plea bargaining.[188] They feared "that prosecuting attorneys, either to save themselves trouble, to save money to the county, or to serve some other improper purpose, would procure prisoners to plead guilty."[189]

Agency threats are also often inspired by improper motives. These can include administrative convenience and the desire to avoid judicial review.[190] Where agencies have improper incentives for issuing threats, due process protection becomes ever more urgent.

The plea bargaining analogy does not lose its force outside the criminal context. Criminal and civil prosecution share similar features. "Criminal proceedings . . . have long included all government pro-

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183 *Brady*, 397 U.S. at 746.

184 *Machibroda*, 368 U.S. at 493.

185 *See* Brito, *supra* note 18, at 565-76 (describing the coercive nature of agency threats).

186 *See id.*

187 *See id.*

188 *See* Edwards v. People, 39 Mich. 760, 762 (1878).

189 *Id.*

190 *See, e.g.*, *Hawkes*, 782 F.3d at 1001 (calling the Army Corps of Engineers' enforcement strategies a "transparently obvious litigation strategy" to avoid judicial review while still prodding targets into compliance).

ceedings culminating in fines, and the mere fact that agencies impose their fines in their own tribunals does not mean that these proceedings are not criminal in nature."[191] The characterization of proceedings as civil has become a deliberate means of sidestepping procedural protections present in criminal cases.[192] Euphemisms should not obscure the obvious analogies between criminal proceedings and civil prosecutions by government agencies.

C. *Threat as Deprivation*

Although a threat does not have formal legal consequences, "There is nevertheless a practical binding effect if private parties suffer or reasonably believe they will suffer by noncompliance."[193] This Article has demonstrated that both the First Amendment's chilling model and the criminal justice system's coercion model indicate that a deprivation of liberty or property occurs when an overbearing agency threat demands that you cease an activity or forgo a particular use of property.[194] The chilling and coercion theories explored above revolve around a similar concept—even if the government has not taken direct legal action, the mere threat of that action alone can trigger due process protections.

The chilling effect and coercion theories have other common elements and important differences. In each situation, a threat that imposes a risk on a private party triggers constitutional protection. In the chilling effect context, courts are concerned with more than just the parties before them. The chilling effect can have wide societal impact—and courts act to protect the speech of those who are not necessarily before the court.[195] The plea bargaining context lacks this systemic focus. In the plea context, courts only look to the pressure imposed on the particular defendant.[196] In general, the chilling effect

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191 HAMBURGER, *supra* note 53 at 229.

192 *See id.* at 231 ("[W]here agencies adjudicate cases of a criminal nature, they tend to deny the associated constitutional rights.").

193 Anthony, *supra* note 49, at 1329.

194 *See supra* notes 143-192 and accompanying text.

195 Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002).

196 This is not to say that those challenging a vague law will not experience even more chill because of the heavy penalties for violating the law. And defendants in a plea bargaining context must consider uncertainty in the law when calculating the likelihood of conviction at trial. However, these doctrines nonetheless seem to emphasize different sides of the risk coin.

emphasizes the uncertainty element of risk, whereas the plea bargaining context stresses the severity of the given threat.

A test for whether an agency threat constitutes a deprivation of a protected interest can analogize to these two areas of constitutional law. This Article argues for a rebuttable presumption that an agency threat causes a deprivation. This presumption aligns with plea bargaining jurisprudence.

A determination that a plea bargain was involuntary invalidates the entire plea. However, if an agency threat reaches the point of deprivation, only procedural protections are triggered. In this sense, the remedies offered for a due process violation from an agency threat more resemble the procedural protections that have long existed automatically in all plea bargains and custodial interrogations. These include the right to adequate representation during plea negotiations, prosecutorial duties to inform defendants of their rights, and Miranda warnings among others.[197] These procedural protections exist because plea bargaining and custodial interrogations are recognized as *inherently* coercive.[198] Extending a similar presumption to deprivations caused by agency threats is hardly radical.

III. THE PROCESS DUE TO VICTIMS OF AGENCY THREATS

This Article has so far established that due process protections should apply to agency threats and that their absence following agency threats is inconsistent with similar constitutional principles. Two questions remain: (1) do the current procedures in place under the APA satisfy the demands of procedural due process for agency threats?, and (2) if not, what more must an agency offer to meet its constitutional obligations? The answer to the first question is no; the APA does not satisfy due process because it allows agencies to control the timing of a threat victim's right to a hearing, and because it does not check agencies' power to intimidate.[199] The second question must be answered on a case-by-case basis; however, we can draw some general

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[197] *See, e.g.*, Missouri v. Frye, 132 S.Ct. 1399, 1407-08 (2012) (holding that defendants enjoy a right to adequate representation during plea negotiations); Edwards v. Arizona, 451 U.S. 477 (1981) (establishing a right to counsel during custodial interrogation); Miranda v. Arizona, 384 U.S. 436 (1966) (establishing the Miranda warning requirement).

