Brass Rings and Red-Headed Stepchildren: Protecting Active Criminal Informants

Michael L Rich
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Michael L. Rich

ABSTRACT

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

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

Informants are critical law enforcement tools, and the active informant, i.e., one who will continue to acquire information for the police while maintaining her criminal connections, is the “brass ring” for an agent. Her continuing connections to the criminal underworld allow for a number of benefits to law enforcement, including the efficient and effective infiltration of criminal organizations and the collection of damning evidence against them, all at a diminished cost to law enforcement.

But despite their importance, society treats informants generally, and criminal informants specifically, i.e. those that cooperate with police in exchange for leniency, like red-headed stepchildren. Active criminal informants are vulnerable to substantial physical, social, and moral harm, yet society does little to ensure their safety. Moreover, informant recruitment is inherently coercive, and there are no safeguards to ensure that informants agree voluntarily to cooperate. Finally, many active criminal informants possess individual characteristics, such as youth, mental illness, and drug addiction, that make them particularly vulnerable to coercion and other harm, but few jurisdictions impose any restrictions on who the police may recruit to cooperate.

Why would society fail to protect such valuable law enforcement assets? First, informants are treated poorly because, to put it bluntly, no one really

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

2 MADINGER, supra note 1, at 29.

3 See infra § I.A.


5 See infra § III.B.1.

6 See infra § V.

7 See infra § III.C.1.

8 See infra § III.C.2.

9 See infra § V.B.
likes them. By assisting the police in apprehending their associates and friends, informants commit the egregious sin of betrayal. The resulting disdain is heightened with respect to criminal informants, because they are criminals who betray others for the purely selfish purpose of obtaining leniency. Second, though active criminal informants are valuable to police, they are often fungible. Though the criminal connections of the low-level criminals who frequently become informants are useful, many others typically share these connections. Moreover, the benefits of cooperating with the police are substantial enough to entice a continuous stream of criminals to cooperate despite the risks.

Though society’s disdain for informants is understandable, the failure to protect them is unjustified. Society has a widely-accepted obligation to protect its vulnerable members, and informants are often quite vulnerable. This duty is enhanced when an individual’s vulnerabilities are

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


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

14 See MALLORY, supra note 1, at 8-10 (describing the utility of informant connections).

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

16 See infra § II.A. The assertion that society has a duty to protect the vulnerable must be distinguished from the position that government has such a duty. The latter is a special application of the former, and one that was rejected, at least as a legal matter, by the Supreme Court in Deshaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989).

17 Interestingly, the informants who receive the greatest amount of media attention are often those who are the least vulnerable. A recent example is the publicity surrounding the capture of Whitey Bulger, a Boston gangster and FBI informant who cannot be fairly described as vulnerable. See Adam Nagourney & Abby Goodnough, Long Elusive, Irish Mob Legend Ended Up a Recluse, N.Y. TIMES, June 25, 2011, at A1. Bulger used his
the result of her engagement in socially-beneficial activities, and the active criminal informant’s cooperation falls into that category.\textsuperscript{18} Of course, it is easy to muster the political will to protect those who are vulnerable and sympathetic, but society also must protect those who, like criminal informants, are repugnant to the majority.\textsuperscript{19}

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

In answering these questions, I proceed as follows. Part I briefly describes the role of the active criminal informant in the criminal justice system. Part II explores society’s duty to protect the vulnerable and examines societal norms suggesting that vulnerabilities that result from an individual’s immutable characteristics or socially-beneficial activity are entitled to the greatest protection. Part III applies the prior Part’s observations to the specific case of the active criminal informant and identifies the vulnerabilities of the informant that are most deserving of protection. Part IV reconciles the informant’s safety and autonomy interests with reference to the rich literature on paternalism and argues for a “soft” paternalistic

\textsuperscript{18} See infra § III.B.2.

\textsuperscript{19} For this reason, one of the goals of the Bill of Rights was to fulfill society’s obligation to protect unpopular and minority interests from oppression by the majority. See Feldman v. United States, 322 U.S. 487, 501 (Black, J., dissenting) (“The founders of our federal government were too close to oppressions and persecutions of the unorthodox, the unpopular, and the less influential, to trust even elected representatives with unlimited powers of control over the individual. From their distrust were derived the first ten amendments, designed as a whole to limit and qualify the powers of Government, to define cases in which the Government ought not to act, or to act only in a particular mode, and to protect unpopular minorities from oppressive majorities.”) (internal quotation omitted).
approach that emphasizes the importance of informed decision-making by the informant. Part V reviews existing legal doctrines and statutory schemes and concludes that they provide insufficient protection for vulnerable informant interests. Finally, Part VI proposes legislative and law enforcement policy changes to provide appropriate protections for active criminal informants. These include requiring court approval for the use of particularly vulnerable informants and prosecutorial consent for the use of all others, providing training for informants and law enforcement agents in minimizing the risk of harm to informants, and encouraging law enforcement to minimize these risks by including informants in the scope of existing workers’ compensation schemes.

I. Active Criminal Informants

In its broadest sense, the term “informant” refers to any civilian who provides information to the police. This Article limits its discussion to active criminal informants for three reasons. First, the homogeneity of informants makes it impossible to discuss their varied interests meaningfully and comprehensively. Second, among all informants active criminal informants are both numerous and the “most prized by law enforcement.” Third, active criminal informants engage in particularly risky activity, both in terms of the threat of physical injury should they be discovered and the potential for moral harm as they continue to associate with criminals and engage in crime.

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21 Informants include a wide range of familiar cultural tropes, such as jailhouse snitches, criminal accomplices, concerned citizens, and innocent eyewitnesses. Id.

22 MADINGER, supra note 1, at 28. No hard data exist detailing how widespread the use of informants is, but estimates place the number of informants active at any given time in the hundreds of thousands. See Natapoff, supra note 15, at 657. Of these, a majority of them are likely to be criminal informants, as leniency is the most common incentive used in the recruitment of informants. See MADINGER, supra note 1, at 51; JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 112 (3rd ed. 1994) (“To maintain an informant network, police must pay off each informer, usually by arranging for a reduction of charge or sentence or by not acting as a complainant . . . .”). And police literature on the use of informants suggests that many informants take an active role in investigations. See MALLORY, supra note 1, at 3 (discussing the importance of informants “who can conduct surveillance, testify in court, identify potential targets, initiate contact with targets, and provide law enforcement with this informants, or introduce an undercover agent to these targets”).

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

A. Their Use

Active criminal informants are most useful to law enforcement because the threat of criminal prosecution makes them highly motivated in their pursuit of evidence against others, and their criminal connections permit law enforcement to infiltrate illicit organizations more efficiently and effectively. Undercover law enforcement agents must devote substantial time and resources, while exposing themselves to significant risk, to infiltrate criminal organizations, and even then they are not always successful. An active criminal informant can expedite that process significantly by vouching for the agent. In some cases, these informants can remove the need for uncover work entirely by continuing their involvement in the organization and obtaining evidence of criminal activity directly. They also assist law enforcement by letting police know about crimes that may never otherwise have been detected and by using their knowledge of criminal communities to direct police investigations to higher-value targets.

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24 There is no standard terminology used to refer to different kinds of informants. Thus, the term “active criminal informant” is not a term of art, but merely descriptive. *See* MADINGER, *supra* note 1, at 28 (referring to an “active informant” as one who “provide[s] information while remaining in position in the criminal setting”). Moreover, the term “snitch” will be avoided because of the unhelpful, pejorative implications of the word. *See* Rich, *supra* note 11 (manuscript at 1-2).

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


28 *Id.* at 9-10.

29 *Id.* at 77; MOTTO & JUNE, *supra* note 1, at 57.

30 MALLORY, *supra* note 1, at 10.

31 *Id.* at 8, 13-14.
Because active criminal informants are most useful in helping police infiltrate criminal conspiracies and detect vice crime, they have historically been of particular importance in the areas of drug enforcement and organized crime, and are being used increasingly in counterterrorism efforts and white-collar investigations. Nonetheless, active criminal informants are employed to investigate all types of crime. Active criminal informants are a cross-section of criminals; they are men and woman, adults and juveniles, and many have mental health problems, suffer from mental deficiencies, or are drug addicts. Many criminal informants are on the lower rungs of the criminal ladder, and law enforcement offers them leniency only if they can deliver evidence against more “valuable” targets.

Along with being the most useful of informants to law enforcement, active criminal informants also engage in the most risky activity. For instance,

32 See Malachi L. Harney & John C. Cross, The Informer in Law Enforcement 12 (2d ed. 1968) (“The short summary of the stated value of the informer from the prosecution point of view is that he is almost indispensable in narcotics cases. With this we agree . . . .”); James Q. Wilson, The Investigators: Managing FBI and Narcotics Agents 76 (1978) (“[W]ithout an informant, few cases can be made at all, and thus the DEA can monitor its agents’ performance by examining case output or undercover buys . . . .”); ACLU Study, supra note 1, at 3.

33 See Natafop, supra note 12, at 30, 154; Mallory, supra note 1, at xi (noting the importance of informants in combatting “[r]ising terrorist activity” and “the emerging economic crime wave”); Wadie E. Said, The Terrorist Informant, 85 Wash. L. Rev. 687, 688 (2010).

34 Harney & Cross, supra note 32, at 14 (“The fact is that the informer is valuable to the police in practically every spectrum of crime.”); Natafop, supra note 12, at 26. That they are considered to be the most valuable informants does not mean that the use of active criminal informants does not have its pitfalls for law enforcement. See Natafop, supra note 12, at 31-38 (detailing some of the problems for law enforcement caused by informants). That being said, even critics of widespread informant use recognize their utility. See id. at 29-31.


36 See ACLU Study, supra note 1, at 51, 53 (community survey in which drug-addicted respondents and those with mental health issues reported working as informants). Though these informants involve additional risks for the police, their use is viewed as inevitable because of the frequency of mental health and drug abuse problems among criminals. See Mallory, supra note 1, at 25 (discussing “restricted use informants,” including juveniles and drug addicts); Madinger, supra note 1, at 186-90 (discussing the use of addicts and those with mental health problems as informants).


38 This is not to say that informants who only provide information or testify on behalf of the government are not subject to harm. See McCray v. Illinois, 386 U.S. 300, 308 (1967)
the prototypical active criminal informant in the drug context arranges to purchase contraband from another criminal so that police can apprehend the seller. In other cases, the informant may wear a wire, join subversive organizations, or even engage in a sexual relationship with a target. These activities are distinct from other informant activity in that they typically require the active criminal informant to be outside of police protection and in proximity with the target of the investigation, who is likely to enact immediate and violent retribution should the informant’s cooperation be discovered. Moreover, those low-level informants seeking evidence against “big fish” may find themselves in situations where they are out of their depth, involving targets who are more serious criminals and prone to violence.

B. Their Recruitment

Recruitment of active criminal informants typically occurs without the oversight of courts or the involvement of defense counsel. Police attempt to recruit informants immediately after, or sometimes in lieu of, their arrest, as this is when the potential informant is most afraid of potential jail time and thus most likely to agree to cooperate. In order to best utilize an arrestee’s fear of punishment as an incentive to cooperate, police emphasize the maximize penalties that the potential informant might face and suggest that cooperation is her only option to avoid those penalties. In some cases, police may even bluff by threatening charges for which there is

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39 See MALLORY, supra note 1, at 77; MOTTO & JUNE, supra note 1, at 57.
40 See Rich, supra note 20, at 691.
41 See Alexander v. DeAngelo, 329 F.3d 912, 918 (7th Cir. 2003) (recognizing the informant’s “usual risk of being beaten up or for that matter bumped off by a drug dealer with whom one is negotiating a purchase or sale of drugs in the hope of obtaining lenient treatment from the government”); Susan S. Kuo, Official Indiscretions: Considering Sex Bargains with Government Informants, 38 U.C. DAVIS L. REV. 1643, 1661-62 (2005) (discussing the risks of physical harm to informants).
42 See, e.g., ACLU Study, supra note 1, at 11 (“[M]eror motor vehicle traffic violators were used in some cases to infiltrate criminal enterprises run by interstate drug traffickers); Rich, supra note 20, at 681-83 (detailing the case of Rachel Morningstar Hoffman, a confidential informant and low-level marijuana dealer who was killed during the purchase of ecstasy, cocaine, and a handgun that she arranged at the instruction of her police handlers).
43 See NATAPOFF, supra note 12, at 16.
44 See ACLU Study, supra note 1, at 12, 54; Rich, supra note 20, at 694.
45 See Rich, supra note 20 at 696; see also ACLU Study, supra note 1, at 10 (“Police ‘squeeze’ criminal defendants by threatening them with additional charges or counts related to their own cases if they do not ‘cooperate’ by becoming [informants]”).
insufficient evidence to convict. And because defense counsel may discourage a potential informant from cooperating or try to extract a better bargain for her client, police will sometimes discourage their involvement. The agreements between police and informants also are often informal and never reduced to writing.

In some cases, prosecutors negotiate with the potential informants instead of the police. This is because police are limited in what they can deliver to an informant. With regards to a potential informant who has just been arrested and against whom charges have not been filed, police can truthfully promise not to disclose her most recent crime to the prosecutor if she cooperates. But the police typically lack the authority to bind prosecutors, so the relevant prosecutor must be involved if the informant is to negotiate a valid and binding cooperation agreement for leniency on charges that are under investigation or have been filed by the prosecutor. And of course, if the negotiations involve pending charges, the potential informant has a constitutional right to have counsel involved. But the right to counsel typically does not attach until formal charges are brought against a potential informant. Thus, prosecutors are free to negotiate cooperation agreements with potential informants without providing them an opportunity to consult with counsel.

46 ACLU Study, supra note 1, at 52-53 (reporting that police threaten to plant incriminating evidence on witnesses or charge them with crimes like obstruction of justice or hindering prosecution if they fail to provide or gather evidence for the police); Rich, supra note 20, at 696.

47 Id.

48 See NATAPOFF, supra note 12, at 19; ACLU Study, supra note 1, at 12.

49 See NATAPOFF, supra note 12, at 18-19.

50 Daniel Richman, Prosecutors and Their Agents, Agents and Their Prosecutors, 103 COLUM. L. REV. 749, 780 (2003) (collecting cases); Joaquin J. Alemany, United States Contract with Informants: An Illusory Promise?, 33 U. MIAMI INT’L L. REV. 251, 260-66 (2002) (same). But see United States v. Castillo, 709 F.2d 35, 37 (9th Cir. 1983) (upholding dismissal of drug charges based on finding that defendant fulfilled terms of cooperation agreement with DEA agents, who promised that he would not be prosecuted). Occasionally, courts find that the apparent authorization by a government agent of an informant’s criminal activity is a defense to charges arising from that activity. See, e.g., U.S. v. Abcasis, 45 F.3d 39, 43-44 (1995) (holding that defendant could claim entrapment by estoppel if he reasonably relied on representations by a government agent that his criminal activity was authorized as part of a cooperation agreement).


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

53 Though some prosecutors’ offices may have formal or informal policies requiring the presence of counsel, it is implausible that, in the absence of some constitutional or statutory
Even where an informant has negotiated with a government representative who has the authority to bind the State, cooperation agreements typically vest substantial discretion in government agent to determine whether the informant has met her obligations and is thus entitled to the promised leniency. Moreover, because a prosecutor cannot bind a court’s sentencing discretion, the offered leniency is usually limited to a promise to convey the fact of the informant’s cooperation to the sentencing tribunal and to seek a lower sentence. Should the court disagree with the prosecutor’s recommendation or adjudge the informant’s cooperation insufficient, the informant is left with little recourse.

C. Disdain for Active Criminal Informants

Though active criminal informants play a crucial role in law enforcement, they are subject to widespread societal disdain. The first mark against them in society’s eyes is that they are criminals. By engaging in criminal activity, the informant becomes a marginalized “other” whose claims on basic rights, such as housing, employment, voting, and sustenance, are lost or severely curtailed. This demonization of the criminal is reinforced by the sensationalizing of crime in the news media and popular culture. And prohibition, some prosecutors would not meet with potential informants outside of the presence of defense counsel.

