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LAW ENFORCEMENT CONFIDENTIAL INFORMANT PRACTICES

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

AND THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

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LAW ENFORCEMENT CONFIDENTIAL INFORMANT PRACTICES

THURSDAY, JULY 19, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY, AND THE
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittees met, pursuant to notice, at 10:05 a.m., in Room 2141, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee on Crime, Terrorism, and Homeland Security) presiding.

Present from Subcommittee on Crime, Terrorism, and Homeland Security: Representatives Scott, Delahunt, Nadler, Johnson, Jackson Lee, Davis, Sutton, Gohmert, Coble, Chabot, and Lungren.

Present from Subcommittee on the Constitution, Civil Rights, and Civil Liberties: Representatives Nadler, Davis, Conyers, Scott, Watt, Cohen, Franks, and Jordan.

Staff present: Mario Dispenza, Counsel, BATFE Detailee; Rachel King, Majority Counsel; Veronica Eligan, Majority Professional Staff Member; Michael Volkov, Minority Counsel; and Caroline Lynch, Minority Counsel.

Mr. SCOTT. [Presiding.] The hearing will now come to order.

I would like to welcome you to the joint oversight hearing. The House Judiciary Committee on Crime, Terrorism, and Homeland Security and the Subcommittee on the Constitution, Civil Rights, and Civil Liberties are eager to hear testimony by witnesses today.

This oversight hearing is the first in a series that will explore law enforcement practices and their impact on civil and constitutional rights. Today's hearing is on the use of confidential informants, particularly in drug enforcement and in capital cases. Law enforcement officials find informants to be a vital part of investigatory work as they gather information, work undercover and gain general background information on crime.

However, an informant's agreement to work for the government can have an enormous negative effect on the criminal justice system and on the community. Moreover, departmental oversight of local and State use of informants seems to be weak and has sometimes led to disastrous civil rights abuses.

It is important to be clear that the type of informant that this hearing is being convened to discuss is not the ones addressing—

we are not addressing the ones concerned with members of the community who work with the police to improve their neighborhoods. Nor are we addressing criminal defendants who as a part of their plea bargain provide law enforcement with factual information and work undercover to expose their associates in crime.

Today we are discussing those who seek to avoid punishment for their own crimes or dishonest people who seek payments from law enforcement and then provide false information that implicates innocent people. We are also addressing the lack of departmental oversight over some offices and departments which has enabled some officers and informants to perpetrate some of the more heinous civil rights violations in recent memory.

For example, in 2002, an uncorroborated word of an informant led to the arrest of 15 percent of a town's African-American men between 18 and 34. In another city, a corrupt police officer's informant planted phony drugs on mostly Mexican immigrants who spoke little English. Using bogus field drug tests and capitalizing on a defendant's lack of English skills, police officers enticed the defendants to plead guilty before the actual lab results uncovered the ruse. The informant had been paid approximately $220,000 for his services.

One of the more shocking violations recently is the tragedy that befell the 92-year-old Kathryn Johnston of Atlanta, Georgia. Last year, Ms. Johnston, an innocent woman, was shot to death in her Atlanta home when police officers burst into her house to execute a search warrant obtained through a false affadavit. Police officers claimed that an informant had bought drugs at Ms. Johnston's home, which was a fabrication.

Perhaps most disturbing is the effect the false testimony has in death sentences. One study has shown that almost half of the documented wrongful capital convictions have included false information from an informant. In at least one instance, a death row inmate was within a week of execution before DNA testing uncovered the truth that a jailhouse informant seeking leniency for her own crimes invented her testimony to send an innocent man to death row.

Despite the impact informants have in the criminal justice system, their use has been subject to scant oversight. And thanks to the get tough on crime policies and the war on drugs, police departments are under increasing pressure to make arrests and recruit more informants. Without increasing supervisory personnel and enhancing internal controls, departmental oversight of informants and rogue police officers will not be sufficient.

To be sure, confidential informants are certainly a critical part of police work. And most law enforcement officers do not engage in the activity described here. However, we cannot ignore the fact over the past two decades law enforcement has made more drug arrests and turned more defendants into informants than ever before.

The war on drugs has pressured law enforcement into using a great many informants with little internal control over their officers and over vetting informants and their information. The consequences have not only been outrageous, but sometimes deadly.

The object of these hearings is to consider testimony possibly leading to legislation that will increase the oversight requirements

of informants to prevent abuses like the ones that we will hear about today.

With that said, it is now my pleasure to recognize the former attorney general from California, the gentleman from California, Mr. Lungren, who is substituting for my colleague, Randy Forbes, the Ranking Member of the Subcommittee on Crime.

Mr. LUNGREN. Thank you very much, Mr. Chairman. I appreciate you and Chairman Nadler holding this hearing today on law enforcement confidential informant practices.

And I welcome all of our witnesses and thank you for taking the time out of your busy schedules to be with us today. Confidential informants and other human sources are a critical investigatory tool for America's law enforcement. Successfully dismantling a terrorist network, drug trafficking organization or a violent gang often hinges on tips provided by confidential informants, including members of the criminal organization oftentimes.

In May, six Islamic militants were arrested for attempting to attack the Fort Dix Army Base in New Jersey. In a period of just 3 months, the FBI was able to gather information about the group from a video and then infiltrate the group using a confidential informant. The informant joined the group in March 2006 and spent the next 15 months aiding the investigation, recording the group's plans in detail.

The informant recorded a number of alarming conversations, including one discussing how the group could kill at least 100 soldiers using a variety of different assault weapons. The six men were arrested by the FBI and ICE officials when they tried to purchase assault weapons from another man working with the FBI.

Authorities also thwarted the plot to blow up JFK International Airport with the help of a convicted drug trafficker, who following his second arrest began supplying information to Federal investigators. He, too, infiltrated the terrorist group and even traveled overseas to meet supporters of the plot and assured them that he wanted to die as a martyr. I underscore the fact he was a convicted drug trafficker who cooperated with officials after his second arrest.

It is clear that without the help of confidential informants in both those cases the attacks on Fort Dix and JFK would have been very different and very devastating results. Like many other investigative tools, the use of human sources is not perfect. And we should always understand that and work against its imperfections.

Working with confidential informants and other sources is a delicate business. It is no secret that many sources are themselves criminals who will lie and manipulate law enforcement for their own personal gain. So law enforcement must be savvy in its assessment of its sources and the accuracy of their information.

Unfortunately inaccurate tips from confidential sources or misuse of such information by police can have negative, even devastating consequences. The 2002 sheetrock scandal in Dallas, Texas, where 18 people were arrested and falsely accused with cocaine possession demonstrates how corrupt human sources combined with dirty cops can lead to the arrest of innocent citizens.

Furthermore, Mr. Delahunt of this Committee and I have co-authored legislation to require the FBI to report violent offenses of confidential informants to State and local law enforcement officials.

As the inspector general reported, one or more guideline violations were found in 87 percent of the confidential informant files that they examined.

And while today's hearing is likely to provide insight into the role confidential informants play at the local level, I would submit an examination of the use of confidential informants at the Federal level should be the principle oversight responsibility of our Subcommittee. And I hope we will take action on that this year.

The proper training and oversight of the use of human sources can ensure the validity of confidential informants and the accuracy of their tips. The fact is that in most instances, the use of human sources by Federal, State, and local law enforcement successfully assists a criminal prosecution with little incident.

Confidential informants are a necessary if sometimes unattractive part of law enforcement. And I hope that today's hearing will provide guidance for the effective use of human sources.

As I say, I welcome all the witnesses. But I would especially like to welcome Ron Brooks, the distinguished law officer of the state of California who has worked for over three decades primarily in the area of trying to get drugs off our streets and save many of our people. I am proud to say that he was, in fact, an employee of mine at the time I was the attorney general of California.

He not only has done an exceptional job as a law enforcement officer, but as a leader of California Narcotics Officers Association. And I think it will be very beneficial for us to hear his point of view of over three decades of service and particularly with—while we are obviously not perfect in California, and we have mistakes. And we have had our number of bad cops.

The training program, the standards that we establish, particularly through our post-training, post officers standard and training commission, which I was a chairman at one time, which attempts to establish criteria to be used in the training of officers through all departments in the state of California and the requirement that the leaders of those organizations, that is, all police chiefs and sheriffs in the state of California must be post certified. And maybe that is where we ought to be looking, at the quality of the training and certification and the ongoing certification process as it affects law enforcement agencies across the country.

And I thank the Chairman for the time.

Mr. SCOTT. Thank you.

Does the Chairman of the full Committee have a statement?

Mr. CONYERS. Yes, the Chairman would love to make an introductory statement.

Mr. SCOTT. The gentleman is recognized. The gentleman is recognized.

Mr. CONYERS. Thank you very much.

I commend Chairman Scott, Chairman Nadler for what they are doing. And I reach out across the Committee room to thank Dan Lungren and Bill Delahunt for the bill they have introduced.

We have got a serious problem here that goes beyond coughing up cases where snitches were helpful. The whole criminal justice system is being intimidated by the way this thing is being run and in many cases, especially at the local level, mishandled.

Now, I have met with Reverend Hutchins earlier. And that may be how the genesis of this hearing. But we have got some really big problems here because now we have got Web sites that are doing this stop snitching campaign where formerly confidential information is now easily accessibly and people's lives are being intimidated.

The whole court system, the criminal justice system, especially at the local level—it is easy for us to oversight the feds. They are right here, and we are right here. So we will watch them.

But we need a uniform system that emanates from what the Department of Justice is doing that will guide a lot of this business that is going on that is totally intimidating, is coercing the process. People are getting killed with great regularity.

I have just called Elijah Cumming and Chaka Fattah in Baltimore and Philadelphia. This business that we are looking, listening at and these wonderful witnesses that are here is out of control. I just called the Wayne County prosecutor in Detroit because we think that it is out of control in Detroit as well. And it is probably the case across the country.

So these are very important hearings. And a lot of people have died because of misinformation, starting with Kathryn Johnston in Atlanta getting the wrong house that cost a 92-year-old woman her life. But then law enforcement tried to intimidate the confidential informants to clean the mess up.

So then you get law enforcement involved in perpetrating the cover-up of what is clearly criminal activity. So this is not a small deal that brings these two Subcommittees together today. And we are going to do something about it. And that is why I am glad that Professor Natapoff is here and people that have been personally involved in this system.

So I thank the Chairman for indulging me. And I yield to Judge Gohmert.

Mr. GOHMERT. I just had a quick question, Chairman. I wasn't sure if my ears heard right. Did you say it was easy to oversee the Feds here? I just wasn't sure I heard that.

Mr. CONYERS. Yes, it is easy to oversee the Feds here since I became Chairman of the House Judiciary Committee.

Mr. SCOTT. The gentleman yields back.

We would like to welcome to the Subcommittee a new Member, the gentlelady from Ohio, Betty Sutton. I think this is her first meeting.

And welcome to the Subcommittee.

We are also joined by the gentleman from Georgia, Mr. Johnson, the gentleman from North Carolina, Mr. Watts, the gentleman from North Carolina, Mr. Coble. And we just heard from the gentleman from Texas, Mr. Gohmert.

Without objection, the other statements will be made part of the record. We have a distinguished panel of witnesses here today to help us consider the important issues we currently have before us.

Our first witness will be FBI Assistant Director for Intelligence Wayne Murphy. He joined the FBI after more than 22 years of service at the National Security Agency in a variety of analytic, staff, and leadership positions. The bulk of his career has been involved with direct responsibility for intelligence, analysis, and re-

porting. He has a bachelors degree in political science from John Hopkins University.

Our next witness will be Commander Pat O'Burke from the Texas Department of Public Safety, Criminal Law Enforcement Division Narcotics Service. He has more than 23 years of service in the Texas Department of Public Safety and more than 25 years total in law enforcement experience, 16 of which is in narcotics enforcement.

He has been deputy commander for 4 years, supervising field enforcement groups for counter-narcotics operations as well as supervising multi-county drug task forces as required by Texas law. He has a bachelor's degree in criminal justice from Lamar University in Beaumont, TX, and is also a licensed polygraph examiner.

Our next witness will be Alexandra Natapoff of Loyola Law School in Los Angeles. She has received numerous awards for her legal scholarship and is a nationally recognized expert on the use of informants in the criminal justice system. Prior to joining Loyola faculty, Professor Natapoff worked as a legal advocate in low-income neighborhoods in Baltimore as the founder and director of the Urban Law and Advocacy Project. She received her bachelor's degree from Yale and J.D. from Stanford.

Our next witness will be Reverend Markel Hutchins from Atlanta. And the gentleman from Atlanta has asked to present Reverend Hutchins.

Mr. JOHNSON. Thank you, Mr. Chairman.

I would like to present to you the Reverend Dr. Markel Hutchins, who is a nationally regarded civil rights leader and an ordained minister. A protege of numerous veteran civil rights icons at just 29 years old, he has emerged as a recognized artist around the country and is widely regarded as the new kid on the national civil rights leadership block.

An authority on non-violence and conflict resolution as taught by the Reverend Dr. Martin Luther King, Jr. and successfully practiced by himself as a high profile activist, Reverend Hutchins has led the advocacy efforts to bring forth truth about the shooting death of 92-year-old Kathryn Johnston who was killed on November 21st of last year by Atlanta police officers in a botched drug raid. Since that evening of that now infamous police shooting, he has worked tirelessly to bring justice and policy change serving as the designated spokesperson for the Johnston family.

And whenever there is a similar episode that occurs in Georgia or in the Atlanta area, those families generally call upon Reverend Markel Hutchins to come to their aid so that they can guarantee that justice is done. And we have had a spate of police shootings in Atlanta. In one county, there were 12 killings last year at the hands of police officers. And not all of those were unjustified.

Reverend Hutchins has and continues to serve on boards, committees, and commissions for numerous institutions. A sought after public speaker, he is a frequent lecturer to corporate labor, government, and academic audiences.

Ebony Magazine, Black America's premier publication, once featured him as one of our Nation's top leaders under 30 and most recently as one of America's most eligible bachelors. Reverend Hutchins is managing principal of MRH, LLC Consulting, chairman of

Markel Hutchins Ministries, and senior advocate of civilrightsleader.org.

Please join me in welcoming the Reverend Markel Hutchins.

Mr. SCOTT. Thank you. Thank you.

And welcome, Reverend Hutchins.

The next witness will be Mr. Ronald E. Brooks, president of the National Narcotic Officers Association Coalition representing 44 State narcotics officers associations with a combined membership of over 60,000 law enforcement officers around the Nation. He is a 32-year California law enforcement veteran with 24 years of those being in drug, gang, and violent crime enforcement. He has been primary investigator, supervisor or manager for thousands of law enforcement operations and has written policies and procedures for managing undercover operations and for managing informants.

Our final witness will be Ms. Dorothy Johnson-Speight, founder of Mothers in Charge. She is the mother of a 24-year-old Khaaliq Jabbar Johnson who was murdered in December of 2001 over a disagreement about a parking space.

In 2003, she, along with other grieving mothers, organized Mothers in Charge to prevent violence, educate and intervene with our youth, young adults, families, and community organizations. There are now over 200 members and supporters of Mothers in Charge with chapters in Northtown and Chester and Delaware County and in Atlantic City.

Each of our witnesses' written statements will be made part of the record in its entirety. I would ask of each of our witnesses summarize his or her testimony in 5 minutes or less. To help stay within that time, there is a timing device at the table. When you have 1 minute left, the light will go from green to yellow then finally to red when the 5 minutes are up.

Assistant Director Murphy?

TESTIMONY OF WAYNE M. MURPHY, ASSISTANT DIRECTOR, DIRECTORATE OF INTELLIGENCE, FBI, WASHINGTON, DC

Mr. MURPHY. Good morning. My thanks to Chairman Scott and Chairman Nadler as well as the Ranking Members of both of the Committees for this opportunity to answer your questions today about the FBI's confidential human source program. I would also like to acknowledge today the presence of the full Committee Chair, Chairman Conyers.

I have a very brief statement I wish to make. As the assistant director for intelligence at the Federal Bureau of Investigation, I am responsible for managing the FBI's human source programs on behalf of Director Mueller and the executive assistant director of the National Security Branch, Mr. Willie Hulon. Most important of all, I believe I am accountable to the American people for managing a program that is worthy of their trust and their confidence.

I am joined today by Deputy General Counsel Elaine Lammert, also from the FBI. The general counsel is a persistent and inseparable partner for us in undertaking this responsibility. Their sober, deliberate, and objective counsel is vital to preserving the integrity of this process. They are a conscience and a guide helping to shape both strategic policy and inform day-to-day tactical activity in the field.

The human source program is the life blood of the FBI. Our ability to acquire and responsibly manage sources is central to the success of our mission. Actions that result from information acquired through our human source program have profound consequence, not just in terms of the potential for operational success, but for how they reflect on the extent to which we are an organization that first and foremost honors our commitment to uphold and defend the Constitution and protect the rights and civil liberties of Americans.

Key elements of a successful program are sophisticated trade craft, thorough documentation, redundant oversight, consistency and accountability, measures of effectiveness, and a process that confronts assumptions and complacency. We have endeavored to invest all of these qualities in our program. And we have worked closely with the director of national intelligence to ensure that our program is compliant and compatible with intelligence community standards.

The importance of the integrity of this program extends to our relationship with law enforcement and intelligence partners in the State, local, tribal, and private sector environments. Today more than ever those partnerships are enabling the kind of transparent and seamless collaboration that is expected of us by the people we serve and protect.

Increasingly we rely on one another's sources to guide actions and to trigger operations. It is essential, therefore, that in this partnership we work together to secure the integrity of that reliance through programs that allow for all of us to share best practices for effective human source programs.

The FBI is committed to playing our part. Working closely with elements of the Department of Justice to make human source management part of the range of issues we address in our constantly evolving partnerships at the State, local, tribal, and private sector level.

These challenging times, coupled with the pressure to fully implement the expanded expectations for the FBI, create a tempting environment for compromise. But such compromise would only serve the interests of those who would do us harm.

Our strength as an organization is reflective of our strength as a Nation that is reflected so well in our ability to balance liberty with security. I hope today that you will find that we have honored that commitment.

Mr. Chairman, since this is an open hearing, certain elements of our policy and our validation program are classified. I may be challenged to fully respond to some of your questions. I would like to say in advance that if it becomes the case, I will take your questions offline in a timely and full follow-up and appropriate channels.

Thank you again.

[The prepared statement of Mr. Murphy follows:]

PREPARED STATEMENT OF WAYNE M. MURPHY

Good morning, Chairman Scott, Chairman Nadler and Members of the Subcommittees.

I am pleased to be here today to discuss the Federal Bureau of Investigation's (FBI's) Confidential Human Source Program. As the FBI relies heavily on its large

contingent of human sources to collect information not accessible by other means, both the Attorney General and the Director have made clear their expectations that the FBI's Confidential Human Source Program must rise to the challenge of our current mission, integrate fully with the broader Intelligence Community, and set a standard for integrity and quality.

As the Assistant Director for the FBI's Directorate of Intelligence, I am responsible for coordinating and establishing standards for human source development, source validation and evaluation, and targeting and exploitation across the FBI and ensuring standards are met. I set the framework in place for policies and procedures that translate our authorities and the direction set forth by the Attorney General, into guidance upon which we spot, assess, recruit, sustain and validate FBI human sources.

On December 13, 2006, the Attorney General signed Attorney General Guidelines *Regarding the Use of FBI Confidential Human Sources,* mandating FBI compliance by June 2007. To that end, the FBI formulated an implementation plan to ensure compliance with the Attorney General Guidelines as they pertain to the utilization and administration of FBI confidential human sources. This implementation plan consists of a number of initiatives that have reshaped the FBI's Confidential Human Source Program, both in respect to its processes but also in its application to our mission. Today I would like to talk briefly about these endeavors.

Confidential Human Source Re-engineering Project

In October 2004, the FBI initiated the FBI's Confidential Human Source Re-engineering Project. Described as the "one-source concept," its key goals were to enhance the consistency, efficiency, and integrity of our Confidential Human Source Program across the FBI and better align source management with our current mission.

The one-source concept focused on creating a Confidential Human Source Program that operated consistently across locations and across investigative programs. Aside from the direct goal of implementing more efficient operation and oversight of the program, this approach allows for greater efficiency in training and continuity of performance as personnel work across individual mission boundaries. Moreover, this enables the FBI to more effectively contribute to partnerships as we increase our focus on joint operations.

Core elements of the re-engineering project included the development and deployment of a new policy manual, a disciplined validation process, and rigorous training and oversight to ensure compliance with the guidelines. The guidance set forth in the *Confidential Human Source Policy Manual* and the *Confidential Human Source Validation Manual* went into effect in June 2007.

The *Confidential Human Source Policy Manual* establishes FBI policy and procedure for the operation and administration of confidential human sources. This manual ensures the FBI fulfills its intelligence collection and information dissemination mission in compliance with the Attorney General Guideline requirements, protocols, rules, regulations, and memorandums of understanding with various law enforcement and Intelligence Community partners governing the FBI's Confidential Human Source Program. Specifically, the manual defines issues such as the criteria for source administration, the development and use of privileged and sensitive sources, source participation in otherwise illegal activity, joint operations with other agencies, source payments, a source's domestic and foreign travel, witness security, and immigration-related matters.