[198] *Miranda*, 384 U.S. at 469.

[199] *See* Sackett v. E.P.A., 132 S.Ct. 1367, 1375 (2012).

conclusions about promptness and safeguards to limit abuse of threats.[200]

The Supreme Court built the test for determining what process is required in *Mathews v. Eldridge*.[201] The three-part test turns on

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural safeguards would entail.[202]

Mathews indicates that targets of agency threats deserve procedural safeguards beyond those offered under the APA.

A. *Insufficiency of the Administrative Procedure Act*

No statutory procedural protections exist that govern the issuance of a threat by a federal agency.[203] Agency heads can promulgate regulations for the governance of the agency, employee conduct, and the performance of the agency's various responsibilities.[204] Some of these rules may offer guidelines for agency threats, but no higher authority than the agency itself controls how it issues threats.[205]

The APA grants a right to judicial review of agency action. It says, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[206] But timing is everything. Unless otherwise provided by statute, judicial review is available only for "final agency action for which there is no other adequate remedy."[207]

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200 *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

201 424 U.S. 319 (1976).

202 *Id.* at 335.

203 Wynn, *supra* note 34, at 1896-97 (A threat's "powerful incentive to comply can be created at a relatively modest cost . . . because the agency's decision to prosecute or initiate any kind of formal adjudicatory proceedings is completely discretionary.").

204 5 U.S.C. § 301 (1966).

205 *See, e.g.*, *supra* note 83 and accompanying text.

206 5 U.S.C. § 702 (1976).

207 5 U.S.C. § 704 (1966).

Agency threats do not satisfy the final agency action requirement. Final agency actions are "the consummation of the agency's decision-making process . . . by which rights or obligations have been determined, or from which legal consequence will flow."[208] Courts tend to understand "final" as the last word on a particular matter, rather than the last word in the overall arc of the administrative process.[209] Thus, a "merely tentative" action will not be final agency action.[210] A threat, though often speaking in certain terms, will usually be considered a tentative or interlocutory action—one that begins the enforcement process but has no legal consequences in itself. Thus, the threat itself does not trigger judicial review under the APA.

The final agency action requirement leaves the agency in total control of when the recipient of a threat can challenge it.[211] This creates an environment prone to unconstitutional delay and abuse. In most cases, the agencies will reach the point of final agency action with only the most stalwart of threat victims—the tenacious few who can stomach the risk of enforcement.[212] Because most targets of a threat will fold before the action matures to finality, most agency action will never face a court.

The delay resulting from the final agency action requirement hurts regulated parties. The extension of the time horizon for judicial review increases pressure on the regulated party. Often, a potential fine for continuing noncompliance grows in the interim.[213] The threat grows in menace and harm over time, and the inability to immediately settle the threat's validity leaves threat victims hanging.[214]

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[208] Bennet v. Spear, 520 U.S. 154 178 (1997) (citations omitted) (internal quotation marks omitted).

[209] *See, e.g.*, *Sackett*, 132 S.Ct. 1367.

[210] *See Bennett*, 520 U.S. at 178.

[211] *Sackett*, 132 S.Ct. at 1375 (Alito, J., concurring) ("Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue.").

[212] *See* Brito, *supra* note 18, at 562-63 (describing the costs imposed by non-binding threats and the difficulty of resisting them).

[213] *See, e.g.*, *Sackett* at 1372. Some have suggested that a laches defense can cure the problem of delayed enforcement and accrual of large fines. *See, e.g.*, Lloyd A. Fry Roofing Co. v. E.P.A., 554 F.2d 885, 891 (8th Cir. 1977). This hardly seems an adequate response. Judges enjoy broad discretion regarding whether to allow a laches defense, and courts would lean toward deference to the agency's enforcement discretion on matters of timing. *See* Andrew I. Davis, Comment, *Judicial Review of Environmental Compliance Orders*, 24 ENVTL. L. 189, 201 (1994). And it appears that the doctrine often cannot be applied against federal agencies. *See id.*

[214] *Cf. Mathews*, 424 U.S. at 342 ("In view of the torpidity of this administrative review process and the typically modest resources of the . . . disabled worker, the hardship imposed