54 For instance, the United States Sentencing Guidelines give the prosecutor discretion to decide whether to file a motion for a downward departure in light of the defendant’s “substantial assistance” to the government bounded only by constitutional limitations. Wade v. U.S., 504 U.S. 181, 185-86 (1992). Similarly, the requirements of most cooperation agreements specify only that the informants must render “full cooperation” or its equivalent to receive leniency. See Hughes, supra note 25, at 47 (citing U.S. v. Brown, 801 F.2d 352 (8th Cir. 1986)). Whether informants have met that standard is the subject of a steady stream of litigation that infrequently ends in the informant’s favor. See Ian Weinstein, Regulating the Market for Snitches, 47 BUFF. L. REV. 563, 589-91 (1999).

55 See Weinstein, supra note 54, at 588, 591-92.

56 See id. at 592.

57 See Michael Pinard, Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity, 85 N.Y.U. L. REV. 457, 489-94 (2010); Alec. C. Ewald, “Civil Death”: The Ideological Paradox of Criminal Disenfranchisement Law in the United States, 2002 WIS. L. REV. 1045, 1074 (describing John Locke’s view that “one who commits a crime forfeits his right to participate in the political process--if not his rights to property and person”).

58 See Craig Haney, Media Criminology and the Death Penalty, 58 DePaul L. REV. 689, 731 (2009) (“[B]eyond reinforcing the master crime narrative by individualizing and decontextualizing crime, media criminology consistently dehumanizes and demonizes perpetrators and effectively exoticizes their criminality.”); Lynne Henderson, Revisiting Victim’s Rights, 1999 UTAH L. REV. 383, 395 (“The news media keeps up a steady drumbeat of crime--“if it bleeds, it leads”--and portrays criminal defendants as unworthy and less than human.”).
the distaste is compounded in the case of the criminal informant because she betrays her criminal compatriots when she cooperates with the police and does so for selfish reasons.\(^{59}\) She is, in common parlance, a “snitch,” a “squealer,” and a “rat.”\(^{60}\) This perception of the informant as disloyal is particularly strong in the high-crime communities that are most marginalized from mainstream society and in which active criminal informants are likely to live.\(^{61}\)

The broader societal disdain of criminal informants is magnified within the law enforcement community, which generally views informant “with aversion and nauseous disdain.”\(^ {62}\) Police officers have such a well-developed sense of loyalty that they punish severely those officers who are perceived to be disloyal.\(^ {63}\) It thus comes as little surprise that in handling informants, police are cautioned to mask their distaste of the informant’s disloyalty.\(^ {64}\) And both police and prosecutors frequently speak of the informant as being, at best, a “necessary evil.”\(^ {65}\) Indeed, a popular aphorism used frequently by prosecutors to explain to juries their use of criminal informants as witnesses is instructive:

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\(^{59}\) See Rich, supra note 11 (manuscript at 13-17).


\(^{61}\) For instance, the perception of informant disloyalty lies at the heart of the “Stop Snitching” movement, which discourages even law-abiding citizens in these communities to cooperate with the police. See Rich, supra note 11 (manuscript at 17-28).

\(^{62}\) Richard C. Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 YALE L.J. 1091, 1093 (1951). It is worth noting, however, that this background distaste for the informant does not mean that police officers and prosecutors never come to like individual informants with whom they deal on a personal level. Indeed, police are cautioned for good reason against becoming too friendly with their informants, particularly those of the opposite sex. See MADINGER, supra note 1, at 185-86. Rather, the assertion here is that active criminal informants specifically are disliked as a class by prosecutors and police officers, even though individual government agents may develop a personal affinity for individual informants.

\(^{63}\) See MALLORY, supra note 1, at 17 (“This code of silence is even upheld In many law enforcement entities. Covering for a partner or not disclosing illegal activity is all too common in the police community.”); Gabriel J. Chin & Scott C. Wells, The “Blue Wall of Silence” As Evidence of Bias and Motive to Lie: A New Approach to Police Perjury, 59 U. PITT. L. REV. 233, 256-61 (1998) (discussing the ostracism, retaliation, and physical violence suffered by police who report wrongdoing by other officers).

\(^{64}\) See MOTTO & JUNE, supra note 1, at 58-59 (“It has been said a thousand ways. Police officers should handle informants with respect and refrain from using the word “inform,” “squel,” “rate,” “narc,” “stool” or other similar derogatory descriptions.”); MALLORY, supra note 1, at 28 (cautioning that “[r]eferring to informants as damn snitches, scum bags, rats, etc. . . . are not very effective methods to obtain accurate information”).

\(^{65}\) MALLORY, supra note 1, at x; see also John Monk, Did freeing accused killer lead to murder?, CHARLOTTE OBSERVER, August 7, 2011, at B2.
perspective on criminal informants: “If you are going to try the devil, you have to go to hell to get your witnesses.”

II. Protecting the Vulnerable

A. Society’s general duty to protect the vulnerable

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

Those arguing for changes in positive law to protect various sub-groups often cite this duty to justify their efforts. Children’s advocates argue for

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66 This maxim comes in many forms, all of which essentially equate criminal informants to denizens of hell. See, e.g., Belisle v. State, 11 So. 3d 256, 303 (Ala. Crim. App. 2007) (case in which prosecutor stated during opening statement, “Unfortunately, sometimes if you want to get the devil, you’ve gotta go to hell for witnesses.”); Moore v. State, 820 So. 2d 199, 207 (Fla. 2002) (case in which prosecutor used during argument the phrase, “Crime conceived in hell will not have any angels as witnesses.”); Monk, supra note 65 (in case in which informant suspected of murder killed another individual while out on bail, quoting prosecutor who said, “When you want to convict the devil, sometimes you got to go to hell to get the witnesses.”).


the expansion of legal doctrines and the enactment of legislation to protect children on the ground that they are among the most vulnerable members of society. Arguments for expanded protection of the mentally and physically disabled also rely on the notion that their vulnerability gives rise to enhanced societal duties. Similar arguments are used to advocate on behalf of legal protections for the elderly and for various immigrant groups on the basis of their unique vulnerability. And the Supreme Court has recognized in a variety of contexts that the protection of vulnerable groups is a legitimate governmental interest.

B. Defining vulnerability

Though the term “vulnerable” is often used to describe those whom we normatively wish to protect, it is infrequently defined clearly. As used herein, a specific instance of an individual’s vulnerability is defined by two variables. One must identify first what the individual is vulnerable to. In other words, to what harm is the individual susceptible? The harm in question of course can be physical, but one also can be vulnerable to harm to one’s less tangible “interests,” such as one’s psychological or economic

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76 See, e.g., Washington v. Glucksberg, 521 U.S. 702, 731 (1997) (upholding assisted suicide ban in part in reliance on governmental interest in protecting vulnerable groups, including the poor, the elderly, and the disabled, from coercion, prejudice, and societal indifference); Heller v. Doe by Doe, 509 U.S. 312, 332 (1993) (recognizing that “the state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable ... to care for themselves”) (quoting Addington v. Texas, 441 U.S. 418, 426 (1979); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 394-95 (1937) (holding that freedom of contract could be restricted in order to protect vulnerable groups).
wellbeing. Additionally, an instance of vulnerability is defined by whom the individual is vulnerable to. Put another way, who, through their action or inaction, can cause the individual the harm to which she is susceptible?

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

C. Identifying the vulnerabilities entitled to society’s protection

If every person is vulnerable, then it is both unfeasible and undesirable for society to protect all people against each vulnerability they face. This

79 The specific question of what counts as an individual’s “interest” such that it might be deserving of protection is itself a normative question. Id. at 111.
80 Id. at 112.
81 Id.
82 See Bray, supra note 67, at 1173; Martha Albertson Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition, 20 YALE J.L. & FEMINISM 1, 1 (2008) (arguing that “vulnerability is—and should be understood to be—universal and constant, inherent in the human condition”).
83 First, protecting one individual against vulnerability inevitably interferes in some way with the interests of another, at a minimum because it requires the redirection of society’s limited resources. Moreover, there are vulnerabilities that society, acting through its government, is ill-suited to protect individuals from, because, for instance, they may be difficult to predict or the heavy hand of government intervention may be ill-suited to addressing them. See, e.g., Alon Harel & Gideon Parchomovsky, On Hate and Equality, 109 YALE L.J. 507, 510 (1999) (arguing that even in the limited arena of vulnerability to crime, vulnerability that arise from certain factors, such as simple bad luck, cannot be protected against by the state); Kyle Graham, Why Torts Die, 35 FLA. ST. U. L. REV. 359, 406-30 (2008) (discussing the demise of “heartbalm” torts and noting that it resulted, at least in part, from practical difficulties of measuring damages and discouraging frivolous suits). Finally, government efforts to protect everyone against all vulnerabilities would almost certainly be viewed as unacceptably paternalistic. See Leslie Bender, Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities, 1990 DUKE L.J. 848, 890 (“Although the motivation for paternalistic intervention may be
being so, one must then figure out how society should decide which vulnerabilities to protect. Answering this question requires a normative analysis that must be undertaken on a case-by-case basis. Nonetheless, two widely-accepted societal norms are useful in undertaking this analysis in the informant context. First, society generally provides greater protection to unchosen vulnerabilities than to those that arise from an individual’s voluntary and intelligent choice. Second, engaging in socially-beneficial activity typically entitles an individual to greater protection from resulting vulnerabilities.

1. The importance of choice

The liberal ideal of equality suggests first that “all men are created equal” and thus are entitled to equal protection under the law, particularly with respect to personal characteristics over which one has little or no control. Similarly, the liberal tradition of respecting an individual’s autonomy suggests that an individual is entitled to less protection from the negative repercussions of decisions that are a product of her free will.

altruistic, it inevitably involves an element of autonomy-deprivation for the “protected” party.”. For a discussion of paternalism concerns in the informant context, see infra § IV.

84 See Erik Luna, Mandatory Minimalism, 32 CARDOZO L. REV. 1, 49-50 (2010).

85 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.”).

86 See U.S. CONST. amend. XIV, § 1 (“nor shall any State … deny to any person within its jurisdiction the equal protection of the laws”); Romer v. Evans, 517 U.S. 620, 632 (1996) (requiring that disparate government treatment be justified, at a minimum, but a rational relationship with some legitimate government interest)


89 For instance, the criminal law punishes only those actions that are the result of an individual’s free and voluntary choice. See Sanford H. Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 CAL. L. REV. 323, 326-27 (1985) (“Central among the beliefs that underlie the criminal law is the distinction between nature and will, between the physical world and the world of voluntary human action. Events in the physical world follow one another with an inevitability, or natural necessity, that is conspicuously absent from our view of voluntary human actions. Voluntary human actions
With these liberal ideals in mind, society undertakes an enhanced duty to protect individuals from vulnerabilities that arise from what can be called, to borrow from equal protection law, immutable characteristics and a diminished duty to protect individuals from vulnerabilities arising from an exercise of free will.90

This clean-sounding dichotomy masks some difficult line-drawing issues, however. First, the concept of immutability is itself surprisingly malleable.91 The most clearly “immutable” personal characteristics are those that could be described as purely accidents of birth over which an individual truly has no control, such as race, color, national origin, genetic makeup, and disability.92 But society also provides enhanced protection against discrimination on the basis of attributes that are central to an individual’s identity, even though they might be mutable in fact, such as religion or gender.93 The decision to protect this latter group of characteristics is based on a normative judgment that they are either so difficult to change or so central to the individual’s identity that society should not expect them to be changed.94

Moreover, some vulnerabilities arise from choices, such as hairstyle, clothing, or language, that are expressions of an individual’s immutable characteristics.95 Others stem from characteristics, including poverty, are not seen as the product of relentless forces, but rather as freely chosen expressions of will.”).


92 Id. at 1515.

93 Id. at 1517-18.

94 Id. at 1517.

95 Most famously, the U.S. District Court of the Southern District of New York rejected a challenge under Title VII to an American Airlines policy that prohibited certain employees from wearing their hair in braids. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (1981). The court reasoned that the wearing of hair in braids is “an easily changed characteristic,” i.e. a choice, and thus not an immutable characteristic protected by Title VII. Id. at 232. Scholars have pointed out how this analysis fails to appreciate the complex interplay
homelessness, obesity, and drug or alcohol addiction, that can be exceedingly difficult to change but are at least in part the result of past choices.\footnote{Empirical questions about whether a particular vulnerability is the result of an individual’s choice or is an accident of her birth can also muddy the waters. For example, the debate between supporters and opponents of protections based on sexual orientation often is framed as a factual question of whether one chooses one’s sexual orientation.\footnote{Similar questions arise about genetic predisposition for other vulnerabilities, such as drug addiction and obesity.}\footnote{Though the existence of these issues complicates how choice impacts the determination of the extent of society’s obligation to protect against a given vulnerability, the principle that choice matters remains. And more specifically, society’s responsibility is inversely proportional to the strength of the causal relationship between an individual’s voluntary choice and the vulnerability at issue.}}

Though the existence of these issues complicates how choice impacts the determination of the extent of society’s obligation to protect against a given vulnerability, the principle that choice matters remains. And more specifically, society’s responsibility is inversely proportional to the strength of the causal relationship between an individual’s voluntary choice and the vulnerability at issue.\footnote{The Supreme Court’s decisions in California v. Robinson, 370 U.S. 660 (1962), and Powell v. Texas, 392 U.S. 514 (1968), are helpful in illustrating the importance of the presence or absence of this causal relationship. In Robinson, the Court found that California violated the Eighth Amendment by imposing criminal liability solely on the}

\footnote{between the choice made by Rogers to braid her hair and her immutable status as an African-American woman. See Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 DUKE L. J. 365.\footnote{See Jones v. City of Los Angeles, 444 F.3d 1118, 1137 (2006), vacated, 505 F.3d 1006 (“[G]enerally one cannot become a drug addict or alcoholic, as those terms are commonly used, without engaging in at least some voluntary acts (taking drugs, drinking alcohol). Similarly, an individual may become homeless based on factors both within and beyond his immediate control, especially in consideration of the composition of the homeless as a group: the mentally ill, addicts, victims of domestic violence, the unemployed, and the unemployable.”).}\footnote{Compare Frederick M. Lawrence, The Evolving Federal Role in Bias Crime Law Enforcement and the Hate Crimes Prevention Act of 2007, 19 STAN. L. & POL’Y REV. 251, 264 (2008) (“First, there is much evidence that sexual orientation is indeed immutable, whether for genetic reasons alone, or some combination of genetic and environmental reasons. Even if this evidence is not conclusive, there is certainly no scientific basis to conclude that sexual orientation is a matter of personal choice.”) (footnote omitted) with Rena M. Lindevaldsen, The Fallacy of Neutrality from Beginning to End: The Battle between Religious Liberties and Rights Based on Homosexual Conduct, 4 LIBERTY U. L. REV. 425, 456 (2010) (“Some of the reasons for the refusal [to treat sexual orientation as a suspect classification] include the fact that unlike same-sex attractions, there is absolutely no choice involved in one's race or national origin—they are immutable characteristics. Same-sex attractions, on the other hand, have, at a minimum, some element of choice.”).}\footnote{See Allison K. Hoffman, Three Models of Health Insurance: The Conceptual Pluralism of the Patient Protection and Affordable Care Act, 159 U. PA. L. REV. 1873, 1930 (2011); Linda C. Fentiman, Rethinking Addiction: Drugs, Deterrence, and the Neuroscience Revolution, 14 U. PA. J.L. & SOC. CHANGE 233, 246-49 (2011).}}
2. Socially-beneficial activities

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

ground of the petitioner’s status as a drug addict. 370 U.S. at 667. The Court reasoned that “in the light of contemporary human knowledge, a law which made a criminal offense of such a disease [as drug addiction] would doubtless be universally thought to be an infliction of cruel and unusual punishment.” Id. at 666. In Powell, however, the Court upheld the conviction of the petitioner for public intoxication. 392 U.S. at 516. The plurality in Powell distinguished Robinson by noting that Powell was not criminally liable for being an alcoholic, but “for public behavior which may create substantial health and safety hazards.” Id. at 532. Powell thus recognizes the importance difference between an individual’s status of being a drug addict, which is almost always the product of a past choice on her part but is now an immutable characteristic, and her intoxication on a given occasion, which is the more direct result of a choice by the defendant. This is not to say that this distinction is beyond reproach. See Michael C. Dorf, Same-Sex Marriage, Second-Class Citizenship, and the Law’s Social Meanings, 97 VA. L. Rev. 1267, 1311-1314 (2011) (criticizing the normative value of distinguishing status and conduct); Douglas N. Husak, Addiction and Criminal Liability, 18 LAW & Phil. 655, 658-59 (1999) (arguing that the pain of withdrawal could satisfy the threat of harm element of a duress defense to a charge of illegal drug use). Nevertheless, Powell and Robinson can be read to reflect the understanding that as the causal relationship between an individual’s past choice and the resulting vulnerability becomes more attenuated, society’s obligation to protect against that vulnerability becomes more prominent.