The *Confidential Human Source Validation Manual* establishes standardized policy and guidance regarding the validation process for confidential human sources. Specifically, this manual codifies the process and standards by which the FBI assesses the reliability, authenticity, integrity, and overall value of a given source. The new validation procedures also provide for a comprehensive and objective FBI Headquarters review. In conjunction with the one-source concept, the validation process will ensure every FBI source is subjected to a level of validation and provides the capability to evaluate sources in a broader national context and make decisions accordingly.

In preparation for the implementation of the Attorney General Guidelines in June 2007, the FBI set forth in its implementation plan training for all personnel involved in confidential human source matters. Central to this effort was an emphasis on training the FBI Confidential Human Source Coordinator personnel located in each of the 56 field divisions. The FBI hosted two identical Confidential Human Source Coordinator conferences in Quantico, Virginia, to accommodate personnel. These conferences were interactive train-the-trainer sessions based on a comprehensive curriculum that included presentations, information-sharing resource tools, job aids, and group exercises on the new Attorney General Guidelines, FBI confidential human source policy, validation, and other pertinent issues related to policy. The conference materials and resources were made available to the Confidential Human

Source Coordinators so they could return to their field offices to conduct training by the compliance date of June 13, 2007.

In addition to the above initiatives, the FBI has worked closely with our Intelligence Community counterparts to ensure we are building standards that will meet or exceed the expectations established for the Intelligence Community regarding the handling of human sources. The FBI recently developed a comprehensive human intelligence (HUMINT) development and collection course to significantly enhance our ability to routinely and systematically identify, target, develop, and operate human sources of high intelligence value. The Domestic HUMINT Collectors Course is a six-week certification course designed to inculcate Special Agents with the ability to engage in the full cycle of clandestine human source acquisition, to use passive and aggressive countersurveillance techniques, and to conduct clandestine acts from an overt platform. The first iteration of the Domestic HUMINT Collectors Course began in June 2007; participants included 26 HUMINT collectors from five field offices and two task force officers—one from the New York Joint Terrorism Task Force and one from the Washington Field Joint Terrorism Task Force.

COMMITMENT TO JOINT OPERATIONS

The success of our Confidential Human Source Program is dependent upon a strong and trusted partnership with our Intelligence Community and state and local law enforcement colleagues.

Over the past year, the FBI enhanced its relationships with the CIA and various military entities, to include Counterintelligence Field Activity, Foreign Counterintelligence Activity, Special Operations Command, and the US Army, US Air Force, Office of Special Investigations, and Defense Intelligence Agency. In particular, the FBI is building upon its relationship with the CIA and the US Department of Defense to ensure we undertake a program that leverages individual strengths, incorporates the benefit of our collective experiences, and supports the goals of the Intelligence Community. These efforts at increased cooperation are made with due regard for the appropriate role of the CIA and the military in the United States.

We have engaged across a range of fronts to strengthen our own program and contribute to the broader human source capacity of the Intelligence Community at large. Efforts to date have included establishing trusted professional working relationships with our counterparts, joint training and training development, joint duty assignments, joint targeting and source development, and joint reporting. Our relationships are marked by recurring meetings at the working level and a commitment on the part of leadership to meet the expectations for a truly national service.

Furthermore, the FBI recognizes the need to engage our state and local law enforcement counterparts. We have begun training federal, state, and local law enforcement agencies that provide representatives to the Joint Terrorism Task Forces and the Field Intelligence Groups located in field offices around the country. The FBI utilizes Confidential Human Source Coordinators in the field as trainers to instruct all FBI agents and task force officers regarding compliance with the Attorney General Guidelines, the *Confidential Human Source Manual,* and the *Confidential Human Source Validation Manual* as well as techniques in the identification, assessment, recruitment, and operation of human sources. Task force officers are co-case agents for numerous confidential human sources operated by FBI agents and jointly manage sources' activities in counterterrorism, counterintelligence, cyber, and criminal investigations. The ability to address HUMINT in a cooperative working environment encourages other law enforcement agencies to share their intelligence base with the FBI, resulting in an enhanced macro view of the local and regional domains.

CONCLUSION

The American people have entrusted us with a tremendous responsibility, and we are committed to living up to their expectations. To that end, we must be an engaged, forward-leaning partner in the broader Intelligence Community as well as with our state and local law enforcement counterparts; we must ensure our standards and processes meet the criteria of integrity and quality; and we must conduct our mission with an unwavering commitment to the defense of civil liberties and the protection of privacy rights.

Thank you for time. I look forward to answering your questions.

Mr. SCOTT. Mr. O'Burke?

TESTIMONY OF PATRICK O'BURKE, COMMANDER, TEXAS PUBLIC SAFETY COMMISSION NARCOTICS SERVICE, AUSTIN, TX

Mr. O'BURKE. Good morning. I would like to thank the Chairman and honored Committee Members for inviting me to appear before this hearing. In 2002, Texas Governor Rick Perry recognized significant problems that occurred within drug task forces that were funded through the Edward Byrne Memorial Fund in Texas.

In a sweeping reform, Governor Perry directed that the Texas Department of Public Safety undertake operational oversight of all such Byrne-funded drug task forces in Texas. There have been other examples cited here today and in Texas.

However, the problems that occurred in Tulia, Texas most underscore the core issues that eroded public confidence in drug law enforcement in Texas. The Department of Public Safety Narcotics Service quickly identified factors such as poorly defined output measures for program management, a lack of standardized operating policies and procedures, and poor informant control and management as key contributors to Tulia and other similar failed drug enforcement efforts.

Measuring police performance and achieving results and reductions or absence of crime, in particular, violent crime, is a difficult task. We work closely with the governor's Office of Criminal Justice Division to develop meaningful strategies and performance measures that we could link to such drug enforcement efforts.

It is always necessary for an effort to have activities monitored such as work products in order to determine if the initiative is working within the scope and mission of its direction. And as such, we have defined output measures that have been typically recorded for drug law enforcement. These usually included numbers of investigations or investigative reports written, numbers of arrests for narcotics law violations, and amounts of illegal drugs seized.

However, the above output measures alone cannot adequately gauge if any success is being achieved in actually disrupting the illegal distribution of drugs. To define success by measuring only sheer volumes of arrest numbers would mean that more arrests must equate with greater success. This clearly does not move us toward the goal of crime reduction.

Arrest numbers also do not attach any value to that arrest when one drug user equals the arrest of one drug kingpin. Consequently, reliance on output measures alone for grant funding mechanisms or police performance evaluations may actually cause drug enforcement initiatives to fail to seek out reductions in crime.

Consequently, the narcotics service worked to develop outcome measures that will more adequately define if we are achieving desired results. And we looked at other measures such as changes in overall crime rate, reduction in drug overdoses, changes in pricing and purity of illegal drugs, and surveys of drug use by certain population as other outcomes that have been reported.

However, these are very rarely linked uniquely to the individual law enforcement effort. As such we work to define that law enforcement was most uniquely suited to working against drug traffickers who we defined as individuals who are operating and dealing drugs for criminal profit as a motive and drug trafficking organizations

as five or more who worked together in concert to sell drugs outside of their immediate group.

We then looked at intelligence collection as a method of how initiatives drove their investigations, how they directed their resources, and how they could subsequently impact these criminal groups. As such, we defined the number of drug trafficking organizations dismantled, the percentages of arrests that could be attributed to proactive work against targeted trafficking organizations and members. And lastly, we looked at percentages of total arrests that we defined as end users.

The narcotics service worked to define the end user as the intended user of illegal who is generally motivated by addiction. Impacting the behavior of end users may involve law enforcement actions, but are generally more effectively treated and managed by treatment, corrections, and rehabilitation options. As such, directing law enforcement investigations against these individuals should receive limited or no priority from drug enforcement initiatives that seek to disrupt illegal trafficking of drugs.

This overall change in strategy was necessarily accompanied by standardized operational policies that mandated professional standards, including background checks, ethical conduct practices, informant management requirements and protocols, and best practices for conducting investigations.

Lastly, we developed an outcome measurement tool that adequately defined and collected data in order that we could look at program evaluation and accountability. I think it is timely and appropriate for us to clearly define the role of law enforcement in comprehensive drug control policy efforts to achieve reductions in drug abuse.

Drug control policy efforts must view law enforcement as only a piece of comprehensive programs, complemented by drug education, treatment, and rehabilitation. Partnerships with legislative bodies and law enforcement leadership are necessary to properly develop purpose-driven enforcement strategies. And these must have effective outcome measures to positively identify and reward professional police efforts and provide for accountability.

Thank you.

[The prepared statement of Mr. O'Burke follows:]

PREPARED STATEMENT OF J. PATRICK O'BURKE

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WRITTEN TESTIMONY FOR
THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY,
AND THE SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND CIVIL LIBERTIES

Joint Oversight Hearing on
Law Enforcement Confidential Informant Practices

July 19, 2007
10:00 a.m. – 12:00 p.m.
2141 Rayburn House Office Building

J. Patrick O'Burke
Deputy Commander, Narcotics Service
Texas Department of Public Safety

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Good morning, I would like to thank the honored committee members for inviting me to appear this morning.

In 2002 Texas Governor Rick Perry recognized significant problems that had occurred within the drug task forces that were funded thru the Edward Byrne Memorial Fund in Texas. In a sweeping reform Governor Rick Perry directed that the Texas Department of Public Safety undertake operational oversight of all Byrne funded drug task forces in Texas.

There have been other examples cited; however the problems that occurred in Tulia Texas most underscore the core issues that eroded public confidence in drug law enforcement in Texas. The Department of Public Safety Narcotics Service quickly identified factors such as poorly defined output measures for program management, a lack of standardized operating policies and procedures, and poor informant control and management as key contributors to Tulia and other similar failed drug enforcement efforts.

Measuring performance and success for police efforts in achieving the desired result of reductions or absence of crime, particularly violent crime, is a difficult task at best. The Department of Public Safety collaborated with Governor Perry's Criminal Justice Division to develop meaningful strategies and performance measures that could be directly linked to drug enforcement efforts.

It is necessary to have identified activity measures to determine if drug enforcement initiatives are producing a work product and working within the scope and mission of narcotics enforcement. These activity measures that record a volume of work should be defined as ***OUTPUT MEASURES*** to show that the effort produced work within the tasking.

For drug law enforcement these measures have normally been defined by the following.

- **The number of investigations and/or investigative reports written**.
- **The number of arrests for narcotics law violations.**
- **The amount of illegal drugs seized.**

However, the above ***OUTPUT MEASURES*** alone can not adequately gauge if any success is being achieved in actually disrupting the illegal distribution of drugs. To define success by measuring only the sheer volume of arrests would mean that more arrests would equate with greater achievement. This clearly does not move towards the goal of crime reduction. Arrest numbers also do not attach any quality to that work product when the arrest of one drug user equals the arrest of one drug "kingpin". Consequently, reliance on ***OUTPUT MEASURES*** alone for grant funding mechanisms or police performance

evaluations may actually cause drug enforcement initiatives to fail to seek out reductions in crime.

Consequently, the Narcotics Service worked to develop ***OUTCOME MEASURES*** that will more adequately define if we are achieving a desired result. In the past, there have been outcome measures for narcotics enforcement that have been tied to changes in overall crime rates, reductions of drug overdoses, changes in pricing or purity of illegal drugs and surveys of drug use by certain population groups. While these may be useful measures for globally evaluating drug control policy efforts that contain education, treatment and corrections components, along with law enforcement, they can not be uniquely linked to the individual law enforcement effort.

As such we should seek to define outcome measures that are clearly linked to law enforcement initiatives in identifying and disrupting illegal distribution of drugs. Law enforcement is uniquely suited to disrupting or eliminating drug distribution by prioritizing its efforts and directing them towards identified drug traffickers and trafficking organizations. The Narcotics Service defined a **"Drug Trafficker"** as a person who works to illegally sell drugs with profit or income as the primary motivation. A **"Drug Trafficking Organization"** was then defined as five or more drug traffickers who work to illegally sell drugs outside of their immediate conspiracy. The desired outcome measures would then identify how drug enforcement efforts collect intelligence, direct their resources and subsequently impact these criminal groups.

As such the desired **OUTCOME MEASURES** developed included the following.

- **Number of Drug Trafficking Organizations dismantled.**
- **Percentage of arrests defined as "targeted" Drug Trafficking Organization members and "targeted" Drug Traffickers who were successfully disrupted.**
- **Percentage of total arrests that are defined as "End Users".** This outcome measure seeks to track the lack of or reduction of "End Users" arrests as a desired result for law enforcement efforts.

The Narcotics Service defined the **"End User"** as a person who is the intended user of illegal drugs and generally motivated by addiction. Impacting the behavior of an **"End User"** may involve law enforcement actions, but are generally more effectively managed by treatment, corrections or rehabilitation options. As such directed investigations against these individuals should receive no priority from drug enforcement initiatives that seek to disrupt illegal trafficking.

This overall change in strategy in Texas was necessarily accompanied by standardized operational policies that mandated professional standards for drug

enforcement initiatives. These standards included background checks, ethical conduct standards, informant management requirements and protocols, and *"Best Practices"* for professionally conducting narcotics investigations. Finally a written measurement collection tool that accurately recorded key ***OUTCOME MEASURES*** along with other desirable measures was implemented for program evaluation and accountability.

It is timely and appropriate for us to clearly define the role of law enforcement in comprehensive drug control policy efforts to achieve reductions in drug abuse. Drug control policy efforts must view law enforcement as only a piece of comprehensive designs, complemented by drug education, treatment and rehabilitation, and community corrections as part of solutions to deter drug abuse. Partnerships with legislative bodies and law enforcement leadership are necessary to properly develop purpose driven enforcement strategies. These strategies must have appropriate management and oversight along with developing effective key ***OUTCOME MEASURES*** to positively identify and reward professional police efforts and provide for accountability. All of these elements are necessary to restore faith in the ability of law enforcement to positively impact illegal drug distribution and abuse in our communities which is absolutely an achievable goal.

J. Patrick O'Burke
Deputy Commander, Narcotics Service
Texas Department of Public Safety

ATTACHMENTS;

1) Drug task force operational polices.

2) Performance measurement tool.

3) Investigative violator code classifications.

ATTACHMENTS

PREFACE

Pursuant to H. B. 1239 passed by the 79th Regular Session of the Texas Legislature, the Department of Public Safety Narcotics Service has produced this manual to document the operational policies and procedures required by the statute governing the operation of multi-county drug task forces. These policies and procedures are intended to provide standardized operational procedures by which multi-county drug task forces will operate in Texas. Nothing in these policies is intended to preclude the establishment of more restrictive operational policies by any task force. The purpose of these policies is to comply with H. B 1239 and provide uniform drug law enforcement to the citizens of the State of Texas. It is the responsibility of the Project Director to ensure that all task force personnel receive and review this policy manual.

Revised 09/01/2005

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Revised 09/01/2005

I. PROFESSIONAL CONDUCT

A. Task Force Officer Responsibilities.

1) This policy covers General Responsibility; Personal Conduct; Off-Duty Conduct; Court Appearance; Other Conduct; and Acceptance of Rewards, Gratuities, and Contributions. Task Force officers realize their obligation to the community and should strive to act in a professional manner in order to inspire the public trust and confidence. Maintaining professionalism should be a primary goal of Task Force officers and will ensure the continued trust and respect of the community. All officers are public servants and shall keep all contacts with the public professional and courteous.

2) All officers have a responsibility to the community, to their agency, and to themselves.

B. Personal Conduct

All officers are subject to public scrutiny and shall strive to present themselves as leaders and professionals within the community, whether on or off-duty.

1) All officers and personnel will abide by Task Force Operational Policies and Procedures. Failure to do so will subject Task Force officers and personnel to recall to their parent agency. Task Force Commanders will investigate or refer for investigation to parent agencies, personal conduct by Task Force officers or personnel when: the situation involves a criminal act; the performance of the officer or personnel is affected; discredit is brought to the Task Force; the operation of the Task Force is impaired. **The Project Director shall notify the director in writing, within five calendar days of the arrest, of the identity of any personnel that are arrested, the reason for the arrest, and any resulting actiou taken by the task force.**

C. Off-Duty Conduct

The responsibility placed upon officers requires that their conduct be exemplary at all times to project a positive image to the community.

1) Officers are to maintain the same professional demeanor both on-duty and off-duty. Officers may be recalled to duty at any time. It is the responsibility of each Task Force officer to notify his/her Task Force Commander or supervisor if they are unable to report to duty and are not physically and mentally fit to perform their duties.

2) A situation may arise at any time when an officer may find it necessary to take some type of law enforcement action.

   a. Officers must have in their possession at all times their official identification cards and their badges. An exception to this policy would be in those instances where, in specific undercover operations, it would not be feasible to have such items in their possession.

   b. All officers should be armed while on duty with a firearm with which they have demonstrated proficiency and has been approved by their parent agency. No task force officer may carry a Class III firearm, including fully automatic firearms without the permission of the Project Director.

   c. The display of the official identification card and badge while off-duty is limited to only those situations where an officer is taking police action.

   d. Officers may find themselves in circumstances, while off-duty, when the exercise of police action is warranted. All officers taking such police action, while off-duty, should be guided by any applicable parent agency policies. Off-duty police action taken by officers shall be reported immediately to the appropriate supervisor.

   e. When circumstances do not permit police action, the off-duty officer shall attempt to gather all useful information and relay it to the appropriate law enforcement agency at the earliest opportunity.

D. Court Appearance

1) All officers and personnel shall respond to all summons and subpoenas issued by any judge or court of law with competent jurisdiction.

2) Failure to appear at court will be considered dereliction of duty. It is the officer's responsibility to notify the court and his/her supervisor when, for a valid reason, he/she is unable to appear in court as scheduled. All officers shall comply with any instructions provided by the court or prosecutor.

3) If an officer determines that they will be unable to appear for court at the designated time, whether on- or off-duty, it is his/her responsibility to notify the court.

4) All officers shall verify their necessity to appear in court with either the court or prosecutor within 24 hours or on the business day prior to the court appearance.

5) All officers shall wear appropriate business attire or employing agency uniform when called to testify in court.

6) When any officer is served with a subpoena to testify on behalf of a defendant in a criminal case, said officer shall promptly notify his chain of command and the prosecuting attorney.

E. Other Conduct

1) Professional Referrals
   a. During the course of employment or official duties, an officer shall not refer any party to an attorney; tow company; bondsman; hospital or doctor; insurance company; or another professional person, group, or organization.

2) Relationship with Supervisors
   a. All officers shall obey lawful orders, directed to them by supervisors, which are necessary for the efficient conduct of Task Force business.

3) Relationship with Subordinates
   a. Supervisors will conduct themselves in such a manner to elicit performance by subordinates, which are consistent with the goals and objectives of the Task Force.

F. Acceptance of Rewards, Gratuities, and Contributions

Seeking or accepting special privileges or favors is forbidden conduct and reflects discredit on the law enforcement profession. Officers and personnel shall not place themselves in a position of compromise by soliciting or accepting gratuities.

1) Retail merchants
   a. In cases when merchants refuse to accept full payment from officers for goods and services rendered, officers, without creating a disturbance or public spectacle, shall make every effort to pay for the services and goods and explain the Task Force policy.

2) Contributions from Outside Sources
   a. Money or any other type of contribution received from a source outside the Task Force which is intended to benefit a particular

fund or community activity will be directed toward the appropriate Task Force fund or function.

b. All requests to accept donated equipment or other contributions shall be forwarded to the Project Director or his designee.

3) No officer or employee shall appropriate for their personal use any evidence, lost, found or stolen property, issued or Task Force property, or entrusted property.

II. TASK FORCE BACKGROUND CHECKS

A. All potential candidates or appointees considered for assignment to a multi-county drug task force, regardless of rank (including non-commissioned personnel), must have a standardized task force background investigation completed that must include a fingerprint based background check through DPS and the FBI. (This policy applies to those currently employed by a law enforcement agency.)

B. Once the candidate or appointee has provided the personal information needed to perform the background investigation, the Task Force Commander, or his designee, will conduct the designated background checks and review prior work history, as appropriate. Task Force Commanders who need assistance in verifying the submitted information may request the assistance of the appropriate DPS District Captain.

C. The background investigation should be completed within ten (10) working days from the date the candidate or appointee has provided the personal information needed to perform the background investigation. A copy of all background surveys will be maintained in the Task Force office, subject to review by appropriate DPS personnel.

D. The Task Force Commander and/or the Project Director may utilize the background investigation as an administrative aid in formulating a final determination regarding a candidate's assignment to the Task Force.

E. DPS retains the right to assess the suitability of personnel assigned to the Task Force as part of the review of the composition of the task force and require changes in any assignment to include return of any personnel to the parent agency.

III. JOB PERFORMANCE EVALUATIONS

The Task Force has a responsibility to each Task Force officer to provide them with an accurate assessment of their job performance. A job performance evaluation should also provide an ongoing skills development program to enhance each

officer's contribution to the Task Force. Such Task Force performance evaluations are intended for the purpose of enhancing Task Force operations.

A. The Task Force Commander may utilize parent agency evaluation formats in performing the assessment of job performance.