If the APA does not allow judicial review at the threat stage, a threatened party faces daunting hurdles before he can make his case in court. The procedural landscape of the Clean Water Act provides a good example. If the Army Corps of Engineers decides that you discharged pollutants into a protected water, you have a few equally unpalatable options. If you decide to pursue a permit, you can challenge its denial in an administrative appeal.[215] The determination of that appeal constitutes final agency action, which will trigger judicial review.[216]

Note, though, that this process provides no means of challenging the agency determination that you have violated the law if you believe you should not have to obtain a permit at all. Further, the permitting process that you will have to endure exacts precious time and money. Indeed, the average applicant spends $271,596 and 788 days in applying for a clean water permit.[217] Alternatively, you can wait for the agency to sue you, at which time you can defend against the agency's determination that you violated the law. Potential bankruptcy or criminal prosecution on the one hand or acquiescence on the other—threat victims can have their pick.

Contrast this bleak scene to threats made by private parties. When a private party threatens to sue another private party, the target of the threat has immediate recourse. Someone who receives a threat need not either fold or watch helplessly while the pendulum's arc swings lower at every passing. They can file for a declaratory judgment to immediately test the validity of the threat against them.[218]

The final agency action limitation results in a twisted irony—you can immediately challenge a threat made by a private party who owes no constitutional due process obligation, but a federal agency that must comply with due process can control whether and when the threat can be brought before a court.

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upon the erroneously terminated disability recipient may be significant.") (citation omitted) (footnote omitted).

215 33 C.F.R. §§ 331.5, 331.12 (2012).

216 *See* Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 1153 (9th Cir. 2005).

217 Rapanos v. United States, 547 U.S. 715, 721 (2006).

218 28 U.S.C. § 2201 (2010).

B. *Timing of Hearing*

An agency's power to control the timing of a hearing—made possible by the final agency action requirement—undermines due process. The timing of a hearing plays a key role in procedural due process. Delay compounds deprivation.[219]

Agencies should offer timely hearings that accord with due process. A three-part test determines whether a hearing is sufficiently prompt for due process purposes.[220] This test is similar to but distinct from *Mathews*. First, courts "examine the importance of the private interest and the harm to this interest occasioned by delay."[221] Second, courts look to the Government's excuse for the delay and the extent to which that excuse is justified by the underlying governmental interest.[222] The final factor is the likelihood of error.[223]

With agency threats, the impact on the private interest is the looming risk of enforcement and the need to know whether to expend the effort on compliance or not. This chills the exercise of liberty and property rights.[224] Thus, the harm is ongoing, and only grows with delay.

The importance of the private interest will depend on circumstance. Temporary deprivations, for example, receive less protection than permanent ones.[225] Agency threats tend to result in indefinite deprivations that will remain until absolution or further agency enforcement.[226] Although the precise interest at stake will vary case-by-case, this indefinite time horizon ought to support a prompt hearing.[227] If the Army Corps of Engineers had offered John Duarte an early hearing with Corps officers, they could have addressed the

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219 *See supra* notes 213-214 and accompanying text.

220 FDIC v. Mallen, 486 U.S. 230, 242 (1988).

221 *Id.*

222 *Id.*

223 *Id.*

224 *See supra* Part II.B.

225 *See Mathews*, 424 U.S. at 340-41 (save in cases of extraordinary harm, temporary deprivations do not need a pre-deprivation hearing.)

226 *Sackett*, 132 S.Ct. at 1375 (Alito, J. concurring) ("Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable.")

227 *Cf.* Paul E. Loving, *The Justice of Certainty*, 73 OR. L. REV. 743, 747 (1994) ("Certainty is near the top rung in the hierarchy of law's social values.").

Corps' mistake early and avoided the uncertainty lingering over his property.

Excuse for delay depends on the purpose for the final agency action requirement. An exhaustion requirement like the finality rule avoids "premature interruption of the administrative process."[228] Delay of judicial review allows agencies "to perform functions within [their] special competence—to make a factual record, to apply [their] expertise, and to correct [their] own errors so as to moot judicial controversies."[229] This purpose, however important, does not excuse delay of some kind of hearing for the targets of agency threats. Indeed, if agencies do not offer a hearing of some sort prior to finality, then the agencies have failed to embrace the finality rule's purpose of allowing them to correct their own errors to moot judicial controversies.

No excuse for the finality rule can forgive the absence of procedural protection for the victims of an agency threat. Even if judicial review at a preliminary stage would disrupt the administrative process, early administrative hearings would not jeopardize the purposes of finality.