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


102 See, e.g., 42 U.S.C. § 3796II-3 (2011) (providing for donation of used body armor by federal law enforcement to state law enforcement agencies in light of substantial risk to law enforcement officers who do not have body armor).

And socially-beneficial activities entitled to societal protection extend beyond prototypical and politically-popular public-service employment. Take unpopular speech, for example. It benefits society by, *inter alia*, inviting discussion, stirring the dissatisfied into action, and inspiring change. The importance of protecting those who engage in unpopular speech is borne out by the First Amendment’s prohibition on the prosecution of those who engage in such speech and the imposition on police of the obligation to prevent violence that might result. Unpopular religious practices are entitled to enhanced legal protection on similar grounds. Society’s duty to protect also extends to socially-beneficial activities not enumerated in the Constitution. And as a corollary to this proposition, the existence of society’s duty generally does not depend upon the motivation behind the vulnerable individual’s engagement in socially-beneficial activity. Thus, when the government attempts to encourage enlistment in the military through substantial monetary bonuses, there is no concomitant reduction in protection.

III. The Vulnerabilities of Active Criminal Informants

Throughout the process of cooperating with the State, from her recruitment to the eventual completion of her cooperation obligations, the active criminal informant primarily has three vulnerable interests: an interest in avoiding punishment, an interest in avoiding harm, and an interest in her autonomy. These interests are vulnerable to harm both because of

109 The informant system has been subject to criticism on a number of other grounds, including its negative impact on the purposes of law enforcement, the potential it creates for corruption, its deleterious effect on crime victims, and its tendency to result in inaccurate outcomes. See NATAPOFF, *supra* note 12, at 31-39, 69-81. Criminal informants at some level share these interests with society at-large. Indeed, criminal informants on average would likely benefit more than the rest of society from improving the accuracy of criminal justice outcomes, because they come into personal contact with the criminal justice system more frequently than most. Nonetheless, such diffuse interests do not approach in importance the individual potential informant’s immediate concerns about
inherent characteristics of the informant system and as a result of individual characteristics of informants that make some informants more vulnerable than others. The following discussion will outline the systemic vulnerabilities and individual vulnerabilities in turn and consider in each case the extent of society’s obligation to protect against the vulnerability.

1. **Systemic vulnerabilities**

   1. **The vulnerable interest in avoiding punishment**

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

For these reasons, the discussion of the informant’s interests will ignore the informant’s interest in avoiding criminal punishment.

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111 The notion that an individual’s interest in engaging in socially-harmful activity is not entitled to society’s protection is a corollary to the principle discussed above that vulnerabilities arising from socially-beneficial activities are entitled to greater protection. See supra notes 100-108 and accompanying text.
112 See Rich, supra note 20, at 741. But see Simons, supra note 12, at 54 (arguing that cooperation itself may be a form of punishment that counsels in favor of lighter formal punishments for some informants).
113 See Natapoff, supra note 15 at 680-83.
2. The vulnerable interest in being free from harm

Most concretely, informants risk bodily harm or death should their cooperation be discovered.\textsuperscript{115} An informant’s cooperation can be discovered through bad luck or through malfeasance or misfeasance by law enforcement.\textsuperscript{116} While there are no data on the frequency of violence against informants, reported cases involving violent crimes against informants are legion.\textsuperscript{117} And the informant is vulnerable to harm not only at the hands of those against whom she is cooperating; rather, the criminal population at-large may punish a “snitch,” and the risk is especially acute if the informant’s cooperation is revealed while she is incarcerated.\textsuperscript{118}

But the potential harm facing criminal informants is not limited to physical injury. They also risk moral harm to the extent that they are required to commit additional and more severe criminal offenses in order to receive leniency.\textsuperscript{119} Committing these criminal acts, even though they may not be strictly illegal due to State authorization, acclimatizes the informant to a level of criminality with which she may not yet be familiar. For instance, an informant who is believed to be involved in small-time marijuana dealing may be pressured to set up deals involving more serious drugs, like cocaine or heroin, or other contraband, such as firearms.\textsuperscript{120} Above and beyond the risk that the informant will be at risk of physical violence as a result of being out of her depth in this more serious criminality,\textsuperscript{121} this exposure may also break down internal barriers to participating in these more serious offenses, thus resulting in a sort of “moral corrosion” of the informant.\textsuperscript{122}


\textsuperscript{116} See ACLU Study, supra note 1, at 9-10.

\textsuperscript{117} See Caren Myers Morrison, Privacy, Accountability, and the Cooperating Defendant: Toward a New Role for Internet Access to Court Records, 62 Vand. L. Rev. 921, 958 n.213 (2009) (collecting cases in which informants were harmed or killed).

\textsuperscript{118} See Benefield v. McDowall, 241 F.3d 1267, 1272 (10th Cir. 2001) (holding that labeling a prison inmate a “snitch” creates a “substantial risk of serious harm” to the inmate and collecting cases to that effect from our courts); Simons, supra note 12, at 29-30 (“In prison, the cooperator will be exposed to the continual threat of physical retaliation, even from prisoners completely unconnected with the cooperator.”).

\textsuperscript{119} This risk is analogous to those faced by undercover police officers who engage in authorized illegality in order to maintain their cover and gain the trust of the targets of their investigation. See Elizabeth E. Joh, Breaking the Law to Enforce It: Undercover Police Participation in Crime, 62 Stan. L. Rev. 155, 190-91 (2009).

\textsuperscript{120} See Rich, supra note 20 at 681-84 (discussing the case of Rachel Hoffman).

\textsuperscript{121} See id.

\textsuperscript{122} See Joh, supra note 119 at 190.
cooperation as itself an immoral act of betrayal, it will leave her
demoralized and ill-at-ease with the actions that she undertakes.\textsuperscript{123}

Finally, criminal informants also risk harm to their relationships with
others, a harm that I will refer to as “social harm.”\textsuperscript{124} Specifically, if her
cooperation is discovered, the criminal informant is likely to be ostracized
by both her criminal and law-abiding communities. She may find it
difficult to continue to make a living through illicit means, as other
criminals will be unwilling to trust a known “rat.”\textsuperscript{125} Moreover, she may be
deprived of legitimate business opportunities, as well as interaction with
others in her religious or ethnic communities.\textsuperscript{126} Such isolation, combined
with the constant threat of physical harm, can take a substantial
psychological toll on the informant.\textsuperscript{127} The concept of “social harm” as
used herein therefore includes both economic and psychological harm to the
informant.

The informant’s vulnerabilities to harm arise from her involvement in the
socially-beneficial activity of assisting the police.\textsuperscript{128} As a result, society

\textsuperscript{123} See Simons, supra note 12, at 31.

\textsuperscript{124} This use of the term “social harm” is entirely distinct from the concept of “social harm”
that underpins criminal law. \textit{See, e.g.}, Eugene R. Milhizer, \textit{Justification and Excuse: What
They Were, What They Are, and What They Ought To Be}, 78 ST. JOHN’S L. REV. 725, 805
(2004) (discussing the traditional use of the concept of “social harm” in criminal law).

\textsuperscript{125} See Simons, supra note 12, at 29-31.

(noting the “social cost” of becoming an informant).

(section 1983 claim involving informant who committed suicide after police refused to
allow him to cease cooperation and enter drug rehabilitation); Williamson v. City of
Virginia Beach, Va., 786 F. Supp. 1238 (E.D. Va. 1992) (section 1983 claim that sixteen-
year-old informant committed suicide as a result of threats received after he agreed to
cooperate), aff’d 991 F.2d 793 (4th Cir. 1993); David Hasemyer & Mark T. Sullivan,
\textit{Courtroom suicide exposes DEA dark side; Informant’s death reveals seamy underworld of
the drug war}, SAN DIEGO UNION-TRIB., Jan. 27, 1992, A-1 (discussing case of informant
who committed suicide in courtroom after being sentenced to twenty-five years in prison).

\textsuperscript{128} The description of assisting the police as a socially-beneficial activity does not reflect an
empirical assessment of whether the assistance that any one informant provides to the
police in fact provides a net benefit to society. \textit{Cf.} Miriam Hechler Baer, \textit{Cooperation’s
Cost}, 88 WASH. U. L. REV. 903 (2011) (suggesting that cooperation may cause a net harm
to society and recommending studies of informant use to determine the extent of such
harm). Rather, it acknowledges two less debatable propositions. First, assisting the police
is behavior that society wishes to encourage because enforcement of the criminal laws is
necessary to social stability and cannot be accomplished efficiently without civilian
cooperation. \textit{Cf.} Miranda v. Arizona, 384 U.S. 436, 477-78 (1966) (“It is an act of
responsible citizenship for individuals to give whatever information they may have to aid
in law enforcement.”). Second, though assistance may not benefit society in all cases, it
would be unjust for society to externalize that risk at the expense of the criminal informant,
owes the informant a greater duty to protect her against the resulting risks of harm. But the contention may be made that the promise of leniency offered to an informant is compensation enough for those risks and that additional protections are therefore not required. In this vein, Judge Posner argued, in dicta explaining why inducing an informant to engage in sexual intercourse with the target of an investigation is not necessarily a constitutional violation, that:

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

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

who is less capable than the relevant agents of the State to determine whether cooperation in a given case will be beneficial. For these reasons, cooperation is properly viewed as socially beneficial activity that gives rise to a duty to protect the cooperator.

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

130 See, e.g., Velez-Diaz v. Vega-Irizarry, 421 F.3d 71, 81 (1st Cir. 2005) (rejecting Bivens claim of family of murdered criminal informant on ground that “[t]here are risks inherent in being a cooperating witness, but the state does not create those dangers, others do, and the witness voluntarily assumes those risks”); Summar v. Bennett, 157 F.3d 1054, 1058-59 (6th Cir. 1998) (dismissing constitutional claim arising from murder of criminal informant who “voluntarily agreed to serve as a confidential informant, albeit motivated by … promises regarding the decedent's pending drug charge”).

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

132 See infra § III.C.1.

133 See Alexander, 329 F.3d at 918 (recognizing that police tactics that rise to the level of coercion are actionable under section 1983).
Second, Judge Posner’s argument delineates only the State’s legal obligations to criminal informants, not society’s normative duties. As discussed previously, choice is not the only touchstone in ascertaining whether society has a duty to protect a vulnerable individual. Rather, society also has a normative duty to protect those who engage in socially-beneficial activities, such as assisting law enforcement. This duty governs despite the admittedly selfish motivations that drive most informants. Moreover, failing to protect informants runs contrary to due process norms by stripping criminal informants of society’s protections essentially punishing them for their criminal activity without requiring a conviction and providing them the benefit of due process.

3. The vulnerable interest in autonomy

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

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

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134 Posner is of course correct as a legal matter: the Supreme Court in Deshaney v. Winnebago County Dept. of Social Services held that because the Due Process Clause only limits the State’s power to act, it does not require the government to protect citizens from injury at the hands of third parties absent some State action depriving the individual of the power to protect herself. 489 U.S. 189, 195-96 (1989).

135 Supra notes 100-108 and accompanying text.


137 Though this does not give rise to a constitutional claim, it runs contrary to the due process principle that one should not be subject to punishment prior to conviction for a crime. See Bell v. Wolfish, 441 U.S. 520, 535 (1979).

138 See Erica J. Hashimoto, Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case, 90 B.U. L. REV. 1147, 1153 (2010). Though the autonomy can be a “protean concept,” Richard H. Fallon, Jr., Two Senses of Autonomy, 46 STAN. L. REV. 875, 876 (1994), the application of the ideal of autonomy herein is sufficiently straightforward that complexities about its precise definition can be set aside.

139 See NATAPOFF, supra note 12, at 40-41.

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

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

a. The coercive threat of criminal sanctions

Whenever a civilian negotiates with the State with the possibility of criminal sanctions on the line, the civilian is faced with the “difficult choice” of deciding what she is willing to give up to avoid that sanction. In the case of a pleading defendant, the State demands that she give up her constitutional right to a trial in exchange for some measure of certainty about the punishment she will receive. The potential criminal informant is offered a similar bargain: she can work for the police in exchange for a

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141 Specifically, in the context of both plea bargaining and cooperation agreements an individual suspected of criminal activity contemplates whether to exchange something of great value, be it her right to trial or her active assistance, for leniency in an actual or potential criminal prosecution. See Natapoff, supra note 15, at 664-68 (describing cooperation agreements as “an extreme form of plea bargain”).

142 See Scott & Stuntz, supra note 110, at 1913-17 (discussing the autonomy benefits of plea bargains); Easterbrook, supra note 140, at 317 (same). Without the option of becoming an informant, the choices of a majority of potential criminal informants would be limited to those available to any individual suspected of a crime.


146 Scott & Stuntz, supra note 110, at 1914.
more lenient punishment—or possibly no punishment at all—for her crimes.\textsuperscript{147}

Difficult choices are not necessarily involuntary ones, however.\textsuperscript{148} Thus, in the plea bargaining context, the question boils down to whether the threat of criminal sanctions is so severe or the offer of leniency so compelling that the defendant agrees to the bargain involuntarily.\textsuperscript{149} Critics of plea bargaining claim that criminal sanctions are so inherently unpleasant, and the opportunity to avoid them therefore so desirable, that an offer of leniency overcomes the will of the negotiating defendant in all cases.\textsuperscript{150}

A similar argument could be made, of course, in the context of potential informants, who negotiate with law enforcement officers who are threatening them with criminal sanctions if they fail to cooperate. And it gives rise to the same question: are threats of criminal sanctions so inherently coercive that they render one incapable of entering into a voluntary agreement? The Supreme Court\textsuperscript{151} and supporters of plea

\textsuperscript{147} See Rich, supra note 20, at 713-16.

\textsuperscript{148} In Aristotle’s famous example, a ship’s captain caught in a storm who jettisons cargo in order to save his crew has acted voluntarily in the sense that he freely made a choice between two undesirable results. Joseph M. Perillo, The Origins of the Objective Theory of Contract Formation and Interpretation, 69 FORDHAM L. REV. 427, 469 (2000); see also Scott & Stuntz, supra note 110, at 1920 (“[C]oercion in the sense of few and unpalatable choices does not necessarily negate voluntary choice.”).

\textsuperscript{149} See Bordenkircher, 434 U.S. at 363. It should be noted that critics of plea bargaining and the informant system both raise numerous other concerns with these two aspects of the criminal justice system. See, e.g. NATAPOFF, supra note 12 (discussing numerous critiques of the informant system); Schulhofer, supra note 140, at 1979 (arguing that plea bargaining “impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent”). These arguments are outside the scope of this Article, however, which focuses on interests typically ignored in the literature: those unique to the potential informant.

\textsuperscript{150} Critics of plea bargaining go as far as to analogize plea bargain negotiations to negotiating at gunpoint or under threat of torture. See Albert W. Alschuler, Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas, 88 CORNELL L. REV. 1412, 1417 (2003); John H. Langbein, Torture and Plea Bargaining, 46 U. CHI. L. REV. 3 (1978); Kenneth Kipnis, Criminal Justice and the Negotiated Plea, 86 ETHICS 93, 97-99 (1976).