B. Task Force performance evaluation is not intended to replace any performance evaluation used by a member's parent agency or to determine promotions or pay-for-performance reviews by that agency.

C. All Task Force officers will maintain an acceptable level of job performance in their assigned duties. Any officer who cannot maintain an acceptable level of job performance, as determined by the Task Force Commander, will be subject to return to their parent agency.

D. The Task Force job performance evaluation system is designed to achieve the following objectives:

1) Help improve job performance through supervisor/subordinate counseling/coaching and goal setting.

2) Promote job satisfaction through self-knowledge of competency and progress toward desired goals.

3) Identification of weaknesses and need for training.

E. It will be the responsibility of the Task Force Commander to ensure performance evaluations are conducted for each Task Force employee on an annual basis. The Task Force Commander may designate appropriate supervisory Task Force personnel to conduct such evaluations. All Task Force performance evaluations will be reviewed and approved by the Task Force Commander.

F. Task Force performance evaluations are a function of Task Force administrative operations and, as such, will be retained by the Task Force Commander subject to review by appropriate DPS personnel. Copies of Task Force performance evaluations will be made available to parent agency employers upon request. Such requests should be made in writing from the member's Agency head or his/her designee. This written request may be in the form of a one-time, on-going request to receive all subsequent evaluations.

G. All Task Force performance evaluations will be conducted in private between the Task Force employee and a Task Force supervisor and will remain confidential. A copy of the performance evaluation will be made available to the Task Force member.

IV. INVESTIGATIVE REPORTS

A. A Task Force supervisor must review and approve all investigative reports, which are prepared and submitted by Task Force officers. Once approved, all investigative reports will become a part of a numbered investigative file. Task Forces may utilize their own investigative report format provided the following described criteria are met.

1) Task Force officers must include all relevant information in investigative reports concerning:
   a. Criminal activity
   b. Suspect identification and disposition
   c. Contraband information and identification
   d. All monies expended for evidence.
   e. Description and disposition of all property seized for forfeiture.
      (1) Make, model, serial number, size, weight or any other significant identifier will be utilized to describe all such property.
      (2) All property seized for forfeiture shall be specifically designated as such in the investigative report.

2) Completed case files for prosecution and/or forfeiture will include the following:
   a. Offense reports
   b. Investigative reports
   c. Supporting documents from all participating agencies
   d. Copies of search warrants, arrest warrants, supporting affidavits and returns
   e. Certificate of magistrates
   f. Confessions or witness affidavits
   g. Consent to search forms
   h. Booking dockets and arrest suspect supplements
   i. Criminal histories
   j. Vehicle registration returns
   k. Chain of evidence documentation
   l. Evidence and crime lab reports
   m. Photo proof sheets
   n. Civil and/or criminal disposition documents

3) All investigative reports and related documents, civil or criminal, will be considered permanent records of the Task Force. Each Task Force is responsible for maintaining, on-site, a readily accessible copy of every Task Force generated investigative report. Investigative reports must be maintained for three years following the final disposition of all persons and property involved. **The Project Director's agency will be responsible for maintaining all records pursuant to**

that agency's record retention policy should the task force dissolve or discontinue operations.

V. DRUG EVIDENCE STORAGE

During the course of any Narcotics Investigation, the seizure of drugs is mandatory. In some cases, large seizures will be made. Most cases, however, will be in an amount that is manageable. The key to any seizure is that accountability is followed and that sound policies and state law are followed to assure a proper chain of custody is maintained. Task Force officers will adhere to the following procedures relating to drug evidence storage.

A. Only initial temporary storage of drug evidence will be permitted at task force offices. The seizing officer, within five (5) working days of the seizure, will submit drug evidence to a laboratory holding DPS accreditation appropriate for the evidence being analyzed. In those instances where submissions are delayed due to reasons such as pending fingerprint analysis, a form memo stating such should be signed by the Task Force Commander or supervisory designee and included in the case file. Any lab holding the appropriate DPS accreditation as noted above may be utilized to analyze drug evidence so long as the drug evidence remains with that lab or another law enforcement agency with a suitable evidence storage facility. Drug evidence is not to be returned to the Task Force offices for storage. U.S. Mail will be permitted for small exhibits utilizing registered/return receipt mail.

B. All drug evidence temporarily stored at Task Force offices shall be secured in a restricted access area with adequate security to provide for proper safekeeping.

C. For cases involving large seizures, Labs should take random samples and destroy excess quantities pursuant to applicable State statute. In those instances, the use of photographic equipment (i.e. still photos and/or video) of large seizures is strongly encouraged.

D. The institution of an appropriate chain of custody record and evidence tracking mechanisms should be in place. Such records should adequately document custody transfers of drug evidence from its seizure until its submission for laboratory analysis.

E. Controlled substances utilized as "show dope" for reversals will not be maintained or kept at task force offices. If needed, these items will be made available from one of the parent agencies from controlled substances awarded to such agency for that purpose pursuant to a valid court order or, in certain instances, from other agency crime laboratories. This will ensure that

all Task Forces are in compliance with Sec. 481.159 of the Health and Safety Code as it relates to the Disposition of Controlled Substance or Plant.

F. Limited quantities of controlled substances may be maintained at Task Force offices for utilization in K-9 training. These substances must have been awarded to the appropriate law enforcement agency by an appropriate court for official use. Such controlled substances will be maintained in a safe, in the custody of the Task Force Commander or his supervisory designee. These controlled substances will be logged out of the safe and provided to K-9 training officers when needed and returned upon completion of the training.

Controlled substances utilized for such training should be properly packaged to prevent damage, loss or accidental ingestion by dogs during training. All K-9 training officers will retain sole custody of such controlled substances in a secure environment. Any loss of controlled substances during training shall be immediately reported to the Task Force Commander and documented in writing for supervisory and DPS review.

G. The timely destruction of drug evidence is crucial. The use of an appropriate court order should expedite the destruction process and still maintain the mandatory accountability of these items. Task Force Commanders will ensure that pending cases are routinely checked to determine final case dispositions and provide for timely destruction of evidence.

H. The Project Director' Agency will be responsible for the storage and destruction of all evidence seized by the task force should the task force dissolve or cease operations.

VI. ENTRUSTED PROPERTY

A. Police power to seize the personal property of citizens is the exercise of authority that should never be taken lightly. Citizens are ordinarily under no obligation to prove ownership of any property found in their possession. Conversely, the burden is upon the officer to prove that property is not legally in possession of the citizen. Unless investigation can establish otherwise, it should be presumed that property found in the possession of any citizen is that citizen's property. If such property is seized for any reason, the citizen is entitled to recover that property when there is no longer a bona fide reason for the Task Force to retain it. (This policy includes weapons; it excludes any contraband.) It is, therefore, Task Force policy to seize and impound property only when a legitimate need so requires and to retain such property only so long as that need is served.

1) Only evidentiary items will be seized (i.e. items of contraband, evidence, stolen property or property that is believed to be from the sale of drug proceeds.) This should be based on probable cause that

exists at the time of seizure. Task Force officers shall abide by all legal requirements set forth in Article 59.03, Code of Criminal Procedure, regarding seal, notification and disposition of property seized under this authority.

2) Proper and consistent documentation of **ALL** seized property is crucial. A complete inventory of all items seized will be made as soon as is practicable and will be maintained as a part of the applicable case file. In the case of a search warrant, along with a copy of the search warrant, a copy of an inventory of seized items will be left at the scene.

3) When property is seized and brought to the respective task force office, a complete and thorough log will be maintained. Entrusted property will be maintained in a secure property room. Only designated officers (i.e. entrusted property officer) will have access to the entrusted property room.

4) Along with the proper inventory of seized property, the entrusted property room officer will maintain a detailed property room log. In addition, all property will be tagged with a property tag when logged into the property room. This will ensure accountability of all items seized as well as a readily available means to check any seized items. The property log and the property room will be subject to inspection by the appropriate DPS personnel.

5) All items seized need to have a proper and timely disposition through the court system.

6) All Task Force officers shall be in compliance with State statute prohibiting officers from obtaining disclaimers from individuals for seized property.

7) Task Force members will, at no time, use any entrusted property for personal use.

8) All task force officers are prohibited from seizing, or allowing to be seized, any firearm which will be sold for asset forfeiture purposes. Should a Task Force desire to seize a firearm which is intended to be placed in service, then the written approval of the Project Director must be obtained prior to the filing of the forfeiture. Any firearm which is placed into service, must be awarded to the Project Director's agency. Additionally, the court order must require that the weapon be used for official purposes only and then destroyed when there is no longer a need to have the weapon.

B. Seized currency

1) All seized money or currency will have a timely transfer to the appropriate local entity responsible for depositing the currency into an appropriate account, pursuant to Article 59.03, Code of Criminal Procedure. If currency is to be held at the office for any period of time, then it will be secured in a locked safe until such transfer can be made.

3) As with seized property, the proper documentation of all seized currency will be maintained.

4) All necessary documentation will be maintained as to the current status and disposition of the currency.

4) The aforementioned documentation will readily show the "chain of custody" of all seized currency from the initial seizure through final disposition.

VII. SEARCH WARRANT OPERATIONS

Officers will comply with Amendment IV of the United States Constitution and Article 1, Section 9, of the Texas Constitution in every instance of search and/or seizure. Officers will ensure that, at a minimum, the following procedures are followed:

A. The search warrant affidavit will be reviewed by a supervisor, his designee or a prosecuting attorney before the affidavit is presented to the appropriate magistrate.

B. An operational plan will be produced and reviewed by a supervisor or his designee prior to the execution of the search warrant. A copy of the operational plan will be provided to all participating officers at the raid plan briefing.

C. A raid plan briefing will be conducted prior to the execution of the search warrant. Only officers participating in the briefing shall be permitted to participate in the entry phase of the search warrant.

D. Participating officers shall be clearly identified as police officers with raid jackets or law enforcement agency uniforms and shall wear protective vests.

E. Officers participating in search or arrest warrants, "buy-bust" arrests or any other enforcement operations shall not wear masks. Task Force Commanders will insure a sufficient number of officers are available to conduct enforcement operations without the utilization of personnel whose

identity should not be revealed. This policy does not preclude the use of nomex protective hoods by officers participating in the seizure of clandestine laboratories.

F. Officers will seize only contraband or that property which has evidentiary value and will produce a detailed inventory of items seized. A copy of the inventoried items shall remain at the scene. All seized property will be transferred to the custody of the case agent or his designee for proper processing and safekeeping.

G. Officers will submit a copy of the inventory along with the search warrant return to the issuing magistrate within the statutory time limit.

VIII. UNDERCOVER OPERATIONS

Covert undercover operations are an effective investigative technique in establishing admissible, credible evidence in support of a criminal prosecution against drug trafficking suspects. The ultimate goal of any undercover operation is a criminal conviction. To that end, every aspect of undercover operations should be well planned, deliberate and performed in compliance with all applicable policies. The actions of undercover officers should always be appropriate, under the circumstances, and easily justified to prosecutors, judges and juries. Officers conducting covert investigations to obtain evidence for criminal prosecution will conduct such investigations under the following guidelines:

A. Officers will obtain the approval of a supervisor prior to the initiation of an undercover investigation.

B. Officers will corroborate undercover investigations with the assistance of other officers conducting surveillance of the case officer, informants and suspect(s).

C. When possible, officers will utilize audio and/or video recording systems when negotiating with suspects. All videotapes or audiotapes shall be considered as evidence and handled as such, regardless of the quality of the recording. Videotapes and audiotapes, which are evidence in criminal offenses, shall be retained until such cases receive final disposition.

D. It is understood that in certain undercover operations the consumption of alcoholic beverages may be necessary. Officers, in such situations, will at all times be physically and mentally fit to perform their duties. Officers shall not operate a motor vehicle while intoxicated or impaired.

E. Officers shall not use or physically simulate the use of any type of narcotics except when physical harm could come to the officers if they do not simulate use of the narcotics. In these instances the officer will immediately after, and

when safe to do so, contact his immediate supervisor and advise him of all the facts of the situation.

IX. OPERATIONAL PLANS

Operational plans are prepared to guide officers through the execution of an enforcement action. They provide for the assignment of personnel, identification of suspects, vehicles and locations and play a significant role in the safety of officers involved.

A. An operational plan will be prepared for each significant tactical or enforcement operation.

B. The operational plan will be generated on an established format and shall note case and event deconfliction procedures taken. The operational plan will state a clear objective and detail the specific roles and assignments of each participating officer. The plan shall also include emergency contingency information.

C. The operational plan will be reviewed by a supervisor or his designee prior to the execution of the enforcement action.

D. Operational plans will be provided to all officers participating in the enforcement action for which they are prepared.

E. Operational plans shall be kept on file in the investigative case file or other repository site, subject to review by appropriate DPS personnel.

X. DECONFLICTION

Narcotics investigations have the very real potential for multiple agencies to be conducting parallel investigations on the same criminal suspects or organizations at any given time. There are serious safety considerations in such situations that may bring law enforcement Investigators into high-risk situations without realizing the presence of other law enforcement Investigators. Similarly, such parallel investigations, conducted independently, are less efficient and effective than cooperative law enforcement efforts conducted in a coordinated manner.

A. All officers will utilize the services of an "event" deconfliction center for all significant enforcement actions. The Case Agent or the Case Agent's supervisor will be responsible for providing the deconfliction center with information about known suspects, vehicles and locations from operational plans to avoid the potential of conflicting police enforcement actions occurring at or near the same location. Officers should utilize existing HIDTA deconfliction centers in Dallas, Houston, El Paso or San Antonio for

search warrant execution, controlled deliveries, reverse role investigations, buy busts, significant arrests and similar high-risk situations.

B. All officers should attempt to utilize the deconfliction center, where practicable, for significant investigative efforts such as long term or planned surveillances or undercover operations.

C. Where a formal deconfliction center does not cover the location of the intended enforcement operation, the Case Agent, or his supervisor, should notify the appropriate law enforcement agencies within the area of operation to ensure appropriate deconfliction has been conducted.

D. On any investigative activity conducted by an officer outside his assigned area of responsibility, the Task Force Commander supervising that officer shall notify the affected law enforcement agencies of the desired investigative efforts within their area. This notification should occur prior to beginning the investigative activity. It shall be the responsibility of the Task Force Commander to ensure proper deconfliction is conducted.

E. Any investigative activity that takes an officer out of his assigned area of responsibility will require prior notification of the appropriate law enforcement agencies within the area of operation.

XI. INTERDICTION

Criminal drug traffickers and organizations must have the ability to transport illegal drugs, contraband and currency or assets to successfully continue their operations. Aggressive criminal interdiction conducted by trained and experienced officers can be successfully utilized in strategic locations to thwart the efforts of criminals in their illegal acts.

A. All highway interdiction stops must be lawful and based on the observation of a violation of law or probable cause to believe that some law has been or is being violated. All investigative reports should adequately set out the observations, facts, information or circumstances for searches and probable cause for all arrests and seizures.

B. All agencies shall adopt strict written policies that prohibit racial profiling in making stops. (Refer to Texas CCP article 2.131 and 2.132.) All agencies shall adopt a reporting form for recording data required in Texas CCP Article 2.133 in making traffic and pedestrian stops. All information shall be reported by the parent agency as required by law.

C. Task Force officers shall not engage in racial profiling. Racial profiling is defined as "a law enforcement action" based on an individual's race,

ethnicity, or national origin rather than on the individual's behavior or on information identifying the individual as having engaged in criminal activity. Racial profiling is illegal, inconsistent with the principles of American Policing, and an indefensible public protection strategy.

D. It is the task of supervision, at every level, to ensure that officers are not engaged in racial profiling and that they clearly understand that racial profiling will not be tolerated. Officers found to be engaged in racial profiling, as well as supervisors found to have condoned, encouraged or ignored patterns of racial profiling, will be subject to disciplinary action.

E. An exception is granted under Article 2.135 of the Texas Code of Criminal Procedure for agencies making use of a video camera in recording traffic or pedestrian stops. All videotapes or audiotapes shall be retained for a minimum of 90 days. Supervisors should randomly review videotaped stops to insure that all stops are lawful and within policy. Videotapes or audiotapes, which are evidence in criminal offenses, shall be retained until such cases receive final disposition. A videotape or audiotape shall be considered as evidence regardless of the quality of the recording.

F. All vehicular traffic stops made during interdiction efforts shall be made in vehicles bearing the official markings of a participating law enforcement agency and equipped with police emergency lights. The seal or marking of the assigned officer's law enforcement agency, such as "Town Police Department" or "County Sheriff's Office", shall be clearly and prominently displayed on the vehicle. Narcotic Task Forces are not considered law enforcement "agencies" within the definition assigned by the Code of Criminal Procedure; however, nothing in this policy is intended to prohibit a Narcotic Task Force from including their name or markings in addition to the law enforcement agency markings.

G. All officers initiating vehicular traffic stops shall be in an appropriate, readily identifiable uniform that is consistent with local community standards and displays the badge or patch of his/her employing law enforcement agency. All officers engaged in highway interdiction stops should maintain an appropriate personal appearance for uniformed law enforcement officers.

H. All officers making interdiction stops should take appropriate enforcement action when violations are encountered. Citations and written warnings should be completed and include information on race/sex and whether searches were conducted.

I. A written consent to search or videotaped consent to search is preferable when conducting consent searches.

J. Seizures of currency or assets must be lawful and within current State or Federal statute. Pursuant to Texas CCP Article 59.03, at the time of seizure, no officer shall request, require or in any manner induce a person to execute any document that purports to waive their interest in the seized asset. The use of such waiver or disclaimer in forfeiture investigations is prohibited. The seizure of currency or assets must be treated as any other seizure of contraband and a sufficient investigation conducted to determine the suitability of continuing with forfeiture proceedings. The generation of revenue for funding should not be the goal of any asset forfeiture. A thorough and adequate criminal investigation should also be conducted in currency seizures to determine if there is merit to any criminal charges being filed.

XII. CONTROLLED DELIVERIES

Narcotics investigations involving the use of controlled deliveries present special concerns for law enforcement personnel in regard to the security of controlled substances. This enforcement tool, when used properly, can be a valuable asset for identifying significant suspects involved in the smuggling of narcotics. The following policies and procedures will assist Task Force officers in conducting controlled deliveries:

A. Controlled delivery investigations will require prior notification to the appropriate law enforcement agencies within the area of operation.

B. Controlled delivery investigations will require the completion of a detailed Operational Plan reviewed by a supervisor.

C. Controlled delivery investigations will require approval from originating prosecutor and concurrence and approval from affected prosecutor.

D. All officers will conduct proper and thorough deconfliction with area law enforcement officers.

E. Controlled delivery investigations will require concurrence and assistance from law enforcement agencies with appropriate jurisdiction.

F. Officers will ensure that all reasonable and prudent measures are instituted to secure controlled substances.

XIII. REVERSE ROLE UNDERCOVER OPERATIONS

Reverse role undercover operations are an appropriate investigative tool to strike at the financial base of drug traffickers. Such operations involve numerous physical and legal hazards beyond those customarily found in normal undercover operations. A uniform procedure will assist officers in producing prosecutable cases and ensure integrity and security of the operation.

Reversals should generally be directed against significant, identified narcotics traffickers. Focusing upon known violators allows for proper targeting and planning thus reducing the possibility of robbery attempts or inadvertent involvement in another agency's narcotics investigation. Reversals often result in the seizure of assets from the drug trafficker. Since the objective of such operations is the immobilization and incarceration of the narcotics trafficker, asset seizures should be secondary in the decision to proceed with this technique. Asset seizures, per se, should not be grounds for initiating a reversal operation.

A. Definitions

1) Reverse Role Undercover Operation – A variation of a traditional investigation in which the undercover investigator poses as a drug seller rather than a drug buyer. **The absence of "flash dope" or other contraband during any undercover meetings and subsequeut investigation does not negate this definition nor preclude the following of this policy.**

2) Major Trafficking Organization – An illicit business enterprise composed of one or more members whose documented liquid assets permit procurement of narcotics in amounts of a value of at least the minimum requirements for the filing of charges under the Illegal Investment Statute HSC 481.126.

B. Reversal Policy and Procedures

1) Reverse role undercover investigations will require prior notification of the appropriate law enforcement agencies within the area of operation.

2) Completion of a written memo submitted to the Project Director documenting the following:

a. Positive identification of all known suspects and documentation that suspects are members of a major trafficking organization.
b. Type, quantity, and quality of controlled substances needed for operation.
c. Proposed time, date, and location of the operations.
d. Security measures instituted to protect undercover investigators, controlled substances, and ensure apprehension of suspects.
e. Prior written concurrence with appropriate federal or state prosecutor.
f. Deconfliction with all area law enforcement agencies.

3) All officers will conduct proper and thorough deconfliction with area law enforcement officers.

4) Reverse role undercover investigations will require the completion of a detailed Operational Plan reviewed by a supervisor.

5) All controlled substances utilized in a reverse role undercover operation will be obtained from a law enforcement agency in compliance with Section 481.159, Health and Safety Code.

6) All officers should ensure that conversations with suspects will be recorded (audio/video) to eliminate entrapment claims.

7) On any investigative activity conducted by an officer outside his assigned area of responsibility, the Task Force Commander supervising that officer shall notify the appropriate law enforcement agencies within the area of operation of the desired investigative efforts within their area. This notification should occur prior to beginning the investigative activity.