The likelihood of error also favors promptness. In *Federal Deposit Ins. Corp. v. Mallen*,[230] bank officers suspended by the Federal Deposit Insurance Corporation (FDIC) had to wait ninety days after their suspension before they could seek a hearing.[231] The period did not violate due process in part because of a reduced likelihood of error. The FDIC's suspension authority was triggered by formal charges of a felony involving dishonesty or breach of trust.[232] The necessity of indictment "establishes that an independent body has determined that there is probable cause to believe that the officer has committed a crime punishable by imprisonment for a term in excess of one year."[233] The separate decision to indict based on the probable cause standard helped prevent arbitrary suspensions and made it

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228 McKart v. United States, 395 U.S. 185, 193 (1969).

229 Parisi v. Davidson, 405 U.S. 34, 37 (1972).

230 486 U.S. 230 (1988).

231 *Id.* at 232.

232 *Id.* at 232-33.

233 *Id.* at 244.

"unlikely that any particular suspension would be erroneously imposed."[234]

Agency threats have no such mandatory procedures to reduce likelihood of error. The issuance of a threat does not enjoy the padding of an independent body's determination. Nor do agencies have to abide by a standard of suspicion such as probable cause before issuing a threat. The delay engendered by the finality requirement subjects presumptively innocent parties to threats of indefinite duration and unknown risk of error, thus violating the constitutional promise of a prompt hearing.

C. *Other Safeguards*

Ex ante review of a threat's validity would help fill some of this procedural vacuum. As the Court noted in *Mallen*, an independent concurring judgment based on an articulable standard, such as probable cause, reduces the likelihood of error and thus reduces constitutional issues with delay.[235] If agencies were required to vet threats prior to their issuance, the regulatory regime of rule by threat would do less violence to due process.

Agencies need not have all of their homework checked by a separate independent body. Such an *ex ante* requirement for issuing something like a notice of violation could become a greater burden than judicial review of non-final action. But agencies should employ a review process based on an established standard before issuing a threat.

Such review processes are nothing new. In the eighteenth century, for instance, the executive authority ensured that notices of legal duty did not stray too far toward the coercive force of law "by having [officials] make their determinations of legal duties in executive hearings, which mimicked aspects of judicial hearings but concluded with the administrators issuing notices of legal duties rather than binding judgments."[236] Here, some kind of vetting process based on articulable standards would reduce the likelihood of error and ease the constitutional injury to threat victims.

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234 *Id.* at 244-45; *see also* Burton v. Alabama Dep't of Agric. & Indus., 587 F.Supp.2d 1220, 1229 (2008) (holding that, in the absence of a concurring judgment from an independent body, a delayed hearing was unjustified).

235 *Mallen*, 486 U.S. at 243-45.

236 HAMBURGER, *supra* note 53, at 203-04.

Warnings similar to *Miranda* could also alleviate procedural problems with agency threats. The Supreme Court in *Miranda* used information to combat inherent coercion.[237] In that context, of course, the relevant information is knowledge of the rights held by someone taken into custody.[238] Here, agencies should make clear that the threat itself does not constitute a final legal determination that the regulatory target has violated the law. Agencies should avoid language in threats that indicates certainty of legal violation and should inform the recipient that they may lawfully ignore the threat.[239] The threat should also inform the regulatory target of its evidentiary and legal basis. This not only eases coercion by reducing uncertainty—it also comprises a fundamental part of appropriate notice under due process law.

D. *Hearings and Agency Resources*

Agencies can offer these procedural safeguards without undue expense. Scarce resources limit what process a court will demand of the government.[240] As Judge Friendly noted in an influential article, because procedures "entail the expenditure of limited resources, . . . at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection."[241] As the Supreme Court stated in *Mathews*, "[T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed."[242] Any court's selection of the point when "the benefit of an additional safeguard . . . [is] outweighed by the cost"[243] is not easily subject to a consistent standard.

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237 *See* Erin E. Brophy & Wendy H. Huang, *Custodial Interrogations*, 88 GEO. L.J. 883, 1021-22 (2000) (describing how *Miranda* alleviates inherently coercive custody interrogations by informing defendants).

238 *Id.*

239 *See* Duarte v. U.S. Army Corps of Eng'rs, 17 F.Supp.3d 1013, 1020 (2014) ("The Corps asserts that plaintiffs did not have to obey the order it issued. If plaintiffs were free to ignore an unconditional command of . . . the Corps, then the [threat] should have said so. Conversely, if the [threat] were simply a 'notification' to plaintiffs, then it should have said so, rather than clothing itself as an 'order' which with it the authority to 'prohibit' plaintiffs from continuing their activities.").