\textsuperscript{151} See Bordenkircher, 434 U.S. at 364 (“While confronting a defendant with the risk of more severe punishment clearly may have a ‘discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices [is] an inevitable’—and permissible—‘attribute of any legitimate system which tolerates and encourages the negotiation of pleas.’”) (quoting Chaffin v. Stynchezme, 412 U.S. 17, 31 (1973)); Brady v. U.S., 397 U.S. 742, 755 (1970) (rejecting the argument that a plea bargain is \textit{per se} involuntary in if prosecution seeks the death penalty); see also U.S. v. Mezzanatto, 513 U.S. 196, 209 (1995) (holding that requiring waiver of exclusion of statements made during negotiation as a condition of entering into plea discussion was not unconstitutionally
bargaining have argued that they are not. But the claim that the potential informant should be entitled to per se protection from this possible coercion fails for another reason: the informant’s vulnerability to the coercive threat of criminal sanctions is the result of her choice to engage in criminal activity. Put simply, every individual knows that should she commit a crime and that crime is discovered, she will face difficult choices that hinge on the threat of criminal sanctions. Moreover, criminal sanctions are known and expected to be sufficiently unpleasant to deter individuals from committing crime. Thus, a potential informant’s vulnerability to such threats can be said to arise from her knowing voluntary choice to engage in criminal activity, and society should not forbid cooperation on the ground coercive, because the dilemma facing the defendant “is indistinguishable from any of a number of difficult choices that criminal defendants face every day”).

Scott and Stuntz argue that under a contract theory of duress, a contract is voidable by one party only if the other wrongfully compelled her to enter into the contract. See Scott & Stuntz, supra note 110, at 1919. Consequently, the dispositive question in the plea bargaining context is whether the prosecutor is responsible for the coercive nature of the plea bargain. Id. at 1920-21. Because in a typical case, absent strategic manipulation of post-trial sentences by the prosecutor, sentencing policy is to blame for the coercion, there is no duress as a matter of contract law. Id.

Of course, this may not always be the case. Another significant objection to plea bargaining is that risk-averse innocent defendants can be coerced into pleading guilty in order to avoid the chance that they might be found guilty and subjected to a lengthy prison sentence. See Ric Simmons, Private Plea Bargains, 89 N.C. L. REV. 1125, 1171-72 (2011). Similarly, an innocent individual who is erroneously threatened with prosecution might decide to become an active informant in order to avoid the risk of allowing the threatened prosecution to move forward. Though there is no hard data to indicate how frequently police threaten innocent people with criminal charges in order to coerce cooperation, anecdotal reports suggest that it does occur. See ACLU OF NEW JERSEY, CONFIDENTIAL INFORMANTS IN NEW JERSEY 52-53 (2011). While such cases fall outside the scope of this Article, it is worth noting that potential informants who are innocent of the charges with which they are threatened would particularly benefit from the information-enhancing proposals set forth infra § VI.C.

Indeed, the possibility of avoiding punishment through cooperation is an engrained fact in criminal culture. See NATAPOFF, supra note 12, at 43-44; Richard Rosenfeld et al., Snitching and the Code of the Street, 43 BRIT. J. CRIMINOLOGY 291, 298-300 (2003).


Interestingly, the Supreme Court’s decisions in the plea bargaining context hinge on the assumption that only guilty defendants plead guilty. See Corinna Barrett Lain, Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context, 80 WASH. U. L.Q. 1, 19-20 (2002). As such, they suggest that part of the reason why society will not protect criminal defendants from the potential coercion in the plea bargaining context is that the defendant’s resulting vulnerability to coercion arises from her choice to engage in criminal conduct.
that potential criminal informants should be protected from the unpleasant choice between jail and cooperation.\textsuperscript{157}

b. The State’s superior bargaining position

Critics of plea-bargaining also contend that the inherent differential in bargaining power between the prosecutor and the defendant is so vast that plea bargains are unconscionable.\textsuperscript{158} According to these critics, prosecutors face little risk of acquittal at trial, while defendants face a vastly increased punishment in the likely event that they are found guilty.\textsuperscript{159} As a result, prosecutors have the power to determine the defendant’s sentence unilaterally and impose it in the form of a non-negotiable offer.\textsuperscript{160} Plea-bargaining’s supporters contend that the prosecutor’s bargaining power advantage is not as great as feared.\textsuperscript{161} This is because, unlike an individual customer of a mass-market good who has little to offer the seller, each defendant has the right to force a costly and time-consuming trial.\textsuperscript{162} According to these scholars, the power to allow the prosecutor to forgo

\textsuperscript{157} Of course, just because society should not forbid \textit{all} cooperation agreements on the ground that the threat of criminal sanction is coercive does not mean that all such agreements are valid. \textit{See} U.S. v. Mezzanatto, 513 U.S. 196, 210 (1995) (“[A]lthough some waiver agreements ‘may not be the product of an informed and voluntary decision,’ this possibility ‘does not justify invalidating \textit{all} such agreements.’”) (emphasis in original) (quoting Newton v. Rumery, 480 U.S. 386, 393 (1987)). The Due Process clause forbids involuntary confessions and plea agreements, and the Supreme Court’s plea bargaining jurisprudence instructs lower courts to engage in a case-by-case review to ensure that no Due Process violations have occurred. \textit{See id.} (suggesting that courts should engage in a case-by-case review of waiver agreements to ensure a lack of coercion or fraud); Brady v. U.S., 397 U.S. 742, 750-55 (1970) (refusing to forbid plea agreements entirely, but instead asking whether on the facts of the case the defendant entered into the agreement involuntarily); Jackson v. Denno, 378 U.S. 368, 376 (1964) (“It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession ….”). Such a case-by-case analysis in the informant context would permit potential informants protection from vulnerabilities, including those discussed \textit{infra}, that are not the result of their own choice. \textit{See} Stanley v. Illinois, 405 U.S. 645, 656 (1972) (“[O]ne might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials.…..”).


\textsuperscript{159} \textit{Id.} at 45-46.

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} \textit{See} Scott & Stuntz, \textit{supra} note 110, at 1923-24.

\textsuperscript{162} \textit{Id.} at 1924.
such a trial is sufficient to prevent the plea bargain from being unconscionable.\textsuperscript{163}

Cooperation is similar to plea-bargaining is that the State’s offer of leniency is of great value to the potential informant. But the bargaining position of potential informants varies more than the plea-bargaining defendant’s and often is much weaker. In particular, while a plea-bargaining defendant always has something valuable to offer the prosecutor, the information and access that most potential informants can provide is essentially fungible.\textsuperscript{164} For instance, low-level drug offenders generally can do little more than use their criminal connections to arrange for controlled drug buys that allow police to arrest other minor criminals.\textsuperscript{165} Though these connections have some value, legions of individuals commit minor drug offenses and have such connections.\textsuperscript{166} Moreover, an offender who refuses to cooperate places only a slight burden on the arresting officer who tried to obtain her cooperation. At most, the officer must bear the cost of passing any evidence of the offender’s wrongdoing on to a prosecutor and testifying at trial.\textsuperscript{167} Thus, most potential informants resemble the consumer of a mass-marketed good: she can impose only a minimal cost on the government agent by refusing to cooperate while the agent can impose a substantial cost on her should she refuse.\textsuperscript{168} This puts the potential informant in a “take it or leave it” situation typical of a contract of adhesion.\textsuperscript{169}

\begin{itemize}
\item \textsuperscript{163} Id.
\item \textsuperscript{164} A handful of informants do possess substantial bargaining power in that few others share their access to evidence. For instance, an informant with established contacts to a suspected criminal organization – be it a terrorist group, a street gang, or a corrupt business – is in a strong position to negotiate with the police. These informants can save law enforcement untold hours of work and mitigate much of the potential risks to agents and thus can exact a heavy price for their information. The relative utility of such high-value informants and their scarcity can be seen in the extensive protections provided by the federal Witness Security Program to a small number of federal informants. See infra notes 247-253 and accompanying text.
\item \textsuperscript{165} See ACLU Study, supra note 1, at 51 (finding that drug-addicted informants typically arranged stings that caught dealers in possession of ten to twenty bags or vials of drugs).
\item \textsuperscript{166} See SKOLNICK, supra note 22, at 124-26 (noting that while “the policeman needs the informer,” the target of an informant’s sting often “cannot bring themselves to believe how little they have been sold out for”).
\item \textsuperscript{167} In most drug cases the burden on officers will not include testifying in court, as more than 90% of those convicted of drug offenses are convicted through a guilty plea, and very few charges are resolved through acquittal. See Beth A. Freeborn, Arrest Avoidance: Law Enforcement and the Price of Cocaine, 52 J. L. & ECON. 29-30 (2009).
\item \textsuperscript{168} See William J. Stuntz, Plea Bargaining and Criminal Law’s Disappearing Shadow, 117 HARV. L. REV. 2548, 2565 (2004) (“In a system (like ours) that rewards snitches generously, some defendants will be punished very harshly--nominally for their crimes, but
\end{itemize}
Yet here again, the potential informant’s vulnerability to the State’s unequal bargaining power can be said to be the result of the informant’s voluntary and knowing decision to engage in criminal conduct.170 By engaging in criminal activity, an individual knowingly submits herself to the State’s monopoly over criminal punishment and it is no secret that the decision of whether to grant her leniency in exchange for cooperation is at the discretion of law enforcement agents. Similarly, courts will refuse to find adhesion contracts where the weaker party failed to avail herself of alternatives prior to negotiating, including the option to walk away.171 As such, the potential informant, unlike the consumer facing an unconscionable adhesion contract, is not entitled to be protected from her weakness in bargaining position vis-à-vis the State.172

c. Information asymmetry

Critics also argue that plea bargains are unconscionable because the prosecutor has superior knowledge of the strength of the case against the defendant as well as the “market value” for such a case.173 The supporter’s response is that the terms of a plea bargain are usually straightforward, and

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169 See Amy J. Schmitz, Pizza-Box Contracts: True Tales of Consumer Contracting Culture, 45 Wake Forest L. Rev. 683, 866-73 (2010) (discussing approaches taken by courts and scholars to so-called “pizza-box” contracts in the consumer realm); Daniel D. Barnhizer, Inequality of Bargaining Power, 76 U. Colo. L. Rev. 139, 202 (2005) (“Similarly, adhesion contract doctrine explicitly incorporates inequality of bargaining power by defining adhesion contracts as those presented on a ‘take-it-or-leave-it’ basis by a party with stronger bargaining power to a party with weaker bargaining power.”).

170 Again, this analysis is based on the assumption that the potential informant is a potential criminal informant, i.e., an individual who in fact has engaged in criminal activity. See supra note 153 and accompanying text.

171 See Barnhizer, supra note 169, at 204-05. Moreover, equalizing the bargaining power would permit potential informants to maximize their interest in avoiding criminal punishment. This interest is not one that the State should protect. See supra notes 110-114 and accompanying text. In contrast, enabling the consumer to negotiate on a relatively equal footing in an open market vindicates broader societal interests. See Oren Bar-Gill, Seduction by Plastic, 98 Nw. U. L. Rev. 1373, 1411-16 (2004).

172 The conclusion that potential informants are not entitled to per se protection from coercion by the strong arm of the state may seem unjust at first blush. It is important to keep in mind, however, that the absence of per se safeguards does not preclude measures more narrowly-tailored to protecting individual informants who are particularly susceptible to coercion for reasons that are not the direct result of their choices. See infra § VI.B.

thus even the most substandard defense counsel can assist a defendant in effectively negotiating a plea.\textsuperscript{174}

But unlike the plea-bargaining defendant, the potential informant has no right to counsel.\textsuperscript{175} As a result, she does not have access to a lawyer’s expertise in evaluating government offers in light of the facts and “customary practices.”\textsuperscript{176} The potential informant is faced with numerous unknowns, including what charges she might face, her chance of being convicted on those charges, the possible sentence she might receive if she is convicted, and the going market value of any cooperation she could provide.\textsuperscript{177} Police and prosecutors, on the other hand, know the evidence they have against the potential informant and have the experience to ascertain the charges that she is likely to face and the sentences that might result from such charges.\textsuperscript{178} As a result, cooperation agreements “are often struck on the basis of incomplete, highly imperfect information and little more than the [potential informant’s] guess about what a trial might reveal if one were held.”\textsuperscript{179}

Unlike the potential informant’s vulnerability to the coercive pressure of threatened criminal sanctions and the inherent inequality of the bargaining power between the informant the State, her vulnerability to this information asymmetry is not a direct result of a knowing and voluntary choice. The criminal justice system is grounded on an explicit constitutional guarantee that a defendant has a right to notice of the charges against her.\textsuperscript{180} Though it almost certainly does not require specific notice of charges prior to cooperation negotiations,\textsuperscript{181} the explicit statement of that right also does not

\textsuperscript{174} See Scott & Stuntz, supra note 110, at 1922-23; Easterbrook, supra note 140, at 309-10.
\textsuperscript{175} See supra note 52.
\textsuperscript{176} See Scott & Stuntz, supra note 110, at 1923.
\textsuperscript{177} See id. at 1959 (recognizing that a defense lawyer is necessary in the plea bargaining context because only the lawyer has the background experience to differentiate between a good and a bad deal based on her knowledge of trial outcomes and sentencing and the market for plea bargain).
\textsuperscript{178} See Taslitz, supra note 173, at 430-31 (discussing the information asymmetry between the prosecution and defendant in the plea bargaining context). Of course, many potential informants are themselves “repeat players” in the criminal justice system. Nonetheless, the personal experience of even the most hardened criminal with charging and sentencing decisions pales in the comparison with that of a police officer or prosecutor.
\textsuperscript{180} U.S. CONST. amend. VI.
\textsuperscript{181} See In re Gault, 387 U.S. 1, 33 (1967) (“Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity.”) (internal quotation omitted).
suggest to the potential informant that law enforcement may seek her cooperation without informing her of the specific charges against her.\textsuperscript{182} Moreover, police tactics that discourage the potential informant from consulting with counsel or taking time to consider the wisdom of accepting the government’s offer exacerbate her ignorance.\textsuperscript{183} Because the potential informant’s vulnerability to this information asymmetry is not the result of a knowing and voluntary choice, society should protect the informant against it.

d. Unenforceability

Cooperation agreements also threaten a potential informant’s autonomy interests because they are usually unenforceable. First, the length or nature of the assistance required of the informant or the nature of the leniency promised by the government may be so vague as to be unenforceable.\textsuperscript{184} Second, the government agent who enters into a cooperation agreement may lack the authority to bind the government.\textsuperscript{185} Third, the agreement almost always reserves to the government complete discretion to decide whether the informant’s cooperation warrants leniency.\textsuperscript{186} Thus, an active informant is vulnerable to the risk that she will agree to work for the police only to be denied, without recourse, any benefit for doing so.\textsuperscript{187}

\textsuperscript{182} Though the maxim that “ignorance of the law is no defense” embodies important norms, see Dan M. Kahan, \textit{Ignorance of the Law is An Excuse—But Only for the Virtuous}, 96 Mich. L. Rev. 127, 127-28 (1997), it applies only in those situations where it can be said that a rule exists and that at least constructive notice of such a rule is possible. See Dru Stevenson, \textit{Toward a New Theory of Notice and Deterrence}, 26 Cardozo L. Rev. 1535, 1587-91 (2005). Here, the exercise of law enforcement discretion in the negotiation of cooperation agreement is not definable by rules, and even if it were possible to glean a set of rules from practice, the potential informant does not have access to counsel, who would be the only ones with the necessary experience to ascertain those rules.

\textsuperscript{183} See \textit{supra} notes 45-46 and accompanying text.

\textsuperscript{184} \textit{Cf.} Krug v. United States, 168 F.3d 1307, 1308-10 (Fed. Cir. 1999) (rejecting claim by IRS informant for monetary award on the ground that no contract arises from indefinite award offer and informant conduct in response).