8) Investigative activities conducted in other jurisdictions will only occur with full cooperation and assistance of authorized law enforcement agencies.

9) Illegal investment HSC 481.126 charges will be pursued against all suspects.

XIV. DEVELOPMENT AND USE OF COOPERATING INDIVIDUALS

Information is vital to the investigative process. Today, as in centuries past, people are the most often utilized and most valuable sources of information. Cooperating individuals are motivated to reveal information to authorities for a variety of reasons. All Task Forces should strive to utilize cooperating individuals in an efficient, cost-effective way to secure intelligence and information necessary to investigate, arrest, and prosecute criminals. Additionally, it is the intent that this be done in a manner designed to maintain the highest professional standards. In those cases where a more restrictive policy is in effect, that policy will supercede those described below.

Development of Sources of Information:
Investigative personnel assigned to multi-jurisdictional drug task forces are expected to continuously develop worthwhile sources of information in the performance of their duties. Individuals from all segments of our society are potentially valuable in this regard. The proper use of confidential sources to assist in gathering intelligence and in developing prosecutable cases is crucial to accomplishing Task Force overall goals. However, while the use of information provided by cooperating individuals to solve or prevent crime is a recognized and accepted law enforcement technique, it is

often looked upon with great scrutiny by many. Task Force officers will adhere to the established policies and procedures described herein regarding the development, use, management and control of cooperating individuals.

In this policy, special attention has been devoted to proper procedures, reports, forms, records and files. To ensure that agency and employee integrity is not compromised, Task Force officers at every level must be diligent in maintaining a cooperating individual program that is ethical and moral while contributing to the accomplishment of Task Force goals.

A. Definitions

1) Cooperating Individuals fall into the following two classes:

a. *Class I Cooperating Individual*. This class consists of all persons who have a criminal record, reputation for involvement or association with individuals in the criminal underworld, or who have a prior state or federal criminal conviction. Both defendants and non-defendants will be included if they meet this basic definition.
b. *Class II Cooperating Individual*. This class consists of persons who do not have a criminal record or reputation for involvement in or association with individuals in the criminal underworld. Examples of Class II individuals include hotel clerks, airport employees, business owners, and concerned citizens who observe activities as a course of their daily business.

2) Establishment means the appropriate documentation regarding the identification, background, criminal record check, photograph, and debriefing of cooperating individuals.

B. Establishment Procedures

Prior to the establishment of any cooperating individual, Task Force investigators will provide the full name and identifying data to the Task Force Commander for approval. The Task Force Commander will be responsible for submitting that information through the local DPS Captain to DPS so that a query will be performed to determine if the individual has been terminated by DPS or any other law enforcement agency. (Terminated cooperating individuals are discussed later in this document)

1) Class I Cooperating Individuals. Class I cooperating individuals must be identified by:

a. original set of fingerprints or
b. State Identification Number (SID) or DPS number and
c. recent photograph

(1) Class I cooperating individual shall be debriefed by a Task Force officer and a supervisor. During the initial debriefing, the cooperating individual should be informed that the possibility exists that he may be subject to court subpoena and testimony in future judicial proceedings. It will be documented whether or not the cooperating individual is willing to testify in these proceedings. The cooperating individual will read, complete, and sign an Agreement of Understanding between the cooperating individual and the Task Force.

(2) Class I cooperating individuals will not be utilized without the prior approval of a Task Force supervisor and the Task Force Commander.

(3) Class I cooperating individuals will be assigned a cooperating individual number. Additionally, at the discretion of the Task Force Commander, an alias name may also be assigned. All cooperating individuals will undergo periodic debriefing in order that their potential may be established, priorities assigned, and effectiveness evaluated. Task Force supervisors will be directly involved with investigative personnel in this ongoing process.

2) Class II Cooperating Individuals. The use of Class II cooperating individuals, acting under the specific direction of a task force investigator, requires prior supervisory approval and the submission of an establishment report.

a. Class II cooperating individuals will be assigned a cooperating individual number. As with Class I cooperating individuals, an alias name may be assigned at the discretion of the Task Force Commander. Full establishment is required if rewards or reimbursements are paid to Class II cooperating individuals.

C. Utilization of Cooperating Individuals

1) A Cooperating Individual is a useful asset in conducting criminal investigations. All Cooperating Individuals should be fully debriefed as to their knowledge of illegal drug activities, other non-drug criminal activities, possible terrorist activities and related terrorist signature crimes and this information documented during the establishment. When appropriate this intelligence information should be shared with appropriate law enforcement agencies to further enhance criminal investigations.

2) The potential uses for a Cooperating Individual include the development of criminal intelligence information on criminal activity, enhancing investigative efforts, including the development of probable cause for search warrants and purchases of evidence for establishing credibility and furthering investigations.

3) Cooperating Individuals have also been used for "controlled buys" (purchases of evidence) for the purpose of filing criminal charges against suspects. This utilization should not be considered a "Best Practice" and should be used judiciously. The utilization of "controlled buys" for the purposes of filing charges should be avoided except in those investigations where other investigative techniques have been attempted and failed or are likely to fail.

4) Cooperating Individuals should not be used for "controlled buys" unless the handling officer has directed the efforts of the Cooperating Individual towards specific identified suspects. The Project Director and the appropriate District Attorney should be informed of any investigations where a Cooperating Individual is being used for "controlled buys" to file criminal charges prior to the utilization of this technique.

5) Article 38.141 of the Code of Criminal Procedure requires that corroboration be provided for the testimony of any person who is acting covertly at the direction of a peace officer. All officers should insure that sufficient corroboration is established in any "controlled buy" to facilitate a successful prosecution. All investigations that utilize a "controlled buy" for the filing of criminal charges shall include the method of identification of the suspect and a signed written statement from the Cooperating Individual setting forth the elements of the criminal activity being documented.

D. Cooperating Individual Reports

Task Force officers will document the original establishment of cooperating individuals.

All investigative activities resulting from the utilization of a cooperating individual shall be properly documented in an investigative report and will be subject to review by appropriate DPS personnel. This includes not only the reporting of information obtained for prosecution of criminal cases but also for documenting intelligence information.

In preparing reports that are likely to be used in criminal prosecutions, it is preferable to refer to sources as "cooperating individuals." However, it is permissible to refer to cooperating individuals by their assigned number. The

respective Task Force Commanders may establish more detailed and specific reporting procedures in this regard.

1) Establishment Report

The original establishment of a cooperating individual will be documented. When completed, this establishment report will be submitted to the Task Force Commander or his supervisory designee for approval. A copy of the report should be maintained at the appropriate Task Force office.

Instructions for documenting a cooperating individual. The documenting report shall be completed to the fullest extent possible.

a. *Identification of the Individual.* This section includes the primary identifying information about the cooperating individual. Complete this portion as thoroughly as possible.

b. *Background.* This section includes general information about the cooperating individual as well as his spouse (if applicable). Determine whether or not the subject has a criminal history or has outstanding warrants. Attach a copy of the criminal history printout, whether or not there is an actual criminal record. Also make a determination that no outstanding warrants exist on the cooperating individual. Information relating to his probation, parole, or conditional release will be recorded in this section.

If the person being established as a cooperating individual is currently a defendant in any investigative file, the investigative file number shall be included in the establishment report.

c. *Information Expected.* Include a brief summary describing the type of information provided by the cooperating individual. Divide this section into categories such as:
   (1) drug intelligence
   (2) non-drug intelligence

d. *Motivation.* Briefly set forth the reasons for the individual's cooperation. Include any pending criminal charges for which the cooperating individual may be requesting special consideration.

e. *Utilization.* Describe briefly the manner in which the individual will be utilized. This includes but is not limited to intelligence gathering, undercover introductions, undercover purchases, etc. Include priorities or specific direction that may be provided the individual. Additionally, document any agreements regarding

expenditure of investigative funds for rewards, advances, or expenses.

2) Cooperating Individual Status Report

A task force form will be utilized to provide a status report on the cooperating individual. These status reports will include Updates, Re-establishments, and Termination. Each of these reports is described below:

3) Update Reports

Update Reports for Class I and Class II cooperating individuals are required at twelve-month intervals. These reports summarize the activity of the individual since the last reporting date and will include the following information at a minimum: additional intelligence provided, investigations initiated, cases initiated, and monies paid. Also include a recommendation as to continued utilization. Document supervisory participation in the cooperating individual debriefings as required. If the cooperating individual is a defendant in a criminal proceeding, report any change of legal status in the case.

If the required annual update report is not submitted prior to the end of the twelve-month period, the cooperating individual automatically reverts to inactive status. Cooperating individuals may be carried on inactive status for an indefinite period of time. However, once a cooperating individual becomes inactive, he must be re-established prior to further utilization.

A supervisor will participate in at least one debriefing interview with each Class I cooperating individual assigned to an investigator under his supervisory control during each six-month period. Update Reports will document supervisory participation in the debriefing of the cooperating individual.

4) Re-establishment Reports

The re-establishment report will include the same basic information required in the original establishment report. The information should be updated as appropriate to include a recent criminal history check and wanted check.

5) Termination Reports

In the event an individual is determined to be unsuitable for further utilization as a cooperating individual, a task force form will be completed and forwarded through channels to the Task Force Commander. This form will only be completed when the supervising officer believes that the Cooperating Individual is unsuitable for use by himself or other officers. The form will indicate the recommendation for termination and will include adequate details why the cooperating individual is not suitable for further utilization. If there is cause to terminate a cooperating individual, a form should be submitted even if the status of the individual has become inactive.

This termination will remain in effect unless and until rescinded in writing. These individuals will not again be utilized without the approval of the Task Force Commander and the Project Director.

A copy of the form will be filed in the Task Force office to insure that the subject is not utilized in the future.

If the cooperating individual's actions leading to a termination recommendation could jeopardize pending cases, the Task Force will cause the appropriate prosecutor to be notified.

Any cooperating individual who is terminated shall have that information reported to the DPS Narcotics Service Commander in a timely manner. Sufficient identifying information about the cooperating individual as well as the reasons for termination should be included in the report.

E. Relationship of Investigator with Cooperating Individual

Task Force officers shall operate within legal boundaries when working with cooperating individuals. All contact with a cooperating individual shall be lawful and in compliance with established policies.

1) The relationship between Task Force officers and cooperating Individuals will remain ethical and professional at all times. The purpose for using a cooperating individual is to assist in the detection, apprehension, and prosecution of individuals violating the law. Less than ethical or professional conduct on the part of officers with regard to cooperating individuals may jeopardize prosecution and will not be tolerated. At no time will any officer solicit or accept anything of value from a cooperating individual.

2) All officers shall maintain a professional relationship with the cooperating individual. Off-duty fraternizing or social contact with the criminal-type cooperating individual is prohibited. Examples of prohibitive behavior include, but are not limited to, the following:

a. Engaging in any business or personal financial dealing with a cooperating individual.
b. Romantic involvement with a cooperating individual (including cohabitation and intimate relationships).
c. Giving to, receiving gifts, gratuities, or loans from a cooperating individual.
d. Interaction between any officer and a cooperating individual that is not duty-related.

Illegal Conduct by Cooperating Individual

Task Force personnel will not suggest, condone, or knowingly allow involvement of cooperating individuals in illegal activities outside the scope of an approved criminal investigation. However, in furtherance of an ongoing criminal investigation, Task Force personnel expressly controlling the investigation may direct a cooperating individual to violate certain laws. Examples of such directed actions, in furtherance of a criminal investigation, include the purchase or possession of drugs, stolen property or other contraband. If a cooperating individual commits a crime outside the scope of an approved criminal investigation, that individual will be at risk of criminal prosecution.

F. Special Requirements

1) *TYPES OF INDIVIDUALS REQUIRING PRIOR APPROVAL:*
There are additional restrictions applicable to the utilization of certain types of cooperating individuals regardless of the cooperating individual's classification. Prior to the utilization of cooperating individuals in the following circumstances, an establishment report with a written justification should be submitted to the Project Director for approval when:

a. The proposed utilization of a person of either sex who has not attained the age of 17 years. This request will be accompanied by written consent of either one or both parents, or the legal guardian.
b. The proposed reinstatement of any person who has been declared as unreliable or unsatisfactory.

c. The continued utilization of any person who is arrested for a felony in either federal or state court while in use as a cooperating individual.

The continued utilization of any person who is arrested for a felony by either federal or state officers while in use as a cooperating individual will require prior approval from the Task Force Commander and the Project Director. Additionally, the defendant will only be utilized upon the approval and concurrence of the federal or state prosecutor responsible for the prosecution of the pending charge.

Note: In instances where there is insufficient time to submit written justification for prior approval, verbal approval will be acceptable. The written justification must be subsequently forwarded through channels for approval as prescribed above.

2) *COOPERATING INDIVIDUALS OF THE OPPOSITE GENDER.*
All interviews or meetings with a cooperating individual of the opposite gender should, whenever possible, include two investigators.

3) *INDIVIDUALS ON PROBATION, PAROLE OR CONDITIONAL RELEASE.*
Approval must be obtained from the appropriate state or federal official prior to utilizing a cooperating individual who is on probation, parole, or who has been conditionally released from a prison unit. Approval to use such an individual should be in writing and should be included with the Establishment Report.

Exception: In situations where written approval is not immediately possible, an investigator or supervisor may obtain verbal approval from the appropriate state or federal official. The following information will be included in the Establishment Report:

a. the name of the state or federal official from whom approval was received;
b. the Task Force Officer who secured the approval; and
c. any restrictions placed on the utilization of the cooperating individual.

G. Payments to cooperating individuals

All payments to cooperating individuals will be made in accordance with policies and subject to the availability of funds. No payments will be made to individuals who have not been properly established.

1) Types of payments:

Payments to cooperating individuals generally fall into the following categories:

a. Payments for information and/or active participation. This category pertains to payments for information and assistance necessary to the development of a case or for intelligence information. Payments for information leading to a seizure of contraband, with no defendants, should be held to a minimum.
b. Payments for security. Any payments for a cooperating individual's personal security may be in lump sum or for actual expenses as they occur. These expenses include:
   (1) travel to relocate the cooperating individual and his family;
   (2) movement and storage of household goods; and
   (3) living expenses at a new location for a stated period of time.
c. Payments to informants of another agency. Such payments are permitted if established as an informant by the task force. These payments should not be a duplication of a payment from another agency; however, sharing a payment is acceptable.

All payments to cooperating individuals will be documented on task force cash expenditure report.

2) Records of payments:

The task force form will be used to document all payments made to a cooperating individual and placed in the cooperating individual's file at the task force office. These records will assist in the preparation of required "update reports" on each cooperating individual. Entries on this form should correspond with information reflected on the task force expenditure report that is used to document payments to cooperating individuals. These records should provide the ability to determine, at any given time, the total amount of money paid to a particular cooperating individual.

3) Receipts and witnesses:

Signed receipts shall be obtained from cooperating individuals for any cash payment or reward made by Task Force officers. Cooperating individuals will utilize either their true name or, at the discretion of the Task Force Commander, a designated alias name when signing all receipts. Any receipt where the signature is not legible or an alias signature is utilized shall include a fingerprint and a notation of which print is made shown on the receipt. The signing of receipts by a cooperating individual should be witnessed by two officers. A supervisor or other law enforcement officer may be utilized as one of these witnesses. Purchases of food, gas, or other miscellaneous items for cooperating individuals do not require

signed receipts, but shall be recorded in appropriate categories on the task force expenditure report. The original of any receipts will be forwarded to the Task Force Commander for inclusion in individual cooperating individual files.

H. Legal or Administrative proceedings involving cooperating individuals

1) Appearance on behalf of Cooperating Individuals.

a. All Task Force officers will obtain approval from the Task Force Commander prior to appearing or making representations at legal or administrative proceedings in behalf of an active, former, or potential cooperating individual.
b. Details of any officer or employee appearing or representing on behalf of a cooperating individual will be documented by memorandum and included in the cooperating individual's task force file.

2) Recommendations regarding prosecution.

a. Task Force supervisors are authorized, in appropriate cases, to communicate with federal, state and county prosecutors to explain the extent of cooperation rendered by a cooperating individual. As a general rule, if representations are to be made on behalf of a cooperating individual in any legal proceeding, all supervisors will notify and coordinate such representations with other affected agencies and prosecutors.

3) Security of cooperating individual files and related documents.

a. All original files related to the establishment, updating, and re-establishment of a cooperating individual will be maintained at the task force office. The Task Force office should maintain a copy of the documentation in a separate and secure file. This file is administrative in nature and should not be used as a repository for investigative information.

XV. OPERATING PROCEDURES FOR NARCOTICS DETECTOR CANINE UNITS

The purpose of the following operational procedures is to provide policy for the operation and management of multi-county drug task force narcotics detector canine units. These policies and procedures are intended to provide standardized minimum operational procedures by which all multi-county drug task forces will operate in Texas.

A. Application

1) These policies apply to all multi-county drug task force narcotics detector canines.

2) In those cases where a canine handler's parent agency has a more restrictive policy in effect, the narcotics detector canine/handler team will be governed by the more restrictive policy.

3) All narcotics detector canines and canine handlers must meet minimum requirements of certification and training. To insure the integrity of task force criminal cases, all task force officers will only utilize narcotics detector canines that meet or exceed the following policies and procedures.

B. Initial Training and Certification

1) Each narcotics detector canine/handler team will be certified by an approved outside agency that is designated by the Task Force Commander. This outside agency should also be qualified to provide annual re-certification.

C. Continued Training

1) The Task Force Commander will insure the narcotics detector canine/handler team completes regularly scheduled, high-quality training. The handlers must maintain written records and documents of all scheduled training.

2) The Task Force Commander will periodically review these written training records. These records are the property of the task force and will be held at the task force.

D. Proficiency Training Evaluations

1) After completion of basic canine/handler team certification and during regularly scheduled training each canine/handler team will be subject to proficiency evaluations.

2) These proficiency evaluations will be scheduled evaluations as well as unannounced evaluations.

3) The Task Force Commander or his designee will be responsible for conducting these evaluations.

4) Failure to meet adequate standards as determined by the Task Force Commander or his designee by either the handler or the canine will result in the team being placed out of service.

5) Being placed out of service may result in one or more of the following:
   a. Additional training exercises.
   b. Disciplinary action against the handler.
   c. Removal of the canine from service.

6) Once the Task Force Commander or his designee has determined that additional training and successful evaluations have been completed the team may return to service.

E. Training Aids

1) Limited quantities of controlled substances may be maintained at Task Force offices for utilization in canine training. These controlled substances should vary in weight to provide realistic training for the canine.

2) These substances must have been awarded to the appropriate law enforcement agency by an appropriate court order. The order should state that the substances are awarded for official law enforcement purposes and destruction.

3) Such controlled substances will be maintained in a locked safe, in the custody of the Task Force Commander or his supervisory designee. These controlled substances will be logged out of the safe and provided to the canine handler when needed and returned upon completion of the training.

4) Controlled substances utilized for such training should be properly stored, packaged and handled to prevent cross-contamination, damage, loss or accidental ingestion by dogs during training.

5) Any loss of controlled substances during training shall be immediately reported to the Task Force Commander and documented in writing for supervisory review. This does not apply to minuscule amounts spilled by the canine/handler during training.

6) Nothing in this policy prohibits the utilization of pseudo-cocaine or pseudo-heroin prepared and utilized under guidelines developed by Bureau of Immigration and Customs Enforcement (BICE).

F. Procedure for Acquisition of Training Aids

1) Controlled substances to be utilized for canine training aids will be acquired from a law enforcement agency laboratory in compliance with Health and Safety Code, Section 481.159 (Disposition of Controlled Substance Property or Plant).

2) The Task Force Commander will submit a written request to the Project Director for acquisition of controlled substances for training aids. In the written request, the Task Force Commander will verify that the canine/handler team is currently certified to train with the controlled substances requested. The Task Force Commander will identify where the training aids will be obtained from and certify that the training aids will be acquired in compliance with Health and Safety Code, Section 481.159 (Disposition of Controlled Substance Property or Plant).

3) A written record of accountability regarding the acquisition and transfer of K-9 training aids will be maintained. In turn, the record will document the transfer to the Canine Handler. This transfer will be completed on each transaction and a copy of this written transfer will be kept on file with the Task Force.

4) When the controlled substances can no longer be utilized for training purposes due to deterioration, age, etc the training aids will be destroyed according to the policies of the Project Director's agency. A copy of the form documenting the destruction of the training aids will be attached to the copy of the original request letter and retained by the Task Force Commander.

G. Documentation of Canine Searches

1) Laws of search and seizure apply to narcotics detector canine/handler teams and as such canine handlers will insure that a valid legal basis exists before a canine is utilized.

2) The canine handler will properly document each instance in which a narcotics detector canine/handler team was utilized and will forward this documentation to the Task Force Commander for approval and placement in the canine file.

H. Veterinary Checkups

1) The Task Force Commander will ensure that canines are scheduled annually for a veterinary checkup.

2) The Task Force Commander will also ensure that any other required checkups are completed as needed.

I. Injury to Persons and Damage to Property

1) Any injury to a person or damage to personal property will be reported to the Task Force Commander immediately.

2) A written record of the circumstances involving the incident will be prepared and submitted to the Task Force Commander as soon as practical.