240 *See Mathews*, 424 U.S. at 347.

241 Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1276 (1975).

242 *See Mathews*, 424 U.S. at 348.

243 *Id.*

However, procedural protection of threat victims will not impose grievous cost. Early hearings to determine the legal viability of a threat—much like a declaratory judgment action—should often save money by putting a quick stop to an enforcement based on wrong facts.[244] And procedures at a hearing can be cheap—cheaper, certainly, than judicial review at a more mature stage.[245] Hearings need not be elaborate, so long as they grant "[t]he opportunity for informal consultation with designated personnel empowered to correct a mistaken determination."[246]

Some courts have worried that judicial review of informal warnings would discourage the use of informal communications between regulators and regulated.[247] The thesis of this Article would offer a middle ground. Agencies can offer informal hearings at much less cost—which should rightfully discourage abusive or overzealous threats—while still making it feasible for agencies to issue informal warnings.

The sliding scale between a judicial trial and total lack of process moves along a continuum that "varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances."[248] The nature of the hearing is a practical inquiry. Some issues will not require live testimony whereas others will. Cross-examination may be key to protection of a constitutionally protected interest in some cases but not others.[249]

The circumstances in which a government may issue a threat have an infinite variety; this Article cannot specify what kind of hearing is owed to each individual challenging a government accusation. However, given the early stage of enforcement, simplified hearing opportunities might suffice. For instance, a hearing must provide a chance for

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244 Barry v. Barchi, 443 U.S. 55, 66 (1979) ("We . . . discern little or no state interest . . . in an appreciable delay in going forward with a full hearing, [as] it would seem as much in the State's interest as the [regulated party's] to have an early and reliable determination with respect to [liability].").

245 *See generally* Friendly, *supra* note 241 (reasoning that something less than judicial review should be offered in administrative hearings because of the undue expense resulting from the full procedural scheme of trial).

246 *See* Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 16 (1978).

247 *E.g.*, Rhea Lana, Inc. v. Dep't of Labor, 824 F.3d 1023, 1028 (D.C. Cir. 2016).

248 Friendly, *supra* note 241, at 1278.

249 *See id.* at 1286 ("[T]he question whether cross-examination should be denied must generally be viewed from an incremental standpoint.").

threat recipients to demand the factual and legal grounds for the threat, and an opportunity to rebut errors. If oral or written testimony can correct an error or misunderstanding regarding the allegation of wrongdoing, the agency should allow it. Extensive presentation of facts with fact-finding rules can await further enforcement. The purpose of this early hearing opportunity is to correct basic errors, demand greater rigor from agencies, promote clear communication, and discourage abusive threats. Victims of agency threats deserve this kind of immediate recourse.

CONCLUSION

To return to this Article's epigraph: "The value of a sword of Damocles is that it hangs, not that it drops."[250] Damocles was a flatterer who heaped praises upon the king Dionysius.[251] Annoyed by the sycophant, Dionysius asked if Damocles would like to live like a king. When Damocles assented, the king regaled Damocles with all the glories of a kingly life, with one small drawback. Damocles had to sit on a throne beneath a gleaming sword that hung by a horsehair. Understandably, he did not enjoy the kingly pleasures much anymore—the sword's shadow lay across it all. "[T]here can be no happiness," Cicero concluded, "for one who is under constant apprehension[.]"[252]

Dionysius wanted to demonstrate the burdensome worries that accompany great power. But this Article is not worried so much about Dionysius as it is about John Duarte: the pressures of being powerful do not measure up to the pressures of being subject to the powerful.[253]

Federal agencies have unfettered discretion to threaten.[254] They control when and if their targets can challenge the basis for those threats.[255] In the meantime, their victims live under the shadow of the sword. The resulting apprehension deprives threat victims of constitutionally protected interests.[256] The targets of this ubiquitous enforce-

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250 *Arnett*, 416 U.S. at 231.
251 MARCUS TULLIUS CICERO, TUSCULAN DISPUTATIONS 185 (C.D. Yonge Trans., 1877).
252 *Id.* at 185-86.
253 *See infra* notes 2-8.
254 *See* Brito, *supra* note 18, at 562.
255 *Id.* at 562-63.
256 *See supra* Part II.B.

ment method deserve the most fundamental of human liberties—the right to a prompt hearing.