\textsuperscript{185} \textit{See, e.g.,} United States v. Flemmi, 225 F.3d 78, 84-91 (1st Cir. 2000) (rejecting informant’s claim to use and derivative use immunity arising from promises made by FBI agents on the ground that the agents lacked the authority to grant immunity); Confidential Informant v. United States, 46 Fed. Cl. 1 (2000) (holding that IRS and FBI agents did not have the authority to promise reward to IRS informant); \textit{see also} Joaquin J. Alemany, \textit{United States Contract with Informants: An Illusory Promise?}, 33 U. Miami Inter-Am. L. Rev. 251, 260-66 (2002) (collecting cases).

\textsuperscript{186} See Pamela R. Metzger, \textit{Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine}, 97 NW. U. L. Rev. 1635, 1662 (2003); Richman, \textit{supra} note 126, at 102 n.114.

\textsuperscript{187} It is worth noting that there are good reasons for the doctrines that render cooperation agreements unenforceable. The requirement of definiteness, for instance, guarantees that
Absent some express notice to the potential informant of the likely unenforceability of any promise made by the State, her vulnerability to the risk that she will be unable to enforce the State’s promise is not the result of her informed choice. It is entirely reasonable, after all, for a potential informant to believe that when an agent of the State makes a promise, even one that is in some way indefinite, that the promise will be enforceable. As such, the State has a duty to protect against this vulnerability.

Moreover, at least in some cases government agents make promises to potential informants for the purpose of encouraging cooperation, but with the knowledge that they are unenforceable. In doing so, agents take advantage of the pre-existing information asymmetry between them and informants. And such an agent’s actions are particularly troubling where she has dissuaded the potential informant from seeking the assistance of counsel, who would no doubt inform her of the likely unenforceability of the State’s promise. The former resembles a case of promissory

the government is held to perform only those promises that they intended to make. See Robert E. Scott, A Theory of Self-Enforcing Indefinite Agreements, 103 COLUM. L. REV. 1641, 1647-48 (2003). The requirement of actual authority to bind the government stems from concerns about sovereign immunity and a desire to protect the public fisc from the actions of unauthorized government agents. See Alan I. Saltman, The Government’s Liability for Actions of Its Agents That Are Not Specifically Authorized: The Continuing Influence of Merrill and Richmond, 32 PUB. CONT. L. J. 775, 781 (2003). And by maintaining discretion to assess the informant’s compliance with the agreement, the State helps to guarantee the informant’s enthusiastic and honest cooperation and to maintain its control over the informant. See Richman, supra note 126, at 95-102. Whether these reasons justify the unwillingness of courts to enforce cooperation agreements is a separate question, however, and one outside the scope of the instant inquiry.

188 No data are available to suggest how frequently police officers make such promises, but there is ample reason to believe that such cases are not uncommon. First, it is well-established that law enforcement agents are permitted to lie and engage in other trickery in their dealings with suspected criminals. See Christopher Slobogin, Deceit, Pretext, and Trickery: Investigative Lies by the Police, 76 OR. L. REV. 775, 778-79 (1997). And some experts specifically encourage police to lie when attempting to recruit criminal informants. See MALLORY, supra note 1, at 23. Moreover, even though law enforcement guidelines for the handling of confidential informants often make clear that agents lack the authority to promise immunity or leniency to informants and instruct agents not to make such promises, see Office of the Att’y Gen., U.S. Dep’t of Just., The Attorney General’s Guidelines Regarding the Use of Confidential Informants § I.C, at 5 (2002) [hereinafter DOJ Guidelines], available at http://www.ignet.gov/pande/standards/prgexhibith.pdf; United States v. Flemmi, 225 F.3d 78, 88-89 (2000) (discussing historical FBI guidelines on the use of informants relating to promises of immunity), cases where informants claim that law enforcement agents made unauthorized promises of leniency or immunity continue to arise.


190 See supra note 47 and accompanying text.
estoppel; the latter looks like promissory fraud. In either event, the equities favor requiring the State to protect the potential informant from the risk that she might rely on unenforceable promises made knowingly by its agents.

2. Individual vulnerabilities

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

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193 This is not to say that informants should be able to bring actions for either promissory estoppel or promissory fraud, as the same reasons that might justify finding the agent’s promises to be enforceable, see supra note 187, also would counsel against allowing such actions. See Ayres & Klass, supra note 192, at 526-32 (discussing situations where fraud with respect to unenforceable promises should not give rise to valid actions for promissory fraud).

194 See J.D.B. v. North Carolina, -- U.S. --, 131 S.Ct. 2394, 2403 (2011) (reviewing precedent and concluding that “a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go”); In re Gault, 387 U.S. 1, 57 (1967) (holding that in the absence of counsel “the greatest care must be taken to assure that [a minor’s] confession was voluntary in the sense that it was not coerced or suggested, but also that it was not the product of ignorance of rights, or adolescent fantasy, fright, or despair”); Richard A. Leo, et al., Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century, 2006 Wisc. L. Rev. 479, 518 (2006); (“children and juveniles … are also more predisposed to submissive behavior when questioned by police”); Patrick M. McMullen, Questioning the Questions: The Impermissibility of Police Deception in Interrogation of Juveniles, 99 NW. U. L. REV. 971, 992 -999 (2005) (reviewing the social science and biological research on juvenile decisionmaking and concluding that “children are most vulnerable to coercive police deception”).

195 Richard Rogers et al., The Comprehensibility and Content of Juvenile Miranda Warnings, 14 PSYCHOL. PUB. POL’Y & L. 63, 66-67 (2008) (reviewing research on developmental issues relating to the ability of juveniles to make meaningful decisions regarding Miranda waiver, including tendencies to overweigh immediate gains and undervalue long-term negative consequences and diminished maturity of judgment).
appear coercive to others.\textsuperscript{196} And the mentally retarded have difficulty recognizing when they are in an adversarial situation with authority figures and are particularly susceptible to agreeing to the wishes of those in positions of authority.\textsuperscript{197} The vulnerabilities of these classes of potential informants unquestionably arise from immutable personal characteristics and therefore are deserving of protection.

Drug addicts and alcoholics also are particularly vulnerable to coercion and harm. In addition to typical pressures felt by all potential informants from the threat of a lengthy prison sentence if they do not cooperate, an addicted potential informant faces the short-term concern of experiencing acute withdrawal symptoms should they refuse to cooperate and be jailed.\textsuperscript{198} The threat of withdrawal may be sufficiently severe to render involuntary the agreement to cooperate of some addicted potential informants and to force them into unnecessarily dangerous situations.\textsuperscript{199} The difficult question,

\textsuperscript{196} See Claudio Salas, The Case for Excluding the Criminal Confessions of the Mentally Ill, 16 YALE J. L. & HUMAN. 243, 264-65 (2004) ("Mental illness makes people suggestible and susceptible to the slightest forms of pressure; coercion can take place much more easily, and in situations that a 'normal' person might not find coercive. The police can much more easily take advantage of the trust and dependence that develops between a confessor and confessant when questioning someone who is mentally ill. This trust and dependence on the part of a suspect will make it impossible for him to understand the true, adversarial context of his interrogation and possible confession."); Note that the inquiry here of whether someone who is mentally ill or mentally retarded is particularly vulnerable to having their autonomy interests impinged by the State is different from the question of whether that person has been subject to government coercion sufficient to give rise to a constitutional violation. See Colorado v. Connelly, 479 U.S. 157, 167 (1986). As the Court explained in Connelly, the constitutional question focuses on the actions of the police, not on whether an individual’s actions were the result of “‘free choice’ in any broader sense of the word.” Id. at 170 (citations omitted). Thus, a mentally ill individual’s decision to assist the police may not be the product of her free will in some sense without the police’s conduct meeting the constitutional standard of government coercion.

\textsuperscript{197} See Morgan Cloud \textit{et al.}, Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects, 69 U. Chi. L. REV. 495, 511-12 (2002) (reviewing literature recognizing that the mentally retarded are “unusually susceptible to the perceived wishes of authority figures,” “are unable to discern when they are in an adversarial situation, especially with police officers,” and often “overrate their skills”).

\textsuperscript{198} Kevin Fiscella \textit{et al.}, Benign Neglect or Neglected Abuse: Drug and Alcohol Withdrawal in U.S. Jails, 32 J. L. MED. & ETHICS 129, 131 (2004) (“Acute drug and alcohol withdrawal is distinguished from most other medical conditions in that the onset of symptoms typically coincides with arrest and detention.”).

\textsuperscript{199} See Commonwealth v. Paszko, 391 Mass. 164, 461 N.E.2d 222, 230 (Mass. 1984) (collecting cases and recognizing that confessions made during drug withdrawal may be involuntary); Douglas N. Husak, Addiction and Criminal Liability, 18 LAW & PHIL. 655, 658-59 (1999) (arguing that the pain of withdrawal could satisfy the threat of harm element of a duress defense to a charge of illegal drug use); Fiscella \textit{et al.}, supra note 198, at 131
however, is whether the addict’s vulnerability to potential coercion is a sufficiently direct result of a knowing and voluntary choice to extinguish her entitlement to society’s protection. Obviously, an individual’s addiction in almost every case is the result of a voluntary choice at some point to begin using intoxicants. But that choice also likely occurred a substantial time in the past, as addictions tend to develop over time. The more crucial issue is whether continued addiction is properly viewed as a voluntary choice. Scientific literature tends to view addiction as a disease, and thus out of the addict’s control, though there are dissenting voices. 202 Meanwhile, the Supreme Court suggested in Robinson v. California that it may support the disease model in striking down a statute criminalizing narcotics addiction. 203 Thus, support certainly exists for the conclusion that society has a duty to protect drug addicts from the vulnerability to their autonomy interests that arises from their addiction. 204

The potential informant who is intoxicated at the time he is asked to cooperate also presents a thorny problem. Intoxication can cause both cognitive and volitional impairments, leading the intoxicated individual to misunderstand what is occurring and to be less able to control their actions. 205 As such, the intoxicated potential informant is vulnerable to being coerced by State agents into agreeing to cooperate in situations where the resulting danger may have dissuaded her had she been sober. But should this vulnerability be protected? Put another way, did the potential informant choose to suffer the vulnerabilities of intoxication on the given occasion?

(The threat of withdrawal associated with continued detention can implicitly serve to coerce arrestees into providing information they might not otherwise volunteer.

200 See Raymond Anton, Substance Abuse Is a Disease of the Human Brain: Focus on Alcohol, 38 J.L. MED. & ETHICS 735, 737 (2010); Alan I. Leshner, Addiction Is a Brain Disease, 17 ISSUES IN SCI. & TECH. 75, 75 (2001).
202 See Fentiman, supra note 98, at 246-47 (discussing recent research suggesting that continued addiction is the result, at least in part, of the individual’s failure to make the choice to stop using the addictive good).
204 As noted supra notes 98-105 and accompanying text, the entitlement of a given vulnerability to protection is often a complex normative question. It is beyond the scope of this Article to resolve that question in an area as hotly-contested as drug addiction.
As noted above, the scientific community largely views addiction as a disease that impairs the volitional capacity of the addict or alcoholic, thus making it difficult for her not to abuse the object of the addiction. 206 But difficulty in controlling one’s actions is not the same as an inability to do so, and the decision to abuse on a given occasion is volitional despite the influence of addiction. 207 Put another way, even if a cocaine addict uses cocaine in response to an incredibly strong desire to do so, the decision to use is still a choice and it is one undertaken with full knowledge of its impact on the addict’s cognitive and volitional abilities. 208 In this vein, substantive criminal law provides little leeway to addicts. Addiction generally provides no defense to charges of illegal intoxication, 209 and voluntary intoxication is a rarely a defense to any crime, even if the defendant is an addict. 210 Similarly, those recovering from addiction are entitled to protection from employment discrimination, but those currently taking illegal drugs are not. 211 These examples suggest that the distinction between intoxication and addiction is a valid one, and that the addict is entitled to protection from vulnerabilities arising from the former, but not the latter.

IV. Paternalism and Moral Harm

The preceding account provides a portrait of the vulnerabilities faced by the individual potential informant in the current environment of non-regulation. Efforts to protect informants against vulnerabilities to harm – some of which will be advocated for in more detail below – will inevitably restrict, either directly or indirectly, the ability of some individuals to become informants. 212 Any such reforms thus raise additional autonomy concerns

206 See supra note 201 and accompanying text.
208 See id. at 193.
209 See Powell v. Texas, 392 U.S. 514, 535-36 (1968) (“We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication.”).
212 Of course, reforms of the informant system also may be justified on a variety of other grounds unrelated to the specific interests of informants, such as minimizing inaccurate outcomes, increasing law enforcement effectiveness, improving the perception of law
for the potential informant and are paternalistic to the extent that they are justified in whole or in part by the claim that they protect informant interests from harm.213 This conflict between the potential informant’s interest in being free from harm and her autonomy interests highlights two issues. First, not all kinds of harm are created equal. In particular, societal protection against moral harm interferes doubly with individual autonomy: not only do these protections interfere with the individual’s ability to assess her own personal tolerance for risk and harm, but they also impose majoritarian moral judgments on the individual. Second, some methodology must be formulated to weigh the competing interests. These questions will be addressed in turn.

A. The problem of moral harm

Potential informants are vulnerable to physical, social, and moral harms as a result of their cooperation with law enforcement.214 Moral harm is different from physical and social harm, however. “Harm,” the prevention of which might justify restrictions on an individual’s autonomy, requires some injury to an interest of the harmed.215 With respect to physical harm, the interest at issue is straightforward and universal: the interest in one’s physical health and life.216 The interests injured by social harm, as I have defined it,217 are similarly universal: the interests in one’s psychological well-being, ability to maintain social relationships, and minimal economic stability.218

On the other hand, the interest threatened by moral harm is one’s interest in being good.219 But unlike one’s interest in avoiding physical injury or death or in making a minimal living, one’s interest in being good is highly individualized. Some people, though likely not many, may have no interest in being good. And among those who do have such an interest, debates will arise both over whether a particular activity is in fact morally harmful to the

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213 See Gerald Dworkin, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2010), http://plato.stanford.edu/entries/paternalism/ (defining paternalism broadly as “the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm”). Though the term “paternalism” often carries a negative connotation, the concept itself is non-normative. Id.
214 See supra note 115-127 and accompanying text.
216 See id. at 37.
217 See supra note 124-127 and accompanying text.
218 See FEINBERG, supra note 215, at 37.
219 Id. at 69-70.
actor, and over how much moral harm an activity will cause. As a result, attempts to protect an individual from moral harm impose a greater restraint on her liberty than efforts to protect her from physical or social harm. Not only do such attempts interfere with the individual’s freedom of action, they also impinge on her entitlement to assess what constitutes morally harmful activity. Moreover, attempting to protect against moral harms runs the risk of imposing an inaccurate moral judgment. In other words, where two groups differ about whether a particular activity causes moral harm to the actor, there is a danger in imposing the will of one over the other in that the winning side may simply be wrong.

In the context of informants, the issue of moral harm is particularly complicated. For instance, the informant may perceive his cooperation as disloyal, and thus immoral, and be demoralized as a result. But the judgment of whether an individual has acted disloyally is highly individualized. Thus, it is possible for an individual informant to feel she has acted disloyally when mainstream society does not agree and for society more generally to perceive cooperation to be disloyal even though the informant does not agree. Assume then that the majority outlaws cooperation that it views it to be morally wrong. That law would not prevent the informant in the former case from cooperating and suffering moral harm. And the law would prevent the latter informant from cooperating though she would suffer no such harm, thus impinging on her autonomy interests without any commensurate benefit.