J. Canine Bites

1) In the event a canine bites or scratches where it breaks the skin of any person, the handler will immediately notify the Task Force Commander.

2) The handler will complete a report documenting the circumstances of the incident and submit to the Task Force Commander as soon as practical.

3) When a canine is involved in a bite situation, the canine handler will take the canine, within 24 hours, to an approved veterinarian for inspection.

4) The canine handler will also take the canine back to the approved veterinarian after the ten (10) day waiting period for a follow-up inspection.

5) The canine handler will ensure that all bites are properly documented with appropriate photographs when necessary.

K. Other Operational Procedures

1) Under no circumstances will a police canine be utilized to search a person for illegal narcotics.

2) During the utilization of a canine, the canine handler will always maintain sufficient control of the canine to minimize property damage and/or personal injury.

3) All written records involving canine certification, training, proficiency evaluations, searches, personal injury or property damage, training aids, and veterinary check-ups will be kept in a separate canine file by the Task Force Commander.

PROGRESS REPORT

Definitions and instructions are provided at the end of this document. For assistance completing the reporting requirements, please contact the Narcotics Service Commander of the Department of Public Safety.

Texas Department of Public Safety • P.O. Box 4087 • Austin, TX 78773-0430
Phone: (512) 424-2150 • Fax: (512) 424-2150 • Email: taskforceinfo@TXDPS.State.TX.US

RESPONDENT INFORMATION

Task Force OR DPS Lieutenant Area:_____

Agency Name: _____

Reporting Date: ____/____/____

Please indicate which report you are submitting:

☐ **Six Month Report**
- Report should include data from September through the end of February (i.e., the first six months) of the evaluation period.
- Due 20 days after the end of the sixth month of the reporting period.

☐ **Year End Report**
- Report should include data from September through the end of August (i.e., the entire twelve months) of the evaluation period.
- Due 20 days after the end of the twelfth month of the reporting period.

SECTION I. RESOURCE TARGETING

1. Provide the following counts for the current reporting period:

		Number of DTOs:	Number of Individual Traffickers:
a.	Known in your impact area at the start of the reporting period		
b.	Newly identified in your impact area during the reporting period		
c.	Targeted for investigation at the start of the reporting period		
d.	Added to the list of targets during the reporting period		
c.	Removed from the list of targets during the reporting period		

f.	How many of the DTO's targeted by your Task Force/Unit during the current reporting period are on DPS's list of Priority Trafficking Targets?		

2. Indicate the sources used to acquire information about DTOs and Individual Traffickers in your impact area. Count only one source for each newly identified DTO or Individual Trafficker. Together, the columns should all sum to the total number of new DTOs and Traffickers identified in Question 1, Item B.

		Number of NEW DTOs identified in your impact area through:	Number of NEW Individual Traffickers identified in your impact area through:
a.	Investigation		
b.	Drug seizures		
c.	Currency seizures		
d.	Informants		
e.	An LEA outside your impact area		
f.	An LEA inside your impact area but not in your Task Force/Unit		
g.	OTHER: *Please list as many other sources as applicable. Attach additional pages as necessary.*		
	Others source(s):		
	Others source(s):		

3. Indicate the total number of DTOs and Individual Traffickers your Task Force/Unit participated in investigating during the reporting period. Include investigations that were initiated by your Task Force/Unit, as well as collaborations led by other LEAs.

		Number of DTOs investigated by your Task Force/Unit:	Number of Individual Traffickers investigated by your Task Force/Unit:
a.	Total number of DTOs and Individual Traffickers investigated		

4. Indicate the number of DTOs and Individual Traffickers investigated in collaboration with partners. A single DTO or Trafficker can be counted in more than one category if multiple collaborators were involved. Include investigations initiated by your Task Force/Unit as well as those initiated by other collaborating partners.

		Number of DTOs investigated by your Task Force/Unit:	Number of Individual Traffickers investigated by your Task Force/Unit:
a.	Alone with no partners outside your Task Force/Unit		
b.	With local LEA partners within your impact area		
c.	With local LEA partners outside your impact area		
d.	With other state agencies		
e.	With other federal agencies		

SECTION II. SPECIFIC ENFORCEMENT INITIATIVES

5. Describe outcomes associated with each of the following specific enforcement initiatives.

a.	Number of methamphetamine labs seized.	

b.	Number of methamphetamine lab cleanups responded to by the Texas Commission on Environmental Quality (TCEQ)	
c.	Number of raves Task Force/Unit officers targeted with prevention and enforcement efforts	
d.	Number of raves known to occur in your impact area	
e.	Number of raves where Task Force/Unit officers were present and visible to educate and discourage participation	
f.	Number of raves cancelled or relocated due to enforcement	

6. **Describe the project's counter-terrorism activities. List them in order from most to least time and resource iuteusive. Consider only those specific activities that fall outside typical euforcement efforts.** The following are some examples of specific activities:

- providing terrorism-related information to the FBI or other agency
- providing resources, staff or time to an anti-terrorist enforcement unit or agency
- receiving training specifically related to counter-terrorism
- providing counter-terrorism training or threat assessments to local organizations
- participating in meetings to develop a coordinated enforcement response to terrorism

Abbreviate as needed to limit each response to 255 characters or less.

| |**YES**

☐**NO** ***If NO, then skip to question #7***

a.	
b.	
c.	
d.	
e.	
f.	

g.	**Number of <u>cases</u> involving specific counter-terrorism activities?**	

SECTION III. OUTCOMES

7. Indicate the impacts resulting from arrests and convictions.

a.	Number of arrests during the current reporting period. (Treat multiple arrests of the same individual as separate incidents. This data should not include multiple charges on one suspect resulting from the same incident.)	
b.	Number of targeted Individual Traffickers that were arrested	
c.	Number of individuals from targeted DTOs that were arrested	
d.	Number of End-Users not counted as Traffickers that were arrested	
e.	Number of DTOs targeted by your Task Force/Unit that had one or more members arrested	
f.	Number of DTOs targeted by your Task Force/Unit that had one or more members convicted	
g.	Number of targeted DTOs that had their operation completely dismantled (i.e., it ceased to operate in your Task Force/Unit impact area)	

8. This question is **ONLY** being asked for **Year End Reporting.**

Identify one outcome for each arrest identified in 7A, above. Include final outcomes for arrests that were reported as "pending" at the end of the last evaluation year. (If you are unable to obtain data for a category, leave the item blank.)

		Individuals from DTOs		Individual Traffickers		End User
		Targeted	Un-Targeted	Targeted	Un-Targeted	
a.	Number of arrested persons pending disposition at the time of this report					
	Number of arrests resulting in:					
aa.	No charges filed by DA					
b.	Case dismissal					
c.	Pre-trial diversion					
d.	Misdemeanor prosecution with an acquittal					
e.	Misdemeanor prosecution with a conviction					
f.	Felony prosecution with an acquittal					
g.	Felony prosecution with a conviction					
h.	Court-ordered substance abuse treatment					
i.	Number of arrests resulting in other outcomes *Describe:* _____					

9. Describe any problems you had problems getting data for #8 (i.e., there are blank items on 8a-i):

10. Answer the following questions about currency, asset and drug seizures

		Currency	Assets
a.	Number of currency/asset seizures attributed to your Task Force/Unit.		
a-1.	Number of seizures resulting from investigations of DTOs		
a-2.	Number of seizures resulting from investigations of Individual Traffickers		
b.	Total value of currency/assets seized.	$	$
b-1.	Total value seized as a result of investigations of DTOs	$	$
b-2.	Total value seized as a result of investigations of Individual Traffickers	$	$
c.	Total value of currency/assets awarded by the court to the Task Force/Unit.	$	$

d.	Number of drug seizures attributed to your Task Force/Unit.	
e.	Number of drug seizures resulting from investigations of DTOs	
f.	Number of drug seizures resulting from investigations of Individual Traffickers	

SECTION IV. PAST & CURRENT TRAINING

11. Did personnel associated with this Task Force/Unit RECEIVE training during the reporting period?

□ Yes □ No → [SKIP to 12]

If YES, please describe the type and amount of training received by Unit personnel during the current reporting period.

	Training		Number of sworn staff participating:	Number of support staff participating:	Number of hours in one complete training or presentation:
a.	Clandestine Lab Site Safety	Trained by DPS/DEA:			
		Trained by other:			
b.	Clandestine Lab Certification	Trained by DPS/DEA:			
		Trained by other:			
c.	Covert Operations School	Trained by DPS:			
		Trained by other:			
d.	Fourth Amendment & Profiling	Trained by DPS:			
		Trained by other:			
e.	Basic Narcotics Enforcement	Trained by DPS:			
		Trained by other:			
f.	First Line Supervisor Training	Trained by DPS:			
		Trained by other:			

12. Report the total percentage of all officers that are currently trained in priority topic areas.

	Training	% of ALL sworn officers that have completed training on this topic	% of persons in supervisory roles
a.	Clandestine Lab Site Safety		
b.	Clandestine Lab Certification		
c.	Covert Operations School		
d.	Fourth Amendment and Profiling		
e.	Basic Narcotics Enforcement		
f.	First Line Supervisor Training		

13. Did personnel associated with this project PROVIDE training during the reporting period? □ **Yes** □ **No → [SKIP to 14]**

If YES, please describe the type and amount of training <u>delivered by</u> Task Force/Unit personnel during the current reporting period. Training delivered in multiple installments to a single audience (e.g., DARE programs) should be reported as one complete training event.

		Number of hours in one complete training or presentation	Number of times the complete training or presentation was held	Number completing the training or presentation
a.	**1.** Title of Training/Presentation: _____ **2.** Indicate if this is: □ A brief presentation to raise awareness of an issue □ A significant training designed to teach new skills and/or improve practice **3.** Specify target audience(s): □ Community members □ Law enforcement □ Professionals □ Youth □ Other _____			
b.	**1.** Title of Training/Presentation: _____ **2.** Indicate if this is: □ A brief presentation to raise awareness of an issue □ A significant training designed to teach new skills and/or improve practice **3.** Specify target audience(s): □ Community members □ Law enforcement □ Professionals □ Youth □ Other _____			

		Number of hours in one complete training or presentation	Number of times the complete training or presentation was held	Number completing the training or presentation
c.	**1.** Title of Training/Presentation: _____ **2.** Indicate if this is: ☐ A brief presentation to raise awareness of an issue ☐ A significant training designed to teach new skills and/or improve practice **3.** Specify target audience(s): ☐ Community members ☐ Law enforcement ☐ Professionals ☐ Youth ☐ Other _____			
d.	**1.** Title of Training/Presentation: _____ **2.** Indicate if this is: ☐ A brief presentation to raise awareness of an issue ☐ A significant training designed to teach new skills and/or improve practice **3.** Specify target audience(s): ☐ Community members ☐ Law enforcement ☐ Professionals ☐ Youth ☐ Other _____			

SECTION V. COORDINATION & SUPPORT FROM DPS RESOURCES

14. Answer the following questions describing your Task Force/Unit's use of DPS resources during the reporting period.

		How often has your Task Force/Unit received information from the following DPS sources:	How often has your Task Force/Unit applied information from the following DPS resources:	How useful have the following resources been for guiding the decisions and actions of the Task Force/Unit:
a.	Intelligence publications (e.g., CLEO)	☐ Not at all ☐ Rarely ☐ Occasionally ☐ Frequently	☐ Not at all ☐ Rarely ☐ Occasionally ☐ Frequently	☐ Not at all useful ☐ A little useful ☐ Very useful ☐ Extremely useful
b.	Analytical Support	☐ Not at all ☐ Rarely ☐ Occasionally ☐ Frequently	☐ Not at all ☐ Rarely ☐ Occasionally ☐ Frequently	☐ Not at all useful ☐ A little useful ☐ Very useful ☐ Extremely useful
c.	Tech Unit support	☐ Not at all ☐ Rarely ☐ Occasionally ☐ Frequently	☐ Not at all ☐ Rarely ☐ Occasionally ☐ Frequently	☐ Not at all useful ☐ A little useful ☐ Very useful ☐ Extremely useful

15. Briefly describe any investigative activities or practices that did not meet expectations during the reporting period and the reason for the lack of success.

16. Briefly describe any additional initiatives or special activities during the current reporting period that you would like included in your report. You may describe highlights of your work, new goals, special achievements, individual stories demonstrating success, or other information you believe is worth noting. Do not include the names of suspects or defendants.

▶ DPS Lieutenant Areas STOP here.

SECTION VI. ORGANIZATION

17. Report the number of sworn and support personnel supported by the Task Force.

a.	Number of SWORN personnel assigned to the task force	
b.	Number of SUPPORT personnel assigned to the task force	

18. List the offices your Task Force operates and utilizes. Then list the LEA's represented at each office, as well as the number of officers from each LEA. The number of officers identified in the second column should equal the total number of sworn officers assigned to the Task Force in question 17a.

Offices operated and utilized by the Task Force:	LEAs housed at each office:	Number of officers from each LEA housed at each office:
EXAMPLE	*[Name of LEA #1]*	*[# housed at LEA #1]*
Name of Office #1	*[Name of LEA #2]*	*[# housed at LEA #2]*
	[Name of LEA #3]	*[# housed at LEA #3]*
	[Name of LEA #4]	*[# housed at LEA #4]*
	[Name of LEA #5]	*[# housed at LEA #5]*

a.	Name of Office #1	LEA #1	
		LEA #2	
		LEA #3	
		LEA #4	
		LEA #5	
b.	Name of Office #2	LEA #1	
		LEA #2	
		LEA #3	
		LEA #4	
		LEA #5	

SECTION VII. ADVISORY BOARDS

19. Answer the following questions about your Task Force Advisory Board.

a.	Number of Advisory Board members during the reporting period	
b.	Number of Advisory Board meetings during the reporting period	

DEFINITIONS

DPS: Texas Department of Public Safety

LEA: Law enforcement agency.

Drug Trafficking Organization (DTO): Typically 5 or more traffickers who operate as an integrated network to sell drugs outside their immediate conspiracy.

Individual Traffickers: A small number of individuals (typically 1-4) who work independently within a limited local market to sell drugs with profit as their primary motive. Does NOT include End User.

End User: Individuals who possess or sell drugs for the primary purpose of supporting their own habit.

Targeted: A subset of all known DTOs or Individual Traffickers identified as priority targets against which Task Force/Unit resources are focused and coordinated in an effort to interrupt or shut down their operation. Targeted DTOs or Individual Traffickers do not include those acted against as an "assist" to other law enforcement agencies, unless they are also a primary focus of direct investigation by your Task Force/Unit.

Assets: Property, vehicles, or other material items of value.

LIST OF STATE AND FEDERAL AGENCIES

For questions that ask you to specify the state and federal agencies involved, please use the following listing and note the agency number(s) in the appropriate sections.

State Agencies

1 Texas Alcoholic Beverage Commission
2 Texas Attorney General
3 Texas Commission on Private Security
4 Texas Department of Criminal Justice
5 Texas Department of Public Safety
6 Texas Lottery Commission
7 Texas National Guard / Counterdrug Program
8 Texas Racing Commission
9 Texas State Board of Pharmacy
10 Texas Parks and Wildlife Department
11 Texas Youth Commission

Federal Agencies

12 Bureau of Alcohol, Tobacco and Firearms
13 Drug Enforcement Administration
14 Federal Aviation Administration
15 Federal Bureau of Investigation
16 Food and Drug Administration
17 Internal Revenue Service
18 National Guard Bureau
19 U. S. Attorney's Office
20 U. S. Border Patrol
21 U. S. Coast Guard
22 U. S. Customs
23 U. S. Department of Agriculture
24 U. S. Department of Justice
25 U. S. Department of Treasury

26 U. S. Immigration and Naturalization Service
27 U. S. Marshal
28 U. S. Office of Homeland Security
29 U. S. Postal Service
30 U. S. Secret Service

VIOLATOR CLASSIFICATION CODES

7.25.07 Criteria for Rating Violators

1. Definitions. To maintain uniformity and integrity of selections, definitions for various criteria are provided.

a. DTO-Drug Trafficking Organization. A group of five or more persons who are involved in a cooperative effort to illegally distribute controlled substances, or launder the proceeds from such activity, for profit or income. This involvement may include direct participation or other roles such as leadership, management, enforcement, support or financial roles. All of the members do not have to be fully identified or known to each of the other members of the organization to meet this definition.

b. DT-Drug Trafficker. A person who has been identified as being involved in the illegal distribution of controlled substances with profit or income as a primary motivation.

c. CPOT-Consolidated Priority Organization Target. A Drug Trafficking Organization that has been identified as participating in or being involved in the control of significant national and international efforts in the illegal distribution of controlled substances and is identified on the Department of Justice's CPOT list.

d. RPOT-Regional Priority Organization Target. A Drug Trafficking Organization that has been identified as linked to a CPOT and is identified by the Regional Organized Criminal Drug Enforcement Task Force (OCDETF) Committee as having significant national or regional involvement in the distribution of controlled substances.

e. TPOT-Texas Priority Organization Target. A Drug Trafficking Organization or criminal organization that has been designated by the Narcotics Service Commander as having been identified as located within Texas and having significant control or impact in the illegal distribution of controlled substances in Texas and or other regions.

f. End User- A person who is the intended user of controlled substances creating the market for the illegal distribution of controlled substances. Such person is generally motivated by an addiction to one or more controlled substances. Such person may also sell or deliver controlled substances or commit other property crimes to support their individual drug addiction.

g. Clandestine Laboratory Operator. A person who is involved in the illegal manufacture or production of a controlled substance, normally thru a chemical synthesis process.

h. Registrant. Any person or firm who is currently registered with the department to manufacture, distribute, analyze or dispense a controlled substance and includes the person who is acting as the agent or employee of the actual registrant, a pharmacist employed by a pharmacy as opposed to a cashier, or a department head of a manufacturing firm as opposed to a stockroom clerk working for the firm.

i. Doseage Unit. That amount of drug normally used at one time by the end user.

25.08 Classes of Violator.

1. Class I Violator

   a. Sale or possession of the following drugs in at least the amounts listed.
      - Cocaine-1000 grams @ 50% purity
      - Methamphetamine-1000 grams @ 50% purity
      - Marijuana-500 kilograms
      - Heroin-454 grams @ 50% purity
      - LSD-5000 dosage units
      - Other Hallucinogens-25,000 dosage units for all
        Depressants
        Stimulants
        Other

   b. Any CPOT, RPOT or TPOT.

   c. Any clandestine laboratory operator producing at least 100 grams of a controlled substance within any 30 day period.

2. Class II Violator

   a. Sale or possession of the following drugs in at least the amounts listed.
      - Cocaine-500 grams @ 50% purity
      - Methamphetamine-500 grams @ 50% purity
      - Marijuana-250 kilograms
      - Heroin-200 grams @ 50% purity
      - LSD-2500 dosage units
      - Other hallucinogens-10,000 dosage units for all
        Depressants-

Stimulants-
Other-

b. Any clandestine laboratory operator who produces less than 100 grams in any thirty day period.

3. Class III Violator

a. Sale or possession of the following drugs in at least the amounts listed.
   - Cocaine-100 grams
   - Methamphetamine-100 grams
   - Marijuana-50 kilograms
   - Heroin-30 grams
   - LSD-1000 dosage units for all
     Other hallucinogens
     Depressants
     Stimulants
     Other

b. Any investigation which is targeting a Drug Trafficking Organization that does not meet criteria as a Class I or II violator.

4. Class IV Violator

a. Sale or possession of the following drugs in at least the amounts listed.
   - Cocaine-28 grams
   - Methamphetamine-28 grams
   - Marijuana-1 pound
   - Heroin-7 grams
   - LSD-25 dosage units
   - Other controlled substances- at least 100 dosage units

b. Information, evidence or investigation which tends to support that the suspect is selling smaller quantities of drugs listed in subsection (a) that the aggregate total in a 30 day period would reach the above listed quantities.

5. Class V Violator.

a. This category is intended to identify that person who is the end user of illegal drugs. This person may also be involved in a delivery of a controlled substance; however this criminal act appears driven by the need to support substance abuse and addiction.

b. Possession or sale of drugs or controlled substances in any amounts less than the above amounts listed for violators in Classes I, II, III of IV.

c. A person may be elevated above this class of violator if evidence seized or the investigation shows a pattern of involvement in the sales of small amounts of controlled substances over a substantial period for profit.

Mr. SCOTT. Thank you very much.

We have been joined by the Ranking Member of the Subcommittee of Constitution, Jerry Nadler—excuse me, Chairman of the Subcommittee—okay, Jerry Nadler from New York. And he will have comments in a few minutes.

And the gentleman from Tennessee, Mr. Cohen, has also joined us. Thank you.

Professor Natapoff?

TESTIMONY OF ALEXANDRA NATAPOFF, PROFESSOR OF LAW, LOYOLA LAW SCHOOL, LOS ANGELES, CA

Ms. NATAPOFF. I would like to thank Mr. Chairman and the Members of these Committees for the honor of appearing before you today. As everyone has acknowledged this morning, the use of criminal informants is an important part of our legal system. It is a broad topic. I would like to focus on just one facet of it today. And that is the facet that makes the Kathryn Johnston tragedy a common and predictable occurrence.