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222 See Feinberg, supra note 220, at 309 (“When we give moral license to state enforcement of the majority will, overruling individual autonomy even in matters that do not violate the rights of others, that is unfair in itself . . . .”).
223 Id. at 310.
224 These concerns about moral harm therefore are not morally relativistic; rather they recognize that genuine disagreements exist about the moral wrongfulness of certain activities and place substantial value on individuals’ interests in resolving these disagreements. See id. at 308-310 (discussing moral relativism).
225 See supra note 123 and accompanying text.
226 The “Stop Snitching” phenomenon in some high-crime communities provides an example of this disconnect. In such communities, individuals who cooperate against other community members often perceive their cooperation to be immoral, while members of mainstream society believe that cooperation is proper. See Rich, supra note 11 (manuscript at 21-27).
227 For instance, an informant who feels no special obligation to her son will not feel that she has been disloyal by cooperating with the police against him. But society more generally will believe that the informant has been disloyal because of widely-held belief about the obligations of a mother to her son. See id. (manuscript at 10-11).
Moral harm also may arise from the informant being required to engage in more serious criminal conduct than that she is accused of having committed, thus causing her to become desensitized to greater criminality. The extent of this moral harm will also be highly individualized. Some informants may be minor criminals forced to commit much more serious offenses, while others may be hardened criminals against whom the police only have evidence of minor offenses. Moreover, some minor criminals may have little interest in their own goodness, while some who have committed more serious offenses may nonetheless maintain strong moral boundaries that are subject to corrosion. Thus, a law targeting this kind of harm by forbidding the use of those charged with minor crimes as informants would fail to protect some informants who would suffer moral harm and protect others who are not at risk. For these reasons, protections against moral harm should be avoided or, if they are deemed necessary, they must be exceedingly well-tailored.

B. How much paternalism?

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

To further understand these distinctions, take John Stuart Mill’s classic example of a traveler with whom we cannot communicate, who is about to walk across a damaged bridge. A strict libertarian would oppose any government interference on the ground that the traveler is bound to harm no one but herself and is free to do so, while a paternalist would believe that

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228 See supra notes 119 -122 and accompanying text.
229 For a more complete discussion of perspectives on paternalism, see JOEL FEINBERG, HARM TO SELF 3-26 (1986).
232 Id. at 138. The soft paternalist’s consideration of voluntariness includes contemplation of conditions affecting an actor’s capacity, such as the influence of drugs, age, or mental impairment. See Feinberg, supra note 229, at 12.
233 See JOHN STUART MILL, ON LIBERTY 166 (Penguin ed., 1974) (1859)
stopping her is appropriate in order to prevent her injury. If, after the person is stopped, it is revealed that she is both competent and aware of the danger but nevertheless wishes to proceed, the soft paternalist would permit her to do so because her assumption of the risk is voluntary. Meanwhile, a hard paternalist would argue that stopping even the knowledgeable and competent traveler may be permissible in some circumstances.

In the case of the potential criminal informant, the strict libertarian, anti-paternalistic view is unsuited to the importance of the rights at issue. Unlike a commercial free market transaction involving the sale of goods, the potential informant is engaged with the State in a negotiation that implicates her freedom, her right to trial, her right to counsel, and her safety. When the criminal informant agrees to cooperate, she foregoes those protections, at least temporarily, and is placed in a position where she must choose either to work or to face criminal prosecution. At a minimum, some guarantee should be made that the informant’s decision to cooperate is made freely and voluntarily.

The protections provided to the plea bargaining defendant suggest society’s unease with a purely laissez-faire approach to the waiver of fundamental rights. Prior to a defendant pleading guilty, she must be provided an opportunity to speak to counsel, and the court hearing the plea must make a record that establishes, at least at some minimum level, that the pleading defendant has waived her rights knowingly and voluntarily. Of course, a strict libertarian might argue that the informant’s freedom of choice is of the utmost importance precisely because such foundational rights are at issue.

234 See Dworkin, supra note 213. 235 Id. 236 Id. 237 See Rich, supra note 20, at 695. 238 Should the informant fail to cooperation to the State’s satisfaction and is prosecuted, these rights will not have been waived. 239 Indeed, the fact that certain fundamental rights, such as the Eighth Amendment right against cruel and unusual punishment and the Thirteenth Amendment right to be free of involuntary servitude, cannot be waived suggests that a certain level of paternalism pervades our Constitutional government. See Kimberly A. Yuracko, Education Off the Grid: Constitutional Restraints on Homeschooling, 96 CAL. L. REV. 123, 153-54 (2008); Anthony T. Kronman, Paternalism and the Law of Contracts, 92 YALE L.J. 763, 780 (1983) (arguing that restrictions on one’s freedom of contract, including one’s ability to enter into a contract of self-enslavement, are best justified by the threat that such contracts pose to “the promisor’s integrity and self-respect”). But see Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. PA. L. REV. 1293, 1387-88 (1984) (arguing that the nonwaivability of these rights is better justified on non-paternalist grounds). 240 See FED. R. CRIM. P. 11; Santobello v. New York, 404 U.S. 257, 261-62 (1971).
Yet, in the plea bargaining context, even academics of a libertarian bent have recognized that “[l]iberty is too important to be allocated by unregulated bargaining. The potential for irrationality and mistake to work irrevocable, life-destroying injustice is too high not to police the bargain.”

On the other hand, a hard paternalist response – namely, a complete ban on the use of criminal informants in order to protect informant interests – also goes too far. For a flat ban to be justified, all informants would have to suffer a net harm as a result of cooperation. This seems unlikely. Many informants successfully cooperate in exchange for the promised leniency without suffering any physical harm. Moreover, some informants successfully cooperate with law enforcement without their cooperation being discovered. These informants will not be subject to the social harm that attends to the discovery of cooperation. Finally, the moral harms potentially suffered by an informant are highly individualized and ill-suited to government protection. Consequently, no matter how strongly or weakly one values an informant’s autonomy interests, at least in some cases the benefits to the informant of permitting cooperation will outweigh the harm.

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

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241 Scott & Stuntz, supra note 110, at 1930 (emphasis in original).
242 Despite the numerous published reports of informants who are injured or killed as a result of their cooperation with police, those reports pale in comparison to the hundreds of thousands of informants who are estimated to be active at any given time. See Natapoff, supra note 15, at 657. Moreover, with respect to the question of whether informants actually receive leniency, a substantial percentage of sentenced federal defendants were granted substantial assistance departures under the U.S. Sentencing Guidelines. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS Table 5.36 (2010) (reporting that 9,421 federal defendants, or 11.5% of all defendants, received downward departures for substantial assistance).
243 As with all empirical matters regarding informants, it is impossible to discern precisely how often an informant’s cooperation is not discovered. Nonetheless, law enforcement guidelines forbidding agents from revealing the identity of informants suggest that it should not be a rare occurrence. See DOJ Guidelines, supra note 188, at §§ I.F.2, I.F.3, II.C.
244 See supra notes 124-127 and accompanying text.
245 See supra notes 214-238 and accompanying text.
net harm while preserving the net benefit to the remainder. These reforms, set forth below, largely take the form of so-called “soft” paternalistic measures aimed at enhancing the voluntariness of the decisions made by potential informants.

V. Current Protections for Active Criminal Informants

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

A. Witness protection programs

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

Witness protection programs are limited in the protection that they provide to informants in three ways. First, they protect only a small minority of cooperating witnesses. These witnesses tend to be “high-value”

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246 See infra, Part VI.
249 See, e.g. CAL. PENAL CODE § 14020 et seq. (2011) (creating witness protection program with priority to cases involving organized crime, gang activities, drug trafficking, and human trafficking); R.I. GEN. LAWS § 12-30-1 et seq. (authorizing the protection of witnesses who are themselves criminals); VA. CODE ANN. § 52-35 (2011) (establishing witness protection program to protect witnesses of serious violent felonies, felony drug offenses, domestic violence, and certain sexual assaults).
250 See Nora V. Demleitner, Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” Against Terrorism?, 51 EMORY L. REV. 1059, 1077 (2002) (“While the Federal Witness Protection Program presents an opportunity to grant noncitizens the right to live and work in the United States, it is numerically restricted, expensive, and may not
informants, i.e., those who can provide substantial information relevant to particularly serious prosecutions. Second, witness protection programs protect only “witnesses,” meaning those informants who are expected to testify in court. Many active criminal informants are never expected to testify, however, and thus are ineligible for protection. Third, witness protection programs provide only physical protection to informants. They simply are not designed to protect against informants from the potential moral and social harms of cooperation.

B. Internal law enforcement policies

The most robust law enforcement guidelines governing the use of criminal informants are those issued by the Department of Justice (“DOJ”) and suit the needs of many individuals who cooperate with law enforcement.”). For instance, in the forty years since its enactment in 1971, the Witness Security Program has provided protection to more than 8,300 witnesses and their family members. See U.S. Marshal Serv., Fact Sheet: Witness Security (Apr. 6, 2011), available at http://www.usmarshals.gov/duties/factsheets/witsec-2011.pdf. The California Witness Relocation and Protection Program, one of the most prolific state witness protection programs, serves at most hundreds of witnesses each year. See CALIF. PENAL CODE § 14023 (2011) (“The Attorney General shall give priority to matters involving organized crime, gang activities, drug trafficking, human trafficking, and cases involving a high degree of risk to the witness.”); VA. CODE ANN. § 52-35 (2011) (limiting protection to those who provide information about serious violent felonies, felony drug offenses, domestic violence, and certain sexual assaults).

251 See 18 U.S.C. § 3521(c) (requiring the Attorney General to assess, inter alia, “the seriousness of the investigation or case in which the person’s information or testimony has been or will be provided” and “the relative importance of the person’s testimony”); CAL. PENAL CODE § 14023 (2011) (“The Attorney General shall give priority to matters involving organized crime, gang activities, drug trafficking, human trafficking, and cases involving a high degree of risk to the witness.”); VA. CODE ANN. § 52-35 (2011) (limiting protection to those who provide information about serious violent felonies, felony drug offenses, domestic violence, and certain sexual assaults).

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

253 See NATAPOFF, supra note 12, at 18-23.

254 Indeed, to the extent that informants are uprooted from their communities, moved to new locations, and provided new identities through a witness protection program, the social harm they suffer is substantial.
applicable to federal law enforcement agencies. The DOJ Guidelines provide some protections for criminal informants. They impose a duty of candor on agents in their dealings with informants and forbid law enforcement agents from promising immunity or giving the erroneous impression that they have the authority to do so. Moreover, in recruiting a potential informant, an agent must consider factors including her age, her history of substance abuse, and the risk of physical harm to the informant should she cooperate. A supervisor must then approve the agent’s suitability determination. After the informant has agreed to cooperate, the agent is required to review the terms of the agreement with her and in the presence of a witness. These terms include a promise that the government will “strive to protect the [informant’s] identity” and the recognition that the agent is not authorized to promise the informant immunity. Finally, when deciding whether to authorize the informant to engage in criminal activity, the relevant law enforcement agent must consider, , the anticipated extent of the informant’s participation in the activity and the risk that the informant will suffer physical injury.

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

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

255 See DOJ Guidelines, supra note 188.
256 Id. at 5.
257 Id. at 8-9.
258 Id. at 8.
259 Id. at 11.
260 Id.
261 Id. at 21.
262 Moreover, the DOJ Guidelines explicitly state that they create no right of enforcement by confidential informants. Id. at 7.
requirements are strict, such as the prohibition on offers of immunity, most leave substantial discretion in the hands of law enforcement agents. For instance, the guidelines list seventeen factors to be considered in determining the suitability of a potential informant, only two of which suggest concern for informant vulnerabilities. No standard is provided for how those factors should be weighed, and most focus the agent’s attention on the informant’s potential utility to law enforcement. Likewise, the guidelines require an agent to consider seven factors in deciding whether to authorize the informant to engage in criminal activity, only one of which touches on informant interests, and the guidelines provide no standards for how those factors should be weighed.

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

263 See id. at 8-9 (requiring consideration of the potential informant’s age and substance abuse history).
264 For instance, the guidelines require consideration of the potential informant’s credibility, her criminal history, the relevance of the information she could provide to the investigation, and the risk that she might adversely impact a current or future investigations. Id. at 8-9.
265 Id. at 21.
267 Findley & Scott, supra note 266, at 325-26.
268 See id. at 324.
269 Id. at 325.
Finally, institutional pressures to favor law enforcement interests over informant interests are reinforced by the underlying distaste many agents feel with those criminals who are willing to “snitch.”

Moreover, as noted earlier, the DOJ guidelines are the most detailed law enforcement regulations on informant use. In many jurisdictions, no guidelines exist at all. In others, guidelines are little more than record-keeping regulations with no provision for consideration of informant interests. Others follow the DOJ approach of suggesting some consideration of the risks that informants face but leaving the discretion in the hands of law enforcement to ultimately weigh the importance of those risks. Finally, a very few jurisdictions place hard limitations on informant use. As a result, law enforcement agents in most jurisdictions have even more discretion in the recruitment and handling of informants than do federal agents. In such a flexible, discretionary environment, the institutional pressures to make arrests, coupled with the general distaste of

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270 See Dan Eggen, FBI Agents Often Break Informant Rules; Study Finds Confidentiality Breaches, Wash. Post, Sept. 13, 2005, at A15 (reporting on internal investigation of compliance with DOJ rules for handling confidential informants that found violations in eighty-seven percent of cases); see also ACLU Study, supra note 1, at 30-32 (reporting results of law enforcement survey in which majority of officers reporting being unaware of the existence of relevant policies on informant handling or failure to abide by them).

271 See supra notes 62-66 and accompanying text.


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

274 Inflexible limits on informant use are difficult to enact, because they inevitably face opposition from law enforcement groups that contend that restrictions on law enforcement discretion will result in less effective law enforcement. For instance, Florida legislators introduced a bill in 2009 that would have required that potential informants be given an opportunity to consult with counsel and forbidden the use of certain classes of informants. HB 271, 2009 Leg. Sess. (Fla. 2009) (as filed by Rep. Nehr, Jan. 8, 2009). The more restrictive provisions of the bill met substantial law enforcement opposition on the grounds that they would impede investigations and endanger informants by involving individuals outside of law enforcement in their recruitment and use. See H.R. STAFF ANALYSIS, HB 271, at 6 (Fla. Feb. 20, 2009) (reporting criticism from the Florida Sheriff’s Association and the Florida Department of Law Enforcement). As passed, the bill stripped away any strict limits on the use of informants. Jennifer Portman, Crist signs “Rachel’s Law,” TALLAHASSEE DEMOCRAT, May 8, 2009, at A1. The only major jurisdiction that imposes any firm limits on who can be an informant is California, which forbids the use of criminal informants under the age of twelve and allows the use of criminal informants under the age of eighteen only with court approval. See Dennis, supra note 35, at 1160-61.
informants, are even more likely to overwhelm any concern individual
agents may feel about informant interests.275

C. Legal action

Successful civil claims by injured informants may deter government action
that puts them at risk. Such claims typically arise in one of two ways. First,
a criminal informant who has suffered injuries as a result of their
cooperation with law enforcement may allege either or both federal
constitutional claims and federal or state law statutory or common-law tort
claims.276 Second, a criminal informant may claim improper police conduct
as a defense to criminal liability or cite it as a circumstance entitling her to a
lesser sentence.277

1. Civil claims

Though civil suits by informants against government agencies and agents
can be successful,278 they face significant legal hurdles. With respect to
statutory or common-law claims, most jurisdictions place substantial limits
on official liability.279 At the federal level, the Federal Tort Claims Act
provides for a limited waiver of sovereign immunity by which the federal
government is liable in tort “in the same manner and to the same extent as a
private individual under like circumstances, but shall not be liable for
interest prior to judgment or for punitive damages.”280 Moreover, the Act
includes a “discretionary function” exception, which excludes claims
“based upon the exercise or performance or the failure to exercise or
perform a discretionary function or duty on the part of a federal agency or
an employee of the Government, whether or not the discretion involved be

275 See JOHN KLEINIG, THE ETHICS OF POLICING 93-95 (1996) (arguing that police
discretion must be restricted to comply with broader societal norms).
government liable under Federal Tort Claims Act for the wrongful death of criminal
informant); Butera v. District of Columbia, 235 F.3d 637 (D.C. Cir. 2001) (affirming
judgment on claims under section 1983 and the District’s wrongful death statute in favor of
family of informant who died while engaged in drug buy planned at behest of police).
/remanding for resentencing upon finding that prosecution unilateral changed terms of
cooperation agreement); U.S. v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983) (defendant
arguing that indictment should be dismissed because it alleged crimes that had been
authorized by federal agents).
278 See McIntyre, supra note 276, at 120 (awarding over $3 million to family of informant);
Butera, supra note 276, at 641 (affirming award of more than $1 million in compensatory
and punitive damages).
279 See Rich, supra note 20, at 701 n.123 (collecting cases).
abused.” State governments have enacted similar limitations on the liability of their agencies and officials.