The government's use of criminal informants is largely secretive, unregulated, and largely unaccountable. This is especially true in connection with street crime and urban drug enforcement. It is this lack of oversight and quality-control that leads to wrongful convictions, to more crime, to disrespect for the law, and even sometimes official corruption. At a minimum, we need more data on and better oversight of this important public policy.

The Kathryn Johnston tragedy reveals the special dangers associated with the use of criminal informants or snitches in poor, high-crime, urban communities. Informants are a cornerstone of drug enforcement. It is sometimes said that every drug case involves a snitch.

And drug enforcement is most pervasive in poor urban communities like the so-called Bluffs where Mrs. Johnston lived. In these neighborhoods, high percentages of the young male population are under criminal justice supervision at any given time. Here in the District of Columbia, for example, it is estimated to be over half.

And a high proportion of these arrests are drug related where, it is common for police to pressure drug arrestees and addicts to provide information in exchange for lenience. As a result, many people are likely to be informing at any given time.

What does this mean for law abiding citizens like Mrs. Johnston? It means that they must live in close proximity to criminal offenders looking for ways to work off their liability. It means that police in these neighborhoods will often tolerate low-level drug offenses and other offenses in exchange for information.

It means that law enforcement may be less rigorous. Police who rely heavily on informants are more likely to act on an uncorroborated tip from a suspected drug dealer, as occurred in this case. In other words, a neighborhood with many criminal informants in it is a more dangerous and less secure place to live.

The negotiations between criminals and the government take place largely off the record, without rules or public scrutiny. The Atlanta police could plant drugs on Fabian Sheats—you recall the suspected drug dealer and the first informant in this case—because the culture of snitching told them that it would never come to light.

The fact that the information he gave them was wrong is also a common and infamous aspect of snitching. The Atlanta police could fabricate an informant in order to get a warrant because the culture of snitching told them that they would never have to produce an actual person in court. In other words, it is this culture of secrecy, of rule breaking, of disrespect for the law and for the truth that led to the Kathryn Johnston tragedy.

I have made several recommendations for legislative action in my written testimony. I would like to mention just one. We need to start collecting aggregate data on the use of confidential informants at the State and local as well as Federal level. Even police and prosecutors in the main do not know the extent of the use of informants in their own jurisdictions, how many crimes they help us solve, how many crimes they themselves get away with.

Most State and local jurisdictions have no mechanism for evaluating or regulating the ways that informants are used. The Federal Government has begun to address this problem. And so, I would like to conclude with an insight from the FBI.

In its budgetary request to Congress this year, the FBI is seeking funds to create a new data monitoring system for confidential informants. And it tells us, "that without the personnel necessary to oversee the monitoring system, the FBI will be unable to effectively ensure the accuracy, credibility, and reliability of information provided by more than 15,000 confidential human sources."

I submit to these Committees that if the FBI cannot ensure the reliability of its confidential informants without better data and monitoring, then State and local law enforcement agencies like the Atlanta Police Department cannot be expected to, either. And we will see more tragedies like Kathryn Johnston.

Thank you.

[The prepared statement of Ms. Natapoff follows:]

PREPARED STATEMENT OF ALEXANDRA NATAPOFF

WRITTEN TESTIMONY FOR
THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY,
AND THE SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND CIVIL LIBERTIES

Joint Oversight Hearing on
Law Enforcement Confidential Informant Practices

July 19, 2007
10:00 a.m. – 12:00 p.m.
2141 Rayburn House Office Building

Alexandra Natapoff
Professor of Law
Loyola Law School, Los Angeles

Mr. Chairman, Committee Members,

Thank you for the honor of appearing before you today. My name is Alexandra Natapoff and I am a law professor at Loyola Law School in Los Angeles. I have spent the past several years studying the use of criminal informants in the domestic criminal justice system. The two law review articles that I have written on the subject have been submitted for the record.[1]

I. HOW THE KATHRYN JOHNSTON TRAGEDY REVEALS THE PROBLEMS WITH USING CRIMINAL INFORMANTS

The use of criminal informants is an important part of our criminal justice system. Police and prosecutors routinely cut deals with criminals for information in connection with all sorts of cases, from murder to antitrust to corruption to terrorism. The practice is, in many ways, a necessary evil. Without it, some kinds of cases could never be prosecuted or solved. It also has significant costs. It is a very broad topic and so I am going to concentrate today on one facet – the facet that makes the Kathryn Johnston tragedy a common and predictable occurrence.

The government's use of criminal informants is largely secretive, unregulated, and unaccountable. This is especially true in connection with street crime and urban drug enforcement. This lack of oversight and quality-control leads to wrongful convictions, more crime, disrespect for the law, and sometimes even official corruption. At a minimum, we need more data on and better oversight of this important public policy.

The Kathryn Johnston tragedy reveals the special dangers associated with using criminal informants or "snitches" in poor, high-crime, urban communities. Criminal informants are a cornerstone of drug enforcement – it is sometimes said that every drug case involves a snitch. And drug enforcement is most pervasive in poor urban communities like the so-called "Bluffs" where Mrs. Johnston lived. In these neighborhoods, high percentages of the young male population are under criminal justice supervision at any given time – here in the District it is estimated to be over half.[2] A high proportion of these arrests are drug related, and it is routine for police to pressure drug arrestees or addicts to provide information. In addition, police rely especially heavily on

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[1] Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE L. REV. 107 (2006) (both articles available at http://www.lls.edu/academics/faculty/natapoff.html); *see also* Alexandra Natapoff, *Bait and Snitch: The High Cost of Snitching for Law Enforcement*, SLATE.COM (Dec. 12, 2005) (available at http://www.slate.com/id/2132092/).

[2] Eric Lotke, *Hobbling a Generation: Five Years Later* (Nat'l Ctr. on Institutions and Alternatives, Alexandria, VA, 1997); see also Marc Mauer & Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later* (The Sentencing Project Washington, D.C. Oct. 1995).

confidential informants to get warrants in inner city zip codes.[3] As a result, many individuals are likely to be informing or trying to inform at any given time. In these communities, therefore, "snitching" is a fact of life.

What does this mean for law abiding residents like Mrs. Johnston? It means they must live in close proximity to criminal offenders looking for a way to work off their liability. Indeed, it made Kathryn Johnston's home a target for a drug dealer. It also means that police in these neighborhoods tolerate petty drug offenses in exchange for information, and so addicts and low level dealers can often remain on the street. It also makes law enforcement less rigorous: police who rely heavily on informants are more likely to act on an uncorroborated tip from a suspected drug dealer. In other words, a neighborhood with many criminal informants in it is a more dangerous and insecure place to live.

These negotiations between criminals and law enforcement occur largely off the record, without rules or public scrutiny. This is the heart of the informant problem: secrecy and lack of accountability. The Atlanta police could plant drugs on Fabian Sheats – the alleged drug dealer and the first informant in this case -- because the culture of snitching told them that it would never come to light. In our system, 95 percent of all cases are resolved by plea, not by trial. This means that the processes by which the government obtains information – even when they are illegal -- will typically remain secret.

The fact that Mr. Sheats' information was wrong is also an infamous aspect of informant use. According to Northwestern Law School's Center on Wrongful Convictions, nearly half of all wrongful capital convictions in this country are due to bad information obtained from a criminal informant.[4] Because of the demonstrated link between the use of informants and wrongful convictions, at least three states – Illinois, Texas, and California – have passed or are considering legislation to curtail the use of snitch witnesses.[5]

Informants breed fabrication. The Atlanta police could invent an informant to get a warrant because the culture of snitching assured them that they would never have to produce an actual person in court. Likewise, they could pressure Alex White to lie after the fact because fabrication is so common. According to research conducted by Professor Laurence Benner and the San Diego Warrant Project, police often fabricate informants to support warrant applications. This is made possible because courts almost never require

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[3] Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants*, 6 J. GENDER, RACE & JUST. 183 (2002); Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. WEST. L. REV. 221 (2000).

[4] Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, Center on Wrongful Convictions (Northwestern University School of Law, 2004) (available at http://www.law.northwestern.edu/wrongfulconvictions).

[5] Ill. Comp. Stat., ch. 725, § 5/115-21; Vernon's Ann. Tex. C.C.P. Art. 38-141; www.CCFAJ.org (California Commission on the Fair Administration of Justice).

the informant to be produced or the information verified. Many wrongful convictions have resulted from police and prosecutors using informants to bolster weak cases.[6]

Snitching also breeds crime. In this case, the police were willing to forego the prosecution of a suspected drug dealer with three prior felony arrests. They also had a long relationship with Alex White who himself has a substantial criminal record. Using criminal informants means, by definition, that the government is tolerating crime – both the crimes already committed by informants, but also the crimes informants routinely continue to commit. For example, the U.S. Department of Justice Office of the Inspector General reports that ten percent of the FBI's confidential informants commit unauthorized crimes while working for the FBI.[7] That is in addition to the crimes that their handlers permit them to commit.[8] The news media likewise provides a steady stream of evidence that informants continue to commit crimes while working for the government.[9]

In sum, this culture of secrecy, rule breaking, and disregard for the law and the truth is what led to the Kathryn Johnston tragedy and it is the hallmark of this kind of informal, unregulated law enforcement practice.

II. THE BROAD SCOPE OF CRIMINAL INFORMANT USE

Everyone involved in the criminal system – from judges to prosecutors to police to defense attorneys – agrees that informing has become a pervasive part of the legal system. And yet we have very little concrete data. We do not know how many informants are deployed by state and local police departments, how many successful cases they generate, how many botched investigations they ruin, and what sort of crimes they are permitted to commit.

In the federal system, approximately 20 percent of convicted defendants receive on-the-record sentencing benefits as a result of cooperation pursuant to section 5K1.1 of the Sentencing Guidelines.[10] The percentages are higher for drug crimes, but defendants in every category of crime receive deals for informing, from murder to child pornography to white collar crime, antitrust, and terrorism. Just as many defendants cooperate and do not

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[6] Northwestern Law School Report, *supra* note 4; Nina Martin, *Innocence Lost*, SAN FRANCISCO MAGAZINE (Nov. 2004).

[7] The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines, U.S. Dep't of Justice, Office of the Inspector General (Sept. 2005) (hereinafter OIG Report) (available at http://www.usdoj.gov/oig/special/0509/final.pdf).

[8] The Attorney General's Guidelines Regarding the Use of Confidential Informants, U.S. Dep't of Justice (May 2002) (establishing Tier I and Tier II categories of "otherwise illegal activity" that CI's can be authorized to commit) (available at http://www.usdoj.gov/olp/dojguidelines.pdf).

[9] *E.g.*, John Glionna and Lee Romney, *Snagging a Rogue Snitch*, L.A. TIMES (Dec. 5, 2005); *FBI Informant Indicted for Nine Felonies Including Drug Trafficking and Obstructing Justice*, U.S. DOJ Press Release (Oct. 28, 2005) (available at http://www.usdoj.gov/opa/pr/2005/October/05_crm_576.html).

[10] BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS Table 5.36 (2002) (hereinafter SOURCEBOOK).

get benefits,[11] and many more cooperate and avoid prosecution altogether and therefore do not show up in the statistics.

The FBI, the DEA, and other agencies handle many more informants, some of them also criminals, some of whom work for money alone. According to its budgetary request, the FBI maintains over 15,000 confidential informants,[12] while the DEA states that it maintains 4,000 paid informants.[13]

At the state and local level, it is much harder to estimate the extent to which law enforcement relies on criminal informants. The Kathryn Johnston case and others like it suggest that it is pervasive. Drug cases typically involve snitches, sometimes more than one, and drug cases represent 35 percent of state felony convictions and over 1.5 million arrests each year.[14] Investigations of other common crimes such as burglary also rely heavily on criminal informants. Anecdotal evidence and media reports indicate that snitching – and snitches gone wrong – are common in all jurisdictions.[15] The Committee can thus be confident that this is a pervasive issue of national importance.

III. RECOMMENDATIONS

The kind of informal deals involved in the Kathryn Johnston case are the most dangerous, the most secretive and unregulated, and the most subject to abuse. As part of these deals, crimes committed by informants are tolerated. Rules are easily broken, and lies are easily told and covered up. These deals are typical of drug enforcement at the state and local level. That means that they take place primarily in urban communities of color, and thus mostly affect the safety and quality of life of the poor and the vulnerable.

The vast majority of police and prosecutors use criminal informants with the best intentions, trying to fight crime. In law enforcement arenas such as white collar crime, informant practices are better documented and more accountable. The informal, unregulated deals typical of street crime and drug enforcement, however, are so fraught with risk that additional scrutiny and regulation is needed. The legislative and judicial branches should assume a larger role in shaping this vital aspect of the criminal system.[16]

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[11] Linda Drazga & John Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* (U.S. Sentencing Commission, Jan. 1998) (six out of ten defendants who provided assistance did not receive departures) (available at http://www.ussc.gov/publicat/5kreport.pdf).

[12] FBI FY 2008 Authorization and Budget Request to Congress, pp. 4-22 – 4-25 (available at http://www.usdoj.gov/jmd/2008justification/office/33_01_justification.doc).

[13] Audit Report: The DEA's Payments to Confidential Sources, U.S. Dep't of Justice, Office of the Inspector General (July 2005) (available at http://www.usdoj.gov/oig/reports/DEA/a05).

[14] SOURCEBOOK, Table 5.44, Table 4.1.

[15] *E.g.*, Henri Cauvin, 13 *Cases Collapse After Disclosure of Informant Offenses*, WASH. POST. (Feb. 11, 2007); *Fake Drugs: Evolution of a Scandal*, DALLASNEWS.COM (available at http://www.dallasnews.com/s/dws/spe/2003/fakedrugs/fakedrug1103.html); Lawrence Messina, *Criminals Earn Cash, Beat Rap by Becoming Drug Informants*, WEST VIRGINIA SUNDAY GAZETTE-MAIL (May 10, 1998).

[16] Additional details regarding these recommendations are contained in my law review articles, *supra* note 1.

1. Data Collection and Evaluation

Even the officials at the center of the criminal process – police and prosecutors – do not know the extent of the use of informants in their own jurisdictions, how many crimes informants help to solve, or how many crimes they get away with. Most state and local jurisdictions have no mechanisms for counting, evaluating or regulating the ways that informants are used. To the extent such data exists, it is not public.

The federal government has begun to address this problem. The Department of Justice revised its guidelines for managing confidential informants in 2002. The Office of the Inspector General has conducted two audits – one of the FBI and one of the DEA – which produced significant information about the handling, reliability, and productivity of the confidential informants used by the federal government. The Sentencing Commission keeps records of how many defendants receive sentencing benefits for cooperation.

The federal efforts need improvement. The OIG report on the FBI concluded that 87 percent of the time, the FBI's handling of its informants did not comply with DOJ guidelines. OIG's DEA audit also found that the DEA procedures for handling its confidential informants were inadequate. U.S. Attorneys offices vary widely in their informant practices, with little public accountability. Nevertheless, these are useful models on which state and local law enforcement agencies can build.

The Committee should craft legislation to expand federal data collection on informant practices, and to require state and local law enforcement agencies to start collecting information along the lines of the federal model. Aggregate information including the total number of criminal informants, their zip codes, race and gender, their productivity in solving crimes and the crimes they commit, should then be reported to the Bureau of Justice Statistics along with other aggregate criminal justice data that appears in the Uniform Crime Reports. This data should be made publicly available.

2. Permit Judicial Review of Federal Cooperation and Benefits

Federal criminal law is currently structured to make informing the primary way that a defendant can obtain a departure from statutory minimum sentences or under the Sentencing Guidelines. It is also structured so that the decision about whether a defendant's cooperation will be a basis for a departure, or whether the issue will be aired at all, lies entirely in the hands of the hands of the prosecutor. This is because only a "government motion" asserting a defendant's "substantial assistance" will permit a court to consider a defendant's cooperation.[17]

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[17] 18 U.S.C. § 3553(e); USSG § 5K1.1; FED. R. CRIM. P. 35; *see* Wade v. United States, 504 U.S. 181 (1992) (government decision not to file 5K1.1 motion unreviewable except where unconstitutional motive is alleged).

This legislative focus on cooperation to the exclusion of all other bases for departure has made informing the dominant currency in federal sentencing, and a target for abuse, manipulation, and inconsistency. Courts should be permitted to review – and defendants to air – issues surrounding cooperation, without prosecutorial permission. The Committee should expand the bases for such departures, eliminate the "government motion" requirement, and permit greater judicial review of the cooperation and reward process.

3. Reliability Hearings and Corroboration Requirements

When scientific and other experts testify in federal court, we require the court to act as "gatekeeper" to ensure their reliability and to protect the jury from undue prejudice and confusion.[18] The same concerns arise with informants, who are, after all, another form of compensated witness. Numerous state jurisdictions recognize the inherent unreliability of snitch and accomplice witnesses and require corroboration.[19] These two measures would help alleviate the significant problem of false informant testimony at trial. Because such a small percentage of cases go to trial, however, it should be recognized that trial-based procedures can address only a part of the larger problem.

IV. CONCLUSION

The FBI has requested funds to create a new system to improve data collection and monitoring of its confidential informants. In its budget request it states that "without the personnel necessary to oversee the [monitoring system,] the FBI will be unable to effectively ensure the accuracy, credibility, and reliability of information provided by more than 15,000 [Confidential Human Sources]." If the FBI cannot ensure the reliability of its sources without better data collection and monitoring, then state and local law enforcement agencies such as the Atlanta police department cannot be expected to either, and we will continue to see tragedies like Kathryn Johnston.

More fundamentally, when the government cuts a deal with a criminal in exchange for incriminating information, it implicates some of the most important values of our criminal system. We pride ourselves in having a justice system that is public, accountable, and that follows the rule of law. The widespread use of secret deals threatens these ideals. Until now, we have substantially failed to scrutinize or regulate this official practice. As a result, our system failed to protect Kathryn Johnston. By establishing better oversight and regulation in this area, Congress can strengthen law enforcement, improve community safety, and promote justice.

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[18] Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993); Rule 702, Fed. R. Evid.

[19] *See* American Bar Association, Resolution, Adopted by House of Delegates February 14, 2005 (urging nationwide adoption of corroboration requirements and documenting current state legislation) (available at http://www.abanet.org/leadership/2005/midyear/daily/108B.doc).

Mr. SCOTT. Thank you.
Reverend Hutchins?

TESTIMONY OF MARKEL HUTCHINS, REVEREND, PHILADELPHIA BAPTIST CHURCH, ATLANTA, GA

Reverend HUTCHINS. Good morning, Mr. Scott, Mr. Nadler, Mr. Lungren, Mr. Conyers, Mr. Johnson. Perhaps one of the greatest civil rights tragedies of this century happened on November 21st when 92-year-old Kathryn Johnston was gunned down in a hail of bullets in a botched drug raid at the hands of Atlanta police officers.

The evening of that shooting I received a telephone call from one of the members of my organization saying that a 92-year-old had been killed and that police were lying. As it turned out, the police not only lied to get the search warrant, they lied about the existence of drugs.

We later learned that they fabricated a story in order to go around an overt police and procedure. Instead of going through the appropriate channels of actually having a confidential informant to purchase drugs, they decided to cut corners and go and lie to a magistrate and say that a C.I. had purchased drugs when no such C.I. existed. We began to get involved with Ms. Johnston's family, found that she was a star person at 92 years old, had never been in the hospital, took no medication at all, not even aspirin.

Ms. Johnston represented in some real sense every American's mother and grandmother and great grandmother. We appealed to the Justice Department to launch a full investigation. They granted that investigation.

The Justice Department's investigation found that the officers involved were not the only officers that were engaged in this kind of behavior. Therefore, subsequent to the three police officers who were indicted, two pleading guilty in the Johnston shooting, there have been other police officers who have now been held and will continue to be held criminally responsible for their actions.

The Atlanta police officers involved in the Johnston shooting sought to cover up their actions by planting drugs in the home of a 92-year-old woman. These same police officers called upon one of their star confidential informants, an experienced long-time paid C.I. from the Atlanta Police Department, and tried to convince him and intimidated him wanting him to lie to cover their tracks. When he refused to do so, he was threatened.

In fact, he was kidnapped by Atlanta police officers, placed in the back of a patrol car, and ended up having to run, open the door of a police car from the inside, jump out and run through the streets of Atlanta, a long time paid confidential informant. I am happy to say to you that that confidential informant joins me today and stands—and sits right behind me, 25-year-old, Alex White.

Shortly after the announcement of the Johnston—of the police officers' guilty pleas in the Johnston shooting, Mr. Chairman, we began to hear from people across the country that this was not an isolated incident, that confidential informants were being lied on to judges by narcotics officers in major and smaller police departments across this Nation. Therefore, we came to Washington, met with Chairman Conyers and numerous other Members of this Com-

mittee and asked that we would go forward with hearings like this one and others around the country that would expose a pattern of abuse of people's civil rights and civil liberties at the hands of those who are entrusted to serve and protect.

I agree with the gentleman from California. Confidential informants are an invaluable tool in law enforcement. However, we suggest that we need better restrictions, more appropriate guidelines, and necessary parameters around the use of confidential informants. And Kathryn Johnston's life and legacy will be furthered if we are able to do that.