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

Informants making constitutional claims typically allege substantive due process violations. The first hurdle faced by these claims is the general bar on constitutional claims for injuries inflicted by third parties. Informants attempt to overcome this bar by arguing that the government is liable under the “special relationship” and “state-created danger” doctrines. Some circuits reject these claims outright when they are brought by informants on the ground that informants voluntarily assume

282 For state limitations on punitive damages, see, e.g., HAW. REV. STAT. § 662-2 (2011). IOWA CODE § 669.4 (2011); MD. CODE, CTS. & JUD. PROC. § 5-522(a)(1). With respect to state analogues of the discretionary function exception, see, e.g., ALASKA STAT. § 09.65.070(d)(2) (2011); GA. CODE ANN. § 50-21-24(2) (2011); IDAHO CODE § 6-904(1) (2011); MASS. GEN. LAWS 258 § 10(b) (2011); N.D. CENT. CODE § 32-12.1-03(3)(d) (2011); NEV. REV. STAT. §41.032(2) (2011).
285 Supra notes 266-275 and accompanying text.
287 See, e.g., id. at 934-35 (dismissing Federal Torts Claims Act action on ground that law enforcement decision of when to arrest target of investigation falls within discretionary function exception); Vaughn v. City of Athens, 176 Fed. Appx. 974, 979 (11th Cir. 2006) (dismissing claims under discretionary function exception where police used arrestee, who was later murdered, to arrange drug buys); Best v. U.S., 522 F. Supp. 2d 252, 260-61 (D.D.C. 2007) (dismissing claim on ground that law enforcement decision about how to protect informant falls within discretionary authority exception). But see Litif v. U.S., 682 F. Supp. 2d 60, 81 (2010) (finding that discretionary function exception did not apply to shield FBI agent’s decision to leak the name of informant).
288 See Rich, supra note 20, at 701-02.
290 Rich, supra note 20, at 702.
any risks that arise from cooperating with the government.291 And even in those jurisdictions where such claims could succeed, the plaintiff still must establish that the government conduct met the substantive due process “shock the conscience” standard.292 This standard is amorphous in any context,293 but in the informant arena, courts have been especially deferential to discretionary decisions by police.294 And even when police conduct might shock the conscience, qualified immunity poses another potential hurdle to recovery,295 albeit one that may diminish over time.296

2. Arguments in an informant’s criminal case

Criminal informants also seek to protect their interests by raising claims of mistreatment in the context of any criminal charges brought against them. These claims take the form of either a defense to liability or an argument for reductions in sentence. With respect to the former, criminal informants assert the related affirmative defenses of public-authority and entrapment by estoppel.297 The public-authority defense requires the defendant to prove her reasonable reliance on a public official’s directive to engage in activity

291 Id. at 703 n.132 (collecting cases).
293 See id. at 861-62 (Scalia, J., concurring) (criticizing the shocks the conscience test for permitting arbitrariness in judicial decision-making while forbidding it in executive or legislative action); Fagan v. City of Vineland, 22 F.3d 1296, 1308 (3d Cir.1994) (calling the shocks the conscience test an “amorphous and imprecise inquiry”).
294 See Matican v. City of New York, 524 F.3d 151, 158-59 (2d Cir. 2008) (holding that police actions in planning sting that revealed informant’s identity did not shock the conscience because it was the result of police decision-making that involved the balancing of their concern for their own safety against their concern for the informant’s).
295 See Butera v. District of Columbia, 235 F.3d 637, 647-52 (D.C. Cir. 2001) (dismissing substantive due process claim based on police failure to protect police informant from a state-created danger on ground that while a due process violation may have occurred, officers were entitled to qualified immunity because an informant’s right to be protected from such a danger was not clearly established).
296 Theoretically, as courts render decisions and the obligations of law enforcement agents with respect to informants become “clearly established,” the qualified immunity defense will no longer be available to those agents who fail to fulfill them. See Saucier v. Katz, 533 U.S. 194, 201 (2001). In applying the qualified immunity doctrine, however, Supreme Court decisions suggest that the standard for establishing that a right has been clearly established is a stringent one that tolerates substantial errors in judgment by law enforcement. See Andrew M. Seigel, The Court against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence, 84 TEX. L. REV. 1097, 1131 n.123 (2006). Coupled with this standard, the relatively low volume of substantive due process cases brought by informants suggests that qualified immunity will remain a significant hurdle to recovery for quite some time.
297 See Fed. R. CRIM. P. 12.3 (setting forth the required procedure for asserting the public-authority defense); U.S. v. Giffin, 473 F.3d 30, 39-40 (2d Cir. 2006); U.S. v. Strahan, 565 F.3d 1047, 1051 (7th Cir. 2009); U.S. v. Achter, 52 F.3d 753, 755 (8th Cir. 1995).
she knows to be illegal. Similarly, entrapment by estoppel requires that the defendant reasonably believed that her conduct was legal because of an official statement of the law. These defenses face hurdles both doctrinal and practical. Doctrinally, many jurisdictions will only allow the defense if the official who allegedly empowered the defendant to engage in the illegal conduct had the actual authority to do so. The absence of informant guidelines creates a practical hurdle to proving such authority, as public officials typically are not empowered to sanction criminal conduct without explicit authorization. Moreover, even when an informant can claim that a public official had the power to authorize the relevant criminal conduct, the issue of whether the official in fact did so is often a disputed question of fact that calls for the jury to judge the relative credibility of the official and the informant. A criminal informant is unlikely to prevail in such a credibility contest.

298 See Strahan, 565 F.3d at 1051.
299 Id.; Achter, 52 F.3d at 755.
300 With respect to the public-authority defense, see Achter, 52 F.3d at 755 (holding that public official who allegedly authorized conduct must have actual authority to do so in order for valid assertion of public-authority defense); Griffin, 473 F.3d at 39 (same); U.S. v. Fulcher, 250 F.3d 244, 253-54 (4th Cir. 2001) (same); U.S. v. Baptista-Rodriguez, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994) (same); U.S. v. Pitt, 193 F.3d 751, 758 (3d Cir. 1999) (same). But see U.S. v. Jumah, 493 F.3d 868, 872 n.1 (7th Cir. 2007) (citing pattern jury instruction on public-authority defense requiring only reasonably reliance on an official’s statement, not actual authorization to approve of criminal activity). With regard to entrapment by estoppel, see U.S. v. Spires, 76 F.3d 464, 466-67 (5th Cir. 1996) (requiring actual authority to interpret the relevant statute before defendant may claim entrapment by estoppel); U.S. v. Collins, 61 F.3d 1379, 1385 (9th Cir. 1995) (same); U.S. v. Duggan, 743 F.3d 59, 84 (2d Cir. 1984) (same). But see Pitt, 193 F.3d at 758-59 (addressing defendant’s claim of entrapment by estoppel on the merits after rejecting public-authority defense for lack of actual official authority); U.S. v. Hedges, 912 F.2d 1397, 1405 (11th Cir. 1990) (rejecting as irrelevant government argument that defendant could not claim entrapment by estoppel because official in question did not have authority to authorize proscribed activity).
301 For instance, the DOJ Guidelines on informant authorize agents to sanction criminal activity in only very limited situations and only with the written and advance approval of a supervisor. DOJ Guidelines, supra note 188, at § III.C.2.
302 See U.S. v. Doe, 63 F.3d 121, 125 (2d Cir. 1995) (holding that the public-authority defense is one that must be tried to a jury and is not a basis for dismissal of an indictment).
303 See Rich, supra note 20, at 701. In addition to the public-authority and entrapment by estoppel defenses, courts have recognized that situations may arise where police involvement in criminal conduct is so outrageous that the convicting a defendant for that conduct would violate due process. See U.S. v. Gurolla, 333 F.3d 944, 950 (9th Cir. 2003). But see United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995) (rejecting the outrageous government conduct defense). The due process clause is violated only where police conduct is “shocking to a universal sense of justice,” however. Id. (quoting United States v. Russell, 411 U.S. 423, 431-32 (1973)). Given that no court has ever allowed a criminal
Criminal informants also argue their entitlement to the benefits of a cooperation agreement – namely, leniency in a criminal case – under what is essentially a breach of contract theory. Though these arguments are sometimes successful, formal cooperation agreements typically leave prosecutors with broad discretion to decide whether to an informant’s efforts merit leniency, and courts loathe interfering with that discretion. Meanwhile, oral cooperation agreements are difficult for criminal informants to prove, as the issue of their existence often comes down to a pitched battle of credibility between law enforcement agents and criminal informants. Finally, even if the informant can prove the existence of an agreement, law enforcement agents often do not have the authority to promise leniency, thus leaving open the possibility that such promises will prove to be unenforceable.

VI. Protecting Active Criminal Informants

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

305 Rich, supra note 20, at 700-01.
306 Id. at 701.
307 See supra note 185 and accompanying text.
A. Providing counsel to potential informants

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

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

Practical problems with this proposal cast serious doubt on its feasibility, however. From a political standpoint, opposition to providing counsel to criminal informants will be substantial, particularly from law enforcement officials who will argue that the involvement of counsel will hamper their effectiveness. Even if such opposition could be overcome, any new

308 See NATAPOFF, supra note 12, at 183-84.
310 This is to be distinguished from the plea bargaining context, where the plea colloquy provides some guarantee that the defendant at least had an opportunity to consult with counsel. See Fed. R. Crim. P. 11(b)(1)(D).
311 See NATAPOFF, supra note 12, at 184 (noting that the presence of counsel “might mean fewer suspects would cooperate, and more might end up being charged with crimes”). For instance, some defense counsel are simply unwilling to represent informants. See Richman, supra note 126, at 69-70.
312 See supra note 274 (discussing the opposition faced by a proposed law in Florida requiring that potential informants be provided the opportunity to consult with counsel).
entitlement to counsel is unlikely to be funded. Already many jurisdictions do not allocate sufficient funds to allow for the provision of appointed counsel that satisfies the requirements of the Sixth Amendment.\footnote{See Heather Baxter, \textit{Gideon's Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis}, 2010 Mich. St. L. Rev. 341 (2010); Daryl K. Brown, \textit{Rationing Criminal Defense Entitlements: An Argument from Institutional Design}, 104 Colum. L. Rev. 801 (2004).} Expanding the entitlement to counsel beyond the Sixth Amendment requirements will exacerbate this problem and swell the already crushing caseloads faced by public defenders.\footnote{See Baxter, supra note 313, at 355-58 (providing data on the caseloads faced by public defenders).} Thus, even if an entitlement to counsel for potential informants could be passed, it is unlikely that the vast majority of potential informants who are unable to pay for their own counsel would receive a level of representation that realizes the hoped-for benefits.\footnote{Meanwhile, the autonomy and safety interests of those who can afford to pay an attorney will receive greater protection. Such a result will only aggravate the effect that a defendant’s financial resources have on criminal justice outcomes. See Deborah L. Rhode, \textit{Access to Justice}, 69 Fordham L. Rev. 1785, 1789-90 (2001).}

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

\textbf{B. Court approval for the use of particularly vulnerable informants}

As set forth above, certain classes of informants – minors, the mentally handicapped and mentally ill, and drug addicts – are particularly vulnerable to coercion and deserving of society’s protection.\footnote{For instance, proposed informant use rules in Florida would have prohibited law enforcement from using as informants any individual currently in a drug treatment program. See Portman, supra note 274, at 1A.} One might argue, then, that the easiest way to protect these informants would be to forbid their use entirely.\footnote{See supra notes 194-201 and accompanying text.} But such a proposal throws out the baby with the bathwater. Though particularly vulnerable to coercion, these individuals retain their autonomy interest in being able to make their own choices to the fullest extent possible and with a minimum of government intervention.\footnote{See Fallon, supra note 138 at 891 n.97.} Completely forbidding all members of these classes from becoming informants destroys that interest in the name of saving them. That being said, there no doubt are some members of these classes who are so vulnerable to coercion and so incapable of making informed and intelligent decisions that they should not be allowed to become informants. A more appropriate approach might be to require a court order before using anyone from these classes as an informant.\footnote{See supra note 313 and accompanying text.}
decisions that their autonomy interests cannot be protected by any informant use policy short of complete prohibition.\textsuperscript{319} Thus, a calibrated approach is needed.

1. Juvenile informants

California’s “Chad’s Law,” which governs the use of minor informants, sets forth such an approach by balancing these informants’ safety and autonomy interests.\textsuperscript{320} First, it provides maximum protection to the youngest juveniles by completely forbidding the use of informants who are twelve-years-old or younger.\textsuperscript{321} Second, it gives some assurance that an older juvenile’s decision is voluntary and intelligent by requiring that law enforcement disclose with the potential informant some crucial information, such as the potential benefit of cooperating and the sentence range that the juvenile might face if she does not inform.\textsuperscript{322} Third, it lessens the risk that an innocent juvenile may be coerced into cooperating by empty law enforcement threats by requiring that a court find probable cause that the juvenile committed the crime for which she has been offered leniency before she can be used as an informant.\textsuperscript{323} Fourth, it diminishes the risk of involuntary cooperation by requiring a court to consider the specific characteristics of the juvenile, such as her age and maturity, and find that the juvenile’s decision to cooperate is voluntary, knowing, and intelligent.\textsuperscript{324} Finally, despite these protections, it preserves the core of the juvenile’s autonomy interest by not replacing the juvenile’s assessment of

\begin{footnotesize}
\begin{enumerate}
\item Such a flat ban is analogous to regimes in the medical context that allow for surrogate decision-making for patients unable to give informed consent. See generally Norman L. Cantor, The Bane of Surrogate Decision-making: Defining the Best Interests of Never-Competent Persons, 26 J. LEGAL MED. 155 (2005). Unlike in the medical context, however, where the issue of identifying the proper treatment can be complex, the risks to informants make it clear that those who are incapable of knowingly and voluntarily deciding to cooperate should be forbidden from doing so.
\item See CAL. PENAL CODE § 701.5 (2011).
\item § 701.5(a).
\item § 701.5(d).
\item Id.
\item § 701.5(c).
\end{enumerate}
\end{footnotesize}
her best interests with a court’s. Other jurisdictions should adopt policies dictating similar procedures for the handling of juvenile informants.

2. Mentally ill and mentally retarded informants

A similar approach should also be implemented for potential informants who are mentally ill or mentally retarded. The central inquiry in permitting their use should be whether the potential informant’s decision to cooperate is voluntary, knowing, and intelligent. This inquiry should involve consideration of the specific characteristics of the informant and her situation and be entrusted to a neutral decision-maker, such as a judge or magistrate, who is at least somewhat insulated from law enforcement pressures. Moreover, to ensure that the decision to cooperate is made intelligently, the decision-maker should be required to inform the vulnerable potential informant of the benefits of cooperation and the sentences she might face should she not cooperate. Finally, the decision-

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325 Rather, the statute permits only the potential informant’s parent or legal guardian to veto the juvenile’s decision to cooperate. See § 701.5(d). This limited intrusion on the juvenile’s autonomy interest is necessary to vindicate the interest of parents in having control over the important decisions in their child’s life. See Darci G. Osther, Juvenile Informants—A Necessary Evil?, 39 WASHBURN L.J. 106, 125-26 (1999).

326 This is not to say that Chad’s Law perfectly protects juvenile informants’ interests. For instance, it requires the court to consider factors, such as the severity of the juvenile’s alleged offense and safety to the public, that are clearly irrelevant to the court’s determination of whether the juvenile’s decision to cooperate is voluntary, knowing, and intelligent. CAL PENAL CODE § 701.5(d) (2011). Other jurisdictions should not dictate such extraneous considerations.