Confidential informants, on our view, ought to be forced to appear before judges. That will, on some level, help to eliminate the kinds of tragedies that we have seen in Atlanta and we have seen in other parts of the country.

Chairman Conyers, you spoke of this so-called stop snitching hysteria that is spreading across the Nation, especially in my generation, the hip hop generation. But I would submit that if we are to further the cause of the betterment of the use of confidential informants, we have got to make confidential informants mean more than just snitches.

They have got to be used as appropriate tools in the fighting of crime. And that can only happen when there are necessary and appropriate parameters and guidelines placed around their use. Thank you.

Mr. SCOTT. Mr. Brooks?

TESTIMONY OF RONALD E. BROOKS, PRESIDENT, NATIONAL NARCOTIC OFFICERS' ASSOCIATION COALITION, SAN FRANCISCO, CA

Mr. BROOKS. Chairmen Scott and Nadler, Mr. Lungren, Members of the Subcommittee, thank you for allowing me to testify before you on this very important topic. I represent the National Narcotic Officers Association's Coalition, some 60,000 police officers on the front lines of drug enforcement around this Nation.

I have served as the primary investigator, supervisor or manager for literally thousands of drug and gang investigations during my career. I have been a police officer my entire adult life. And in those 32 years, I have known very few police officers who set out to break the rules or do anything that would discredit them, their families or our profession.

Unfortunately I do know of officers who have unwittingly made poor decisions involving the use of informants due to insufficient policies, a lack of supervision or inadequate training. Some of these regrettable decisions have resulted in the arrest of innocent persons or even much worse.

We must reduce the risk of using informants. And I believe the solution lies with training officers, supervisors, and managers to use sound informant policies which include corroborative evidence.

The mere thought of using an informant is distasteful for many people. The use of informants by law enforcement agencies invokes the thoughts of big brother, political spying, and the government's efforts to undermine the anti-war movement during Vietnam. But despite the negative connotations regarding informant use, it is im-

portant to be mindful of the reality of conducting drug, gang, and terrorism investigations.

Drug trafficking organizations, street gangs, domestic and international terrorist organizations and closed and violently guarded societies. The trade craft employed by modern career criminals is often as sophisticated as those employed by law enforcement and intelligence professionals. Confidential informants, most working for pay or legal consideration and based upon their truthful and honest cooperation with law enforcement have the bona fides that allow them access to criminal organizations.

I have worked undercover on hundreds of occasions. And in almost every case where I was the undercover officer and in the vast majority of the thousands of other investigations that I have conducted or supervised there would not have been a successful conclusion had it not been for the information provided or access gained through the use of an informant.

On a few occasions, however, this authority has been severely misused. The 1999 arrest of 46 persons in Tulia, Texas, has rightfully been called one of the worst miscarriages of justice in memory. These arrests were based on the work of a rogue mercenary cop and an informant working under the legal authority of a small town sheriff without benefit of policy, direction or supervision. And there are certainly other cases where the improper use of informants exacerbated by a lack of adequate policies and training has resulted in the serious miscarriage of justice, including the one recently described in Atlanta, Georgia.

But like most other professions, law enforcement and the use of informants by police officers should not be judged or condemned simply because of a relatively few instances of mismanagement and wrongdoing. One example of a program that has been successful in addressing drug and gang crimes and in protecting our communities are the multi-jurisdictional task forces funded through the Byrne justice assistance grants. These task forces are co-located in shared facilities with common policies, consistent supervision, and governance provided by all of the participating executives.

This arrangement has increased the professionalism of drug enforcement and reduced the incidents of misconduct or wrongdoing. We must focus on training. When used in conjunction with well-written policies and effective supervision, good training has demonstrated that a professional environment and adequate supervision can dramatically reduce the potential for the abuse of law enforcement's authority.

Unfortunately many States don't have the standardized policies or training mandates or even the funds available. Fortunately a successful example of a training program that can dramatically mitigate the risk of using informants is free of charge to State, local, and tribal officers throughout the U.S. through the Bureau of Justice Assistance Center for Task Force Training. This intensive 3-day workshop dedicates most of its time and curriculum to the development and implementation of sound policies, risk management, and informant procedures and ethics.

Unfortunately funding for this program has not been included in the House CJS appropriations bill for 2008. The program is critical and is a necessary step toward stopping these abuses.

It is important to strive to improve law enforcement professionalism and to reduce instances where innocent people suffer because of improper police. But when regrettable events occur, the answer is not to regulate or hinder the appropriate use of informants. The solution is to provide adequate resources and training.

There has long been a saying in law enforcement. Good informant, good case. Bad informant, bad case. No informant, no case. And that saying captures the critical nature of our work.

When it comes to the proper use of informants, we must do more on training, supervision, and implementation of sound policies. When we appropriately manage informants, great cases, the ones that make our communities safer, are the results.

But when informants are not properly used, the results could be devastating. But without the ability to freely use informants, law enforcement would have very few significant successes, organized criminals would operate with impunity, and the safety of our Nation would be in jeopardy. Thank you.

[The prepared statement of Mr. Brooks follows:]

PREPARED STATEMENT OF RONALD E. BROOKS

Statement For The Record

Ronald E. Brooks, President
National Narcotic Officers' Associations' Coalition (NNOAC)

Before the Committee on the Judiciary

Subcommittee on Crime, Terrorism, and Homeland Security
and
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

United States House of Representatives

Thursday, July 19, 2007

Chairmen Scott and Nadler, Ranking Members Forbes and Franks, members of the Sub Committees, thank you for offering me the privilege of testifying before you on the important topic of law enforcement confidential informant practices.

My name is Ronald Brooks and I am the President of the National Narcotic Officers' Associations Coalition (NNOAC) which represents forty-four state narcotic officers' associations with a combined membership of more than sixty thousand law enforcement officers from throughout the nation.

I am an active duty thirty-two year California Law Enforcement Veteran with more than twenty-four years spent in drug, gang and violent crime enforcement. I have served as the primary investigator, supervisor or manager for thousands of drug investigations and enforcement operations ranging from street level buy programs in neighborhoods plagued with drug related gang violence to multi-national investigations targeting sophisticated drug trafficking organizations.

I have written and implemented policies and procedures for managing undercover operations and confidential informant polices for several local, regional and statewide law enforcement agencies. In my capacity as a narcotic unit supervisor, manager or executive, I have been responsible for enforcing policies (including those regulating informant use), investigating employee misconduct and participating in the disciplinary process for officers that do not follow relevant laws or policies.

For more than twenty years I have developed curriculum for and taught courses in drug investigation and the management of drug enforcement operations for the Drug Enforcement Administration, California Department of Justice, California Narcotic Officer's Association and the United States Department of Justice-Bureau of Justice Assistance. My instruction has included sections addressing: ethics, integrity, policy development, risk assessment, undercover operations and informant management. More importantly, I have learned about narcotic enforcement the hard way - by witnessing firsthand, the despair, death, disease, violence and devastation that illicit drug use brings to individuals, families and communities across our great nation.

Thanks to the leadership provided by the United States Congress, there is considerable good news to report to the American public regarding the fight against drugs and drug related violent crime. In recent years, the White House Office of National Drug Control Policy (ONDCP) has reported significant reductions in overall drug use. Moreover, our nation has experienced dramatic reductions in both violent and property crime as part of a multi-year trend. This is in part a result of law enforcement's success in battling drug abuse, gangs and drug related crime.

Many of us look with pride on the accomplishments brought about by the implementation of a balanced and comprehensive drug strategy, but these successes would not have occurred had it not been for aggressive law enforcement. Efforts that included using all of the legal and generally accepted investigative techniques available to America's law enforcement officers including court authorized wire taps, surveillance, interviews of

suspects, victims and witnesses, review of documentary evidence, undercover operations and utilizing information and access provided by confidential informants working under the direction and control of law enforcement officers.

The mere thought of using an informant is distasteful for many persons. The use of informants by government entities including law enforcement agencies evokes thoughts of "Big Brother", political spying during the "red scare" of the 1950's and the government's efforts to undermine the anti-war movement during the Viet Nam war. Despite these negative connotations it is important to understand the reality of conducting criminal drug, gang, violent crime and terrorism investigations.

Drug trafficking organizations, criminal gangs, domestic and international terrorist organizations and other organized crime groups are closed and violently guarded societies. The persons who participate in these vicious and disruptive criminal activities are professionals in their own right and much like legitimate businesses, protecting their corporate secrets; they use the cloak of secrecy combined with violence, fear and intimidation, to inoculate themselves against intrusion by law enforcement which could mean incarceration, loss of contraband or assets and in some cases deportation or even a death penalty sentence. The tradecraft employed by modern career criminals is often as sophisticated as that employed by law enforcement professionals or even the intelligence community. To avoid detection and arrest, drug traffickers and other criminals are guarded with their identities and information and are very cautious about whom they meet, transact business with or allow into the inner circle of their violent organizations.

I have worked undercover on hundreds of occasions. Posing as a criminal, I have purchased and sold illegal drugs, precursor chemicals, firearms, explosives and stolen property. I have witnessed the planning of violent crimes including murder and have infiltrated criminal tax evasion and money laundering schemes. My undercover efforts have resulted in the arrest of serious criminals, the seizure of significant quantities of drugs, assets, clandestine drug labs and weapons; and have prevented several violent crimes. In almost every case where I was the undercover officer, and in the vast majority of the thousands of other drug, gang and firearms investigations that I have conducted, supervised or managed, we would not have reached a successful conclusion had it not been for the information provided or access gained through the use of a confidential informant.

There has long been a saying in law enforcement, "good informant – good case, bad informant – bad case, no informant – no case". That saying truly sums it all up. When we appropriately manage informants, great cases, ones that make our community safe are the result. When informants are improperly used, the results can be devastating. But without the ability to freely use informants, law enforcement would have very few significant investigative successes, organized criminals would operate with impunity and the safety of our nation would be in jeopardy.

Informants are motivated by many things, but most frequently by: greed - the desire to be paid for their services, or fear - the desire to trade information for leniency in prosecution

or sentencing. Informants may also be motivated by a desire to protect their community, eliminate competition, seek revenge or sometimes, by the perverse desire to be a front seat participant in the dangerous world of criminal investigations. I can safely say that most of these informants would not qualify as productive members of society and you probably would not want them as your next-door neighbor. Just as you would not want the criminals that they are assisting to investigate residing next door. But it is for precisely that reason that these confidential informants are indispensable investigative assets. Confidential informants, most working for pay or legal consideration based upon their truthful and honest cooperation with law enforcement, have the bona-fides that allow them access to criminal organizations.

There have been many instances, including several well known cases where informants, in an effort to seek favorable consideration from law enforcement, receive payment for services, destroy competition or settle grudges, have lied or provided inaccurate information that resulted in the arrest of innocent persons or other inappropriate law enforcement actions.

Some of these cases have achieved significant notoriety including the recent Atlanta Police Department shooting death of 88 year old Kathryn Johnston in a case where at first blush, improper informant management and wanton disregard for standard law enforcement practice appears to have caused or contributed to this terrible tragedy. Or the 1999 arrest of forty-six persons in Tulia Texas in what has rightfully been called one of the worst miscarriages of justice in recent memory. These arrests were based upon the

work of a rogue mercenary law enforcement officer and his informant working under the legal authority of a small town sheriff without the benefit of generally accepted policies or adequate training and supervision. There are certainly other cases where improper use of informants, corruption, and a lack of adequate policies, training or supervision has resulted in serious miscarriages of justice. But like most other professions, law enforcement and the use of confidential informants by police officers should not be judged or condemned simply because of a relatively few instances of mismanagement or wrongdoing.

Unfortunately, cops are easy to take for granted. We often underestimate the significance of the security around us because we become accustomed to living in a relatively safe environment. But taking the life-and-death role of drug law enforcement officers for granted, especially at this time in our history, would be a terrible mistake. Instances of police misconduct are immediately reported in the press and rightfully so. After all, we live in a free and transparent society where our public servants are held to a high standard. Unfortunately, what rarely appears in the media is the good work of the more than 870,000 sworn law enforcement officers serving in Federal, state, local and tribal law enforcement agencies throughout the United States as they struggle against the tide of drug abuse, gangs and violent crime. The overwhelming numbers of these officers serve honorably and are willing, if necessary to lay down their lives in the service of their communities and this great nation. For those officers charged with investigating terrorism, drugs, gangs and other organized crime, using confidential informants is an important, valuable and necessary tool in crime suppression, the maintenance of safe

communities and the protection of our homeland. It is the use of confidential informants, as part of a comprehensive investigative and enforcement strategy that has helped to keep our communities safe and has contributed to the recent reduction in drug, property and violent crime. I have supervised thousands of undercover operations and I know from experience, that even the most skilled undercover officer would not be able to penetrate most organizations were it not for confidential informants who have earned the trust of the members of that criminal enterprise.

Since September 11, 2001, the focus of federal assistance to state and local public safety agencies has shifted to protecting the homeland from terrorist activities and equipping first responders. This is appropriately the top priority right now. However, the shift has now come at the expense of traditional law enforcement missions, such as drug enforcement, which not only impacts communities on a daily basis, but are directly tied to the Global War on Terror. In shifting resources to homeland security, we must not lose our focus on drug enforcement and prevention. In fact, protecting our homeland MUST mean protecting citizens from drug traffickers and violent drug gangs.

The damage created by the abuse of illegal drugs has not been erased by the events of September 11th. Probably more than most Americans, the members of the NNOAC understand the danger that illegal drugs pose to the fabric of our society. We lost almost 3,000 Americans on September 11th. In contrast, more than 30,000 Americans die each year - as a direct result of illicit drug abuse and its related effects. In addition, ONDCP estimates that illicit drug use costs our society $160 billion each year. I believe that the

loss of 30,000 lives annually and a cost of $160 billion each year means that drug trafficking is a form of home-grown terrorism in America.

Since September 11th, no child on U.S. soil has been injured or killed in a foreign-organized terrorist attack. But almost every child, regardless of race, gender or economic background will be asked by friends or acquaintances to try dangerous illegal drugs. Each child will struggle with a choice that has the real potential to ruin their life, a choice that – wrongly made – will cause them to sacrifice their health, mental state, education, and family. Stumbling into the world of drugs will likely force them to be estranged from family, friends and faith, far too often robbing them of life itself. Unfortunately, many of our nation's young people will make that life-altering choice this year – a choice with devastating results. But we know that we can reduce that risk when we reduce the availability of drugs, increase costs, make a strong social statement that drug use won't be tolerated and reduce the influence of gangs and other thugs on impressionable teens.

We don't allow ourselves to fight terrorism with one hand tied behind our back. Altering law enforcement's ability to use confidential informants would tie the strong hand of state and local law enforcement behind its back by reducing the investigative techniques that are available to investigate drugs gangs and other crimes.

One example of a program that has truly been successful in addressing drug and gang crime and in protecting our communities are the multi-jurisdictional task forces funded through the Edward Byrne Justice Assistant Grant. These taskforces are collocated in

shared facilities with common policies and procedures, consistent supervision and governances provided by all of the participating law enforcement executives. This arrangement has increased the professionalism of drug enforcement and reduced the incidents of misconduct or wrongdoing including those associated with the use of informants. In 2004, Byrne Grant funds were used to help finance more than 400 multi-jurisdictional task forces nationwide. Based on the 2004 Annual Report submitted by the State Administrating Agencies those task forces alone reported:

286,000 drug arrests

$259 million in cash and property forfeited

5,600 clandestine methamphetamine labs dismantled

55,000 weapons seized

1.8 million grams of powdered cocaine seized

278,000 grams of crack cocaine seized

73,000 grams of heroin seized

27 million kilograms of marijuana seized

75 million marijuana plants seized.

I can assure you, based upon my thirty-two years of law enforcement experience and regular conversations with NNOAC members across the country, that the vast majority of those cases were made with the assistance of confidential informants.

As citizens of a free society we should be concerned with the use of informants but we must not allow the improper actions of a relatively small number of informants or police officers to jeopardize a legitimate investigative technique that has helped protect our nation from terrorism, drugs and violent gangs such as the Crips and MS13.

Nationwide, drug abuse has been on the top of America's families concerns for over twenty years. In a poll conducted last year in the Central Valley of California, citizens listed the danger of methamphetamine and meth related crime as more significant concerns than the war in Iraq, terrorism, rising gas prices, and the economy. I am sure that those citizens are more than willing to allow law enforcement to use informants and other legal investigative techniques if it will help reduce the drug threat in their community.

On May 15th this year, I attended the National Law Enforcement Officer's Memorial Service on the steps of the United States Capitol. During that service President George W. Bush memorialized the sacrifice of more than 18,000 American law enforcement officers who paid with their lives since the founding of America to help make our country a safe place to work, live and raise our children. On June 8, 2006, I joined thousands of grieving family members at a candle light vigil lead by parents and the Drug Enforcement Administration to remember our nation's children who have been lost to drugs. These two memorial services serve as a reminder of the importance of drug enforcement and of the need to allow America's police officers to have the tools necessary to fight back against terrorism, drugs and gangs. As Americans, we must never give up our fight to

preserve, protect and defend this great nation from the scourge of drugs, gangs and violent crime. To do so, would dishonor the memory of my fellow police officers and those who have died as a result of drug abuse. It is solemn duty to do everything in our power to keep our nation's most precious treasure, our children safe and drug free.

While I know that as members of the Congress you each understand the impact of drugs and gangs on the safety of our communities, especially in your own districts. But often, discussions in Washington regarding public safety and drug policy can become academic and not grounded in reality. The truth is, for the 60,000 members of the NNOAC and for law enforcement officers, fire fighters, EMS workers, probation officers, drug court judges and treatment professionals, that these issues involve real-life tragedies.

From a personal point of view, my civilian friends are often concerned about the physical and emotional toll that thirty-two years of facing the danger of working undercover and conducting tactical operations against illicit drug dealers has taken on me. The truth is, as a police officer you learn to live with the danger, long hours and time away from family. What keeps me up at night is the death, fear, economic despair and ruined lives I see as a result of drug addiction, gangs and drug related violent crime. It is hard to watch generations of families succumb to the downward spiral of drug abuse and addiction. It is heartbreaking to carry children out of meth houses breathing the poisonous gas; it is a tragedy to see families like the Dawson family in Baltimore, Maryland who were subjected to the worst form of terrorism at the hands of drug dealers.

America's law enforcement officers are driven by a commitment to fight the scourge of drug abuse, by recurring images of innocent children lying in dirty diapers who are living in deplorable and dangerous conditions and suffering from malnutrition, with drug addicted parents who often abuse them and unable to care for them. My colleagues and I are driven to face the danger of drug enforcement by witnessing impressionable young lives ruined when they are lured into a culture of crime by adults promising quick money.

I have been a police officer my entire adult life. While serving as the President of the NNOAC, I have spoken at law enforcement conferences and met with narcotic officers from throughout the United States. I have known very few police officers who have set out to break the rules, create a scandal, or do anything that would discredit themselves, their family or our profession. Unfortunately I do know of officers who unwittingly, because of insufficient policies, a lack of supervision, inadequate or non existent training have made poor decisions involving the use of confidential informants. Some of these regrettable decisions have resulted in unnecessary injuries, the arrest of innocent persons or other unwarranted police action. The answer to this challenge of reducing the risk of using informants lies not with mere regulations but with teaching agencies sound informant policies and providing officers, supervisors and managers that must work in this high risk, high liability field of drug and gang enforcement with the information they need to do their job in a professional and credible manner.

During the past twenty years in my own state of California there have been very few instances of scandals, corruption, injury or death attributed to the improper use of

confidential informants. This is due in part to standard polices and procedures adopted by law enforcement agencies throughout the state to regulate the use of informants. These policies include regulations mandating the need to adequately identify and approve informants, avoiding the use of those informants who pose a higher than acceptable risk, the requirement for supervisory and management oversight when informants are used and many other regulations that are based upon past experience. The professionalism surrounding the use of informants is also directly attributable to the high standards imposed by the California Commission on Police Officer Standards and Training (POST) and the availability of free or inexpensive high quality drug enforcement training through the California Narcotic Officers Association and the California Department of Justice. Training classes that focus on the appropriate control and management of informants, the assessment and management of risks associated with the use of informants and undercover operations, and integrity and ethics training that is designed to instill a culture of ethical conduct among California's law enforcement officers. This training, when used in conjunction with well written policies and effective supervision has demonstrated that a professional environment and adequate supervision can dramatically reduces the potential for the abuse of law enforcement authority or the misuse of confidential informants as an investigative tool.

Unfortunately, many states do not have standardized policies, training mandates or even funds available to provide drug enforcement training. Luckily, a very successful example of a training program that can dramatically mitigate the risk of using confidential informants is available free of charge to state, local and tribal police officers from

throughout the United States through the Bureau of Justice Assistance, Center for Task Force Training (CenTF). Since 2001, this program has trained more than 2,300 narcotic supervisors and managers at 60 Narcotic Task Force Commanders Workshops and 5,366 investigators at 106 Methamphetamine Investigation Management workshops held at locations throughout the United States. The intensive three day Commanders Workshop dedicates most of its time and curriculum on the development and implementation of sound policies and procedures, assessment and management of risk, management of informants and how managers can establish an ethical culture within their law enforcement unit. The training also provides many articles, sample policies and other reference materials for use in effectively managing a drug investigation unit or informant program.