327 The use of the voluntary, knowing, and intelligent standard is appropriate here, given the similarities between cooperation agreements and plea bargains. In the plea bargaining context, the defendant’s guilty plea must be voluntary, knowing, and intelligent because it involves a waiver of fundamental constitutional rights. Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005). Though the decision to cooperate does not involve a de jure waiver of constitutional rights, the cooperation agreement often supplants the formalized criminal justice system, particularly when an agreement is reached without the filing of formal charges. The informant essentially concedes her guilt on the threatened charges and accepts the required cooperation as part of the appropriate punishment, obviously without a jury trial and usually without consultation with counsel. See supra notes 43-47 and accompanying text. Thus, agreeing to cooperate involves a de facto waiver of these rights. Of course, the informant may at any point stop cooperating, face criminal charges, and once again be entitled to the rights enjoyed by other criminal defendants. Consequently, a cooperation agreement is not a legal waiver and all such agreements need not be tested under a voluntary, knowing, and intelligent standard. But when concerns about coercion and lack of knowledge are heightened because of the vulnerabilities of the civilian at issue, the standard used to judge plea bargains is useful to address those concerns. Moreover, the familiarity of judges with this standard will allow them to apply it consistently in cooperation cases.

328 See supra notes 266-275 and accompanying text.
maker should be obliged to find that probable cause exists to believe that the potential informant committed the crime for which leniency is promised before approving any cooperation agreement.

Mental health issues present detection and line-drawing problems that are not present in the juvenile context, however. Unlike age, which can be ascertained generally on sight and to a certainty with minimal investigation, mental health issues can be difficult for untrained laypersons to detect.\(^{329}\) Moreover, individuals with mental health issues often try to hide those issues out of embarrassment or fear.\(^{330}\) Meanwhile, law enforcement training on the identification and treatment of individuals with mental health issues is spotty.\(^{331}\) Consequently, crafting a bright-line rule between those individuals with mental health issues who can voluntarily agree to cooperate and those who are unable to do so is impractical.\(^{332}\)

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

\(^{329}\) See Bruce J. Winick, The Supreme Court’s Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier, 50 B.C. L. Rev. 785, 822-23 (2004).


\(^{332}\) Of course, there will be some potential informants whose mental health issues clearly preclude them from being effective informants. Given law enforcement interests in effectiveness and efficiency, there is no need for a rule making such individuals ineligible to cooperate.
By requiring law enforcement to refer to the court all potential informants about whom they have substantial concerns, this standard is easier for untrained law enforcement to apply than a bright-line rule. But for it to be effective, it requires “buy-in” from agents: if they believe that court review is merely an impediment to law enforcement, they will avoid it in all but the most obvious cases and thus undermine the goals of the reform. For this reason, law enforcement agents also must be trained to recognize that their interest in obtaining arrests and convictions converges with society’s interest in protecting the mentally ill and mentally retarded.\textsuperscript{333} Specifically, the same issues that interfere with the capacity of a potential informant to cooperate knowingly, intelligently, and voluntarily also impact her ability to be a useful informant. For instance, a potential informant who is vulnerable to coercion due to mental illness or retardation also would be more likely to fabricate information in order to gain the approval of law enforcement.\textsuperscript{334} Similarly, a delusional or paranoid informant is likely to provide useless information as they may have difficulty distinguishing fantasy from reality.\textsuperscript{335} Helping law enforcement recognize that their interests are synchronous with society’s will foster the realization that the court’s involvement is not merely a roadblock to an effective investigation and enhance compliance.

3. Drug-addicted informants

Drug-addicted informants present similar challenges. Police training on the detection of drug addiction and drug use is inconsistent.\textsuperscript{336} And addicts have strong incentives to keep their addiction a secret, including the desire to be able to cooperate in order to “work off” any charges and remain out of jail. Nevertheless, drug addicts are well-known by law enforcement to be

\textsuperscript{333} An alternative, or perhaps additional, reform might impose some sort of sanction on those agents who fail to comply with the requirement of court review. I do not advocate for this proposal, however, because sanctions on the police are often politically unfeasible and underenforced.

\textsuperscript{334} See Saul M. Kassin et al., Police-Induced Confessions: Risk Factors and Recommendations, 34 LAW & HUM. BEHAV. 3, 21 (2010) (noting the tendency of the mentally retarded to desire to please persons in positions of authority); Allison D. Redlich et al., Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness, 34 LAW & HUM. BEHAV. 79, 81-82 (2010).

\textsuperscript{335} See MADINGER, supra note 1, at 189 (“Someone who is paranoid and delusional about imagined plots or contrived schemes is not going to be a very successful informant.”).

unreliable informants.\textsuperscript{337} Thus, society’s interests again align with those of law enforcement, and the approach to handling drug-addicted informants should be similar to that of the mentally ill. Namely, police should be required to obtain court approval before using any informant whom they reasonably believed suffers from a drug addiction that substantially impacts her ability to agree to cooperate intelligent, knowingly, and voluntarily. Similarly, training should again be used to reinforce the synchronicity between law enforcement’s interest in accurate arrests and convictions and society’s interest in protecting addicts.

C. Remedying information asymmetries

As discussed above, all criminal informants are vulnerable to coercion due to information asymmetries not of their own making. Specifically, they are unable to evaluate the claims made by law enforcement agents about the potential charges and sentences they might face if they do not cooperate and the potential benefits they might receive by cooperating. Furthermore, they cannot evaluate the enforceability of the promises made by law enforcement.\textsuperscript{338}

One potential solution to these information asymmetries would be to expand the previous proposal and require court involvement in the use of any informant.\textsuperscript{339} Doing so would have the benefit of remedying the information asymmetries at issue. On the other hand, given the sheer number of informants used by law enforcement, it also would almost certainly overburden the court system. Moreover, increasing the number of individuals who know the identity of a potential informant would increase the possibility that her possible cooperation would become known, thus endangering the informant.

A more moderate step would be to require that the relevant prosecutor’s office provide consent prior to the use of any criminal informant. Specifically, a representative of the relevant prosecutor’s office with authority to bind the office would assess the case against the potential informant, provide a non-binding determination of the charges she might

\textsuperscript{337} See MALLORY, supra note 1, at 25 (noting that many jurisdictions recognize that drug-addicted informants are less reliable); MADINGER, supra note 1, at 187-88 (discussing the unreliability of addicted informants).

\textsuperscript{338} See supra notes 184-193 and accompanying text.

\textsuperscript{339} Another possible solution would be to require police to tell potential informants the truth. Though attractive in its simplicity, such a requirement would run contrary to police practice and recent precedent, which permit and even condone police lying to suspected criminals. See Deborah Young, \textit{Unnecessary Evil: Police Lying in Interrogations}, 28 CONN. L. REV. 425, 427-32, 451-56 (1996).
face and the sentence she could receive, and commit the prosecutor to provide a specified benefit should the individual agree to cooperate. The results of the prosecutor’s assessment would be reduced to writing and shared with the potential informant.

The benefits of this requirement from the standpoint of protecting the informant are obvious: the potential informant would no longer be forced to rely on police assertions about her guilt and the possible sentence she might face, and she would receive an enforceable, written promise of a benefit from the relevant prosecutor should she cooperate.\footnote{Though the prosecutor’s assessment of the possible charges and sentence that the informant might face if she chooses not to cooperate would be non-binding, the prosecutor would be constrained to be honest in her assessment by her narrow obligation as an attorney not to lie to third-parties, see MODEL RULES OF PROF’L CONDUCT R. 4.1, and her more general duty as a prosecutor to truth. See Bennett L. Gershman, 14 GEO. J. LEGAL ETHICS 309, 313-14 (2001).} This procedure also would minimize the risk that the informant’s identity might be disclosed, and the informant’s safety thus compromised, by limiting disclosure of the informant’s identity to the recruiting officer and a single member of the prosecutor’s office designated for this task.

Moreover, the procedure is not unduly burdensome on police or prosecutors. From the police standpoint, the proposal does deprive individual officers of the discretion to recruit informants without outside interference. Nonetheless, law enforcement experts on informant recruitment and handling do not condone such unfettered discretion and already recommend that informant recruitment be subject to supervisory approval.\footnote{See MALLORY, supra note 1, at 113.} Meanwhile, determining the existence of probable cause is a routine task for a prosecutor who often must assess the validity of arrests and the prospects of winning cases at trial. Similarly, the task of making a non-binding assessment of the sentence that an arrestee might face is part and parcel of the plea bargaining process. Of course requiring prosecutors to make a binding promise to a potential informant will impose costs on society as those promises are then enforced, but such is a price that society must pay in order to vindicate the autonomy interests of its members.

D. Training police and informants to minimize risk

The safety interests of informants can best be protected through better training of both police and informants. Often, occurrences of harm to informants can be traced back to inadequate training of police, either in how to safeguard the identity of informants or in how to plan operations so as to provide the maximum possible protection to the informants who are
involved.\textsuperscript{342} Police, and particularly those involved in areas of law enforcement in which the use of informants is common, should receive additional training in these areas so as to minimize unnecessary risks to informant safety.

Informants also receive little or no training in how to handle the potentially dangerous situations that they face.\textsuperscript{343} The threat of criminal sanctions should they fail to satisfy their police handlers often causes informants to remain in a dangerous situation longer than is wise. To counteract this incentive, informants should receive at least rudimentary training in how to recognize when they are in a dangerous situation and how to remove themselves from it before they are harmed. Moreover, police should be instructed not to punish informants who exit dangerous situations prior to obtaining the evidence sought.

\textbf{E. Including informants in existing workers’ compensation schemes}

Even with better training for police and informants, police still will have substantial discretion in their use of informants, and this discretion will be exercised in manner responsive to internal and external pressures to maximize arrests and convictions.\textsuperscript{344} These pressures, combined with the generally dim view of criminal informants held by law enforcement, suggest that police inevitably sacrifice informant safety for the opportunity to increase arrest and convictions rates. Incentives are therefore needed to encourage police to protect informant safety. Such incentives would most reasonably take the form of some combination of internal law enforcement regulations and the potential for external sanctions. Unfortunately, internal regulations relating to informants have proven to be ineffective at conforming police conduct with respect to informants.\textsuperscript{345}

This leaves external sanctions as the most practical means of deterring police from unnecessarily endangering informants. But what form should

\textsuperscript{342} See, e.g., ACLU Study, supra note 1, at 33 (finding that sixty-three percent of surveyed officers reported receiving no training in the handling of informants); John Riley, \textit{Expert: Cops put his life in danger}, NEWSDAY, Sept. 22, 2011, at A41 (reporting, in case of two officers sued for negligently revealing the identity of an informant who later was killed, that the officers received no formal training in how to handle and protect confidential informants).

\textsuperscript{343} See, e.g., Hoffman’s Attorneys Release Statement Critical of the TPD, TALLAHASSEE DEMOCRAT, May 10, 2008, at A6 (reporting that informant killed during arranged drug deal had received no training from police).

\textsuperscript{344} See supra notes 266-270 and accompanying text.

\textsuperscript{345} See supra note 270.
these sanctions take? The consensus among criminologists is that the certainty of punishment is the most critical factor in deterring misconduct. This being so, the current threat of external sanctions is unlikely to deter police from unduly endangering informant interests, because the possibility of recovery under a tort theory depends largely on the ability of the informant to establish egregious misconduct and, as a result, damages are awarded only in the most exceptional cases. Such uncertainty in the imposition of sanctions against police, even if the sanctions themselves are severe, deters very little misconduct. While lowering the standard needed to establish civil liability would provide greater certainty of punishment, and thus greater deterrence, doing so would require either a wholesale change in substantive due process jurisprudence or the political will to open law enforcement to substantial civil liability. To be frank, neither seems particularly likely.

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

For the purposes of deterring police from taking unnecessary risks with informant safety, workers’ compensation is an excellent fit. The cost to law enforcement agencies of obtaining workers’ compensation insurance for

347 See supra note 278 and accompanying text.
349 In the rare cases where informant claims survive, jury awards tend to be large. See, e.g., Butera v. District of Columbia, 235 F.3d 637 (D.C. Cir. 2001) (amending award of $70 million in compensatory damages and $27 million in punitive damages to a total award of just over $1 million).
informants would depend upon the number of informants they employ and their track record of past injuries.\(^{353}\) As a result, law enforcement agencies would be incentivized to minimize the risk of physical harm to informants.\(^{354}\) And because the increased costs would apply agency-wide, so too would reforms of informant policies, thus widening the scope of reforms to an extent unlikely with substantial but scattershot jury awards. Finally, this approach properly places the incentive and responsibility for reform on law enforcement agencies, which are most capable of formulating effective policies.

One additional point is worth noting. Folding criminal informants into existing workers’ compensation schemes will do little to deter the most flagrant police misconduct that threatens the safety of informants.\(^{355}\) By allowing certain, low-level recovery for harms suffered by informants, the workers’ compensation scheme will encourage law enforcement agencies to adopt policies that impose low-cost limitations on the most dangerous practices. These policies are likely to influence officers who tend to follow the rules, but are unlikely to deter extremely reckless or intentional endangerment of informants, activities which typically are already forbidden. Many states do exclude from workers’ compensation schemes intentional torts by the employer,\(^{356}\) but these exceptions are construed narrowly and often require a finding of actual intent to harm by the employer.\(^{357}\) And even if egregious law enforcement misconduct were excluded from the workers’ compensation scheme, the informant would be left to rely on uncertain tort recovery.\(^{358}\) The inability of this solution to deter the worst misconduct should not be fatal to the plan, however; rather, it is part of a larger struggle to deter such wrongdoing.

**CONCLUSION**

In the preceding discussion, I have attempted to remedy the oversight of scholars who have largely ignored the interests of informants by focusing

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\(^{353}\) See Arthur Larson, 9 Larson’s Workers’ Compensation Law § 150.06 (Matthew Bender, Rev. Ed. 2011).

\(^{354}\) Agencies also may decide to use fewer informants. While this would harm the interest of potential informants in avoiding punishment, that is not an interest that society ought to protect. See supra notes 110-114 and accompanying text.

\(^{355}\) See Epstein, supra note 351, at 814 (“Unlike ordinary negligence, intentional harms introduce an element of moral hazard that is very difficult to control by a set of rules designed for accidents.”).

\(^{356}\) See Arthur Larson, 6 Larson’s Workers’ Compensation Law § 103.01 (Matthew Bender, Rev. Ed. 2011).

\(^{357}\) Id. at § 103.03.

\(^{358}\) See supra notes 278-296 and accompanying text.
on those interests exclusively. But of course informant interests do not exist in a vacuum, and obvious questions arise from such a single-minded focus. Among them, one might well ask why, in an era of limited government resources, should resources be devoted to protecting the interests of active criminal informants? More specifically, why should protecting these informants be prioritized over other pressing law enforcement concerns?

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

Informant use also can have corrosive effects on the high-crime communities in which they are most often used and the relationship between police and those communities. Releasing criminals to inform on their neighbors weakens social ties, increases crime, and interferes with the communicative function of the criminal law in high-crime communities. Moreover, civilians often view the recruitment and use of informants as coercive and exploitative. These concerns in turn given rise to civilian distrust of police, a reduced willingness by law-abiding citizens to cooperate, and an adversarial relationship between law enforcement and the communities they are meant to serve. By increasing somewhat the transaction costs involved in recruiting a new informant, the proposals contained herein will reduce the number of informants used and thus ameliorate the sense that informants are infiltrating high-crime communities. In addition, restrictions on the use of particularly vulnerable informants and guarantees that informants agree to cooperate knowingly and voluntarily will counter the impression that police exploit informants. The ultimate result would hopefully be an increase in trust and cooperation between law enforcement and communities.

359 See NATAPOFF, supra note 12, at 32-33.
360 Id.
361 See Natapoff, supra note 15, at 691-93.
362 See ACLU Study, supra note 1, at 53-54.
363 See Rich, supra note 11 (manuscript at 20).
Finally, the use of informants may ultimately undermine the deterrent effect of criminal sanctions if the perceived benefits of cooperation to the criminal outweigh the increased risk that an informant will detect their crimes.\textsuperscript{364} The obvious solution to this problem is to reduce the rate at which informants are recruited, but such reforms are unlikely to be implemented internally by law enforcement.\textsuperscript{365} Once again, by increasing the transaction cost of informant recruitment, the proposals set forth herein would require law enforcement to enact such a reduction.

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

\textsuperscript{364} See Baer, supra note 128, at 963.
\textsuperscript{365} See id. at 963-65.