I would encourage the members of this committee and your colleagues in the Congress to understand the continuing threat to the security of our nation that is posed not only by foreign born terrorists but by drug traffickers, drug related violent criminals and the continued growth of street gangs. I hope you will recognize that America's law enforcement officers including those represented by the NNOAC are risking their lives each day to protect their communities and the nation from our own homegrown terrorism – drugs and gangs. While I agree that it is important to strive to improve law enforcement's professionalism and to reduce the instances where innocent persons suffer because of improper law enforcement conduct, the answer is not to regulate or hinder the appropriate use of confidential informants, the solution is to provide adequate resources and training to allow law enforcement officers to carry out their sworn obligation.

America's law enforcement professionals need all of the tools currently at their disposal including the highly successful multi-jurisdictional task forces funded by the Byrne Grants and the ability to use legal and acceptable investigative techniques such as confidential informants in their never ending fight against crime. Law enforcement has registered encouraging success in the battle against drugs and violence.

We have also prevented attacks on our homeland from foreign or homegrown terrorists using information or access obtained through confidential informants. Earlier this year, it was a confidential informant who assisted the FBI by acting under their direction and control to infiltrate a New Jersey based terrorist cell. This informant gathered critical evidence for use in prosecution and more importantly assisted in thwarting a planned attack on Fort Dix. And it was an informant, arrested on drug crimes that provided the information that disrupted a planned attack on the fuel farm at JFK Airport.

These cases have national and international significance in the global war on terror, but they are no more significant than a case involving a planned gang murder if the person's who's life was saved was that of a loved-one. These types of investigations and thousands of others, big and small will not be made without the techniques and resources including the use of informants that we now rely upon.

I would urge the members of the House Committee on the Judiciary and especially the members of these two subcommittees to work with the NNOAC to continue to fund the Byrne Program and to increase funding and availability for BJA's CenTF program so that

every law enforcement officer who needs training receives it, so we can continue to improve the professionalism and efficiency of America's law enforcement programs.

Thank you for inviting me to testify and for taking the time to listen to my presentation. I have submitted my full comments for the record and I will be happy to answer and questions that you might have.

Mr. SCOTT. Thank you very much.

We have been joined by the gentleman from Massachusetts, Mr. Delahunt. His legislation has been already referenced earlier today. And the gentlelady from Texas, Ms. Jackson Lee has joined us.

Ms. Speight?

TESTIMONY OF DOROTHY JOHNSON-SPEIGHT, FOUNDER AND EXECUTIVE DIRECTOR, MOTHERS IN CHARGE, PHILADELPHIA, PA

Ms. JOHNSON-SPEIGHT. Good morning, and thank you for the opportunity to speak before this Committee this morning. My name is Dorothy Johnson-Speight and I am the executive director and founder of Mothers in Charge.

As a mother of a teenager living in urban America, I always lived with some level of fear. The statistical data provides the grim facts. Homicide is the leading cause of death among African-American males between the ages of 14 and 24.

These homicides are often perpetuated by offenders with long lists of criminal activity that also includes murder. I don't think any mother or father should live with the fear and fact that their children may not be alive to see 25 because of violence in the community.

My son Khaaliq graduated from the University of Maryland, and a few years later was going back to complete his graduate degree. Our plan was that we would work together and work with children at risk. He would get his master's, and I would get my Ph.D., and we would practice together.

In December, only 6 months after his 24th birthday, I experienced my worst nightmare. My son became one of those statistics. At age 24 and-a-half, he was shot to death on the streets of Philadelphia over a parking space.

This is my son Khaaliq. This is his picture graduation from the University of Maryland in 1999.

The person responsible for my son's death was caught over the next few days. A month later, while watching the news, I saw a plea from a mother who lost her son in the same neighborhood. She was looking for someone to step up and speak up with information in the fatal stabbing of her 19-year-old son, Justin. She had only a few clues, but those clues seemed to be familiar to me.

Because of my need to come forward with any information that may be pertinent to her case, I went in search to find this mother. After our meeting, we learned that the same angry man that murdered my son, Khaaliq, had murdered her son, Justin Donnelly, 5 months earlier.

This man was seen in the community several times after Justin's death. And because he was known as such a violent person in that community, the people of that community were afraid to come forward. They had information, but he walked the streets for 5 months until he murdered my son.

I am constantly reminded that if one person had provided the necessary information after Justin's murder, maybe Khaaliq would still be alive today. I live with that awful pain every day.

The murderer was ultimately found guilty of first degree murder for both crimes and is currently serving two life sentences. Al-

though justice was served, it does not stop the pain that I feel every day, and it will not bring back our son.

This is a picture of 19-year-old Justin Donnelly. And his mother is here with me today.

Both of our children were killed by the same person four blocks away. And people had information, but they were afraid to come forward.

In 2003, Ruth and I took our anger and our pain and joined other mothers who had lost children and started Mothers in Charge. We now have a membership of over 300 women, mainly mostly mothers who have lost children facilitating violence prevention and intervention programs for children, parent education programs, and other various community support services.

These services include a mentoring program with the juvenile offenders housed in the House of Corrections, grief and loss group counseling sessions with children at Carson Valley School. And we are currently administering a reading STARS program, a program where we tutor and challenge young people to increase their reading skills and run two female rites of passage programs.

We have chapters in Philadelphia, Pennsylvania and its surrounding communities, as well. And we will soon open a chapter in New York, North Carolina, Georgia, and California.

Potential witnesses need support to come forward. They need to be supported to provide information. They need to not be intimidated by crime, by criminals who are often in our communities committing the same crime over and over again.

In addition to Mothers in Charge, starting our organization, we have become an integral part of a campaign called Step Up, Speak Up. Step Up, Speak Up began as a partnership between the Federal Bureau of Investigation, the Philadelphia Division's Community Relations Unit, Mothers in Charge, and Clear Channel Outdoor in an effort to encourage citizens living in the Philadelphia area to cooperate with law enforcement. The SUSU initiative is an outreach program to reduce community-wide fear and intimidation and to encourage citizens to cooperate and provide information to law enforcement.

The campaign was created as a response to the Stop Snitching and the Don't Talk 2 Police t-shirts, video and music. Law enforcement agencies rely and depend on the cooperation and testimony of witnesses and recognize that witnesses sometimes feel intimidated even when there is no actual danger of retaliation. The Step Up, Speak Up campaign is not a structured organization, but a process to support goals and activities that emerge from grass roots community organizations attempting to encourage witness cooperation.

Although there is no legal obligation to contact the police or law enforcement agencies, the information provided by witnesses could make the difference in bringing a criminal to justice. Citizen cooperation could prevent further crimes and protect others from becoming victims.

It is a criminal offense to intimidate a witness or anyone assisting law enforcement in an investigation. Some forms of intimidation are community-wide and subtle, such as the Stop Snitching apparel and the display of this apparel and those messages that

are popular through music and video. The SUSU campaign is a response to those subtle forms of intimidation.

However, there needs to be more of a concerted effort to address the undermining of the work of law enforcement with this Stop the Snitching culture that has emerged across this country and are claiming lives because of it. Mothers in Charge and Step Up, Speak Up is an example of what can happen when we make a commitment to make a difference.

We have to understand the importance of witness intimidation and create ways to counteract it by protecting our Nation's citizens against violent criminals. If we are unable to protect and support our communities and wanting to speak up about criminal activity, it will continue to undermine the hard work of law enforcement agencies and grass roots organizations.

We need judicial and legislative assistance to rid our communities of witness intimidation with stricter legislation that will in turn allow law abiding citizens to feel safer in coming forth with information that will rid our streets of violent and repeat criminals.

Today in Philadelphia there are 220 murders to date. A lot of them are unsolved because people are afraid to come forward. Human sources are a key to law enforcement. I ask that you support people who want to come forward and provide information to address the issue of violence in our communities across this country.

I thank you.

[The prepared statement of Ms. Johnson-Speight follows:]

PREPARED STATEMENT OF DOROTHY JOHNSON-SPEIGHT

*The Hatfield House *3201 West Girard Avenue *Philadelphia, PA 19130*
*Telephone: 215-236-3937 *Fax: 215-236-7622*

Good morning. My name is Dorothy Johnson-Speight and I am the Executive Director and Founder of *Mothers In Charge.* As the mother of a teenager living in Urban America, I always lived with some level of fear. The statistical data provides the grim facts: homicide is the leading cause of death of African American males between the ages of 14 and 24. These homicides are often perpetuated by offenders with long lists of criminal activity that also includes murder. I don't think any mothers or fathers should live with the fear and fact that their children may not be alive to see their 25th birthday.

My son Khaaliq graduated from college a few years earlier and was going back to complete his graduate degree in January. Our plan was that we would work with children at risk, I would get my Doctorate, and we would go into practice together. In December, only six months after his 24th birthday, I experienced my worst nightmare. My son became one of the statistics. At age 24½ he was murdered; shot to death on the streets of Philadelphia over a parking space.

My story is like too many stories in all urban communities. December 6, 2001 just after midnight my phone rang. It was my stepson. He told me to come quickly - Khaaliq had been shot. My son had been shot 7 times by an angry man over a parking space that stopped only because his gun jammed. Because this man was so filled with hate, he stood over my bleeding son and kicked him in the face.

The person responsible for my son's death was caught over the next few days. A month later, while watching the late news I saw a plea from a mother who lost her son in the same neighborhood. She was looking for someone to step up and speak up with information in the fatal stabbing of her 19 year old, Justin. She had only a few clues that seem to be familiar to me. Because of my need to come forward with any information that may be pertinent to her case, I went in search to find this mother. After further investigation we learned that the same angry man that murdered my son Khaaliq had murdered her son Justin Donnelly, 5 months earlier. This man was seen in the community several times after Justin's death and because he was known as such a violent person in that community - the people of that community were afraid to come forward. They knew what he was capable of, and did not want to suffer the same fate. Because no one came forward and provided information, he walked the streets every day until he murdered my son. I am constantly reminded that if one person had provided the necessary information before my son's murder, Khaaliq would still be alive today. I live with that awful pain everyday. His murderer was ultimately found guilty of first degree murder for both crimes and is currently serving two life sentences. Although justice was served it does not stop the pain I feel each day and it will not bring back my son.

In 2003, Ruth and I took our anger and pain and joined other mothers in starting *Mothers In Charge.* We now have a membership of over 300 people and facilitate violence prevention and intervention programs for children, parent education programs, and other various community support services. These services include a mentoring program with the juvenile offenders housed in the House of Corrections, grief and loss group counseling sessions with the Carson Valley School and Residential Facility, as well as countless violence prevention workshop presentations throughout the school district and the city of Philadelphia. We are currently administering the Reading STARS program, a program where we tutor challenged young people to increase their reading skills, as well as run two female rites of passage programs to encourage self-esteem and self-respect among the young female population. We have chapters in Philadelphia, Pennsylvania and its surrounding communities, as well as chapters soon opening in New York, North Carolina, Georgia, and California.

In addition, *Mothers In Charge* has become a integral part of The Step Up, Speak Up (SUSU) Campaign. SUSU began as a partnership between the Federal Bureau of Investigation (FBI) Philadelphia Division's Community Relations Unit, Mothers In Charge and Clear Channel Outdoor in an effort to encourage citizens living in the Philadelphia area to cooperate with law enforcement.

The SUSU initiative is an outreach program to reduce community-wide fear and intimidation and to encourage citizens to cooperate and provide information to law enforcement. The campaign was created as a response to the "Stop Snitching" and the "Don't Talk 2 Police" t-shirts, video and music. Law enforcement agencies rely and depend on the cooperation and testimony of witnesses and recognize that witnesses sometimes feel intimidated even when there is no actual danger of retaliation.

The Step Up, Speak Up campaign is not a structured organization, but a process to support goals and activities that emerge from grass roots community organizations attempting to encourage witness cooperation.

Although there is no legal obligation to contact the police or other law enforcement agencies, the information provided by witnesses could make the difference in bringing a criminal to justice. Citizen cooperation could prevent further crimes and protect others from becoming victims. It is a criminal offense to intimidate a witness or anyone assisting law enforcement in an investigation. Some forms of intimidation are community-wide and subtle, such as the "Stop Snitching" apparel and the display of this apparel and those messages through popular music and videos. The SUSU campaign is a response to those subtle forms of intimidation.

In addition to fear, a witness may be deterred from providing information and testifying because of strong community ties and a distrust of therefore, in addition to providing a resource list for the public with the contact numbers of law enforcement agencies they can call if they have information about a violent crime, the Step Up, Speak Up brochure specifically contains a resource list with the contact numbers for government witness programs and community groups which support and affirm the role of witnesses in solving and reducing violent crime.

Mothers In Charge and SUSU is an example of what can happen when we make a commitment to make a difference. We have to understand the importance of wit-

ness intimidation and create ways to counteract it in protecting our nation's citizens against these violent criminals. If we are unable to protect and support our communities in wanting to speak up about criminal activity, it will continue to undermine the hard work of law enforcement agencies and grassroots organizations. We need judicial and legislative assistance to rid our communities of witness intimidation with stricter legislation; this will in turn allow law abiding citizens to feel safer in coming forward with information that can rid our streets of violent, repeat offenders.

Thank You.

Mr. SCOTT. Thank you very much.

And I failed to reference when I mentioned the gentleman from Massachusetts, the bill introduced by the gentleman from Massachusetts the gentlelady from Texas has introduced H.R. 253 entitled No More Tulias: Drug Enforcement Evidentiary Standards Improvement Act to try to avoid situations that happened in Tulia.

We will now have questions from Members. And we will subject ourselves to the 5-minute rule. And I will begin by recognizing myself for 5 minutes.

Mr. Murphy, has the Department of Justice changed policy in use of confidential informants in the last few years?

Mr. MURPHY. Yes, we have, Chairman Scott. We have implemented a comprehensive series of changes associated with managing our human sources more effectively, more responsibly, and more efficiently.

Mr. SCOTT. Has the change made a difference?

Mr. MURPHY. I would say it is too early to tell. The formal changes only took place in June of this year in terms of the implementation of those. But they are a rigorous set of changes, both in terms of how we manage human sources and how we validate and continue to sustain human sources. And we have confidence that they will over time improve and allow us to continually improve our human source program.

Mr. SCOTT. Does the department have resources to investigate situations like Atlanta? You have investigated that alleged abuse and uncovered after the allegation that it was, in fact, rogue police officers. Do you have sufficient resources to respond to similar allegations?

Mr. MURPHY. Chairman Scott, I believe Director Mueller has made that issue a priority. And he will make resources available for this type of issue.

Mr. SCOTT. Professor Natapoff, you have indicated data collection being one legislative suggestion and also judicial review and reliability hearings. You mentioned the data collection. Can you make comment on the judicial review and reliability hearings?

Ms. NATAPOFF. Excuse me. Yes, Mr. Chairman. The judicial review recommendation is directed toward the fact that in the Federal system, there is very little, if any, judicial review or public airing available for defendants who are cooperating with the government. My written testimony references the aspects of the Federal code and the rules of Federal criminal procedure that constrain the court's ability to review a defendant's cooperation under current law. It requires a government motion submitted to the court to permit the review of any cooperator.

The sentencing commission has issued a report indicating that over half of all defendants actually provide some cooperation to the

government and yet never receive any on-the-record credit for that cooperation. What that does is it draws a veil over the Federal process of cooperation and it makes the prosecutor the gatekeeper for our ability to view the operation of this important public policy.

The suggestions I have made would permit a more open airing of the work of defendants and the work of the government in the process of cooperation, which is central, of course, to our investigatory and our sentencing processes and reduce the availability of the opportunity for abuse, for manipulation, and also for inconsistencies. As this Committee is well aware, the main purpose of the U.S. sentencing guidelines was to reduce inconsistencies in sentencing across the board in Federal sentencing. And there is a lot of data that indicates that the secrecy surrounding cooperation and the use of confidential informants in criminal cases radically increases the kind of inconsistencies that we see in that.

Mr. SCOTT. Well, is there a question of reliability of the testimony when people are being rewarded for coming up with testimony?

Ms. NATAPOFF. Yes, Your Honor, sir, that is a separate question. I and other scholars have—and researchers—have recommended that as in a few jurisdictions that the Federal Government institute the ability of Federal courts to act as gatekeepers to the use of informants as witnesses at trial much as the Federal system provides for reliability hearings for paid experts, we have suggested that this would be a powerful tool for ensuring the reliability of paid, compensated confidential informants if they are to be used at trial as witnesses.

I would note, however, that since very few cases in the Federal or for that matter, in the State system actually proceed to trial, this important reform would affect a relatively small number of cases. What it would do, however, is it would open up the process to more scrutiny, to more accountability, and it would send the message that we will not tolerate the kind of unaccountable, unreliable or confidential informants in our most important judicial processes.

Mr. SCOTT. Can training or setting of standards or professional development make a difference in the use of informants?

Ms. NATAPOFF. Absolutely. I think everyone today is in agreement that we need more training, that we need more resources for the handling and the——

Mr. SCOTT. And what form would that training take place? Would it be setting standards, credentials, seminars? How would you actually do the training?

Ms. NATAPOFF. I would incorporate by reference the recommendations of the other witnesses on the panel. And I would suggest, however, most importantly that what training and accountability does is it changes the culture of snitching in our criminal justice system.

It sends the message that this is an important public policy that we take seriously, that we will not permit these kinds of deals for information and lenience to take place off the books at the untrained or unconstrained discretion of individual officers and that instead this is a public policy that we are going to rationalize, that

we are going to treat as we would any other important public policy in our criminal justice system.

Mr. SCOTT. Thank you.

The gentleman from California?

Mr. LUNGREN. Thank you very much, Mr. Chairman. This is an important hearing, also a very difficult one for me because I see and I hear Ms. Speight and the pain that you have for the loss of your son and the failure of the system and the failure of people to assist the system to get a murderer off the streets before he struck your son.

And then I hear Reverend Hutchins. And we had a death in that case of a law abiding citizen who did nothing more than live in her own home. And she died at the hands of what appears to be rogue cops in a rogue police operation.

And when I hear from Mr. Brooks, who I have known for many years, and I know whereof he speaks of the importance of these kinds of legitimate law enforcement efforts to try and protect against what we heard from an aggrieved mother. And at the same time, we have a case that has gotten national attention that didn't involve a death, but involved improper actions by Federal law enforcement officers on our border.

And in the midst of that discussion, some people are saying, "Well, all they did was they didn't file proper reports." And I think we lose sight of the fact of how important training, proper procedure, supervision, follow-up, and consequences are in the entire system. We don't speak about it enough, it seems to me.

And I am not certain that, Professor Natapoff, the idea of the Federal courts getting further involved in it is as important as training, supervisions, standards, certification, and oversight. And I have a little concern about the idea that if we on the Federal level do something, that will make the matters necessarily better because I have had a particular concern, shared with Mr. Delahunt, about the performance of the FBI, a bureau that I have great respect for, but a bureau that has fallen down tremendously in the area of confidential informants, a bureau that has, by the report of its own inspector general, in 87 percent of the cases that they reviewed not followed their own procedures.

Now, I realize some of those are probably very minor technical. But others are very important. And as a former law enforcement official at the State level, my concern and the focus of the legislation that Mr. Delahunt and I have come up with is the failure of the FBI to control its confidential informants such that those confidential informants are allowed to commit serious violent felonies in local jurisdictions. And our legislation would make it a requirement that the FBI notify local law enforcement or the chief law enforcement officer of the State when that has occurred.

Because just as we could hamper proper law enforcement operations by getting rid of confidential informants, we hamper local and State law enforcement operations when the FBI refuses to alert people to the fact that confidential informants working with the FBI are allowed to commit serious violent felonies, including murder. That is where I think the system goes awry.

So with all due respect, Professor, the idea that maybe with Federal guidance we do better doesn't always sit well with me as a former chief law enforcement officer of a State.

And, Mr. Murphy, I loved to hear what you had to say because I hope that it is true. But tell me exactly what the FBI has done, exactly. Don't just tell me you need more money. What have you done specifically to ensure that the problems we saw in the Boston office, the New York office, some other offices around the country where the failure to respect local law enforcement to the extent of telling them of C.I.s who had committed violent felonies, failure to share that information occurred?

Is that still occurring today? And is there a policy in the FBI to alert local and/or State law enforcement where C.I.s have—you have reasonable evidence that C.I.s working with you have committed serious violent felonies?

Mr. MURPHY. Thank you for that question. The specifics in terms of what we have accomplished under the direction of Director Mueller asking us in 2004 to undertake a reengineering of both our policy and our validation process and then to ask the attorney general to provide additional guidelines to introduce into that process additional checks and balances to ensure that we are conducting this process in a manner that was consistent with expectations, has put what I would describe as a series of layered defenses against the kind of abuses and the kind of problems that were presented in some of the cases that you refer to in your remarks.

It is not just a matter of periodically revisiting your processes. It is a matter of stepping outside of them and aggressively challenging them and ensuring that you are implementing procedures that are protecting against the potential for those sorts of activities to occur.

I think those activities in combination with the substantial change in the nature of the relationship between Federal, State, local, and tribal law enforcement partners through our partnerships in the joint terrorism task force, our partnerships in fusion centers, our partnership in gang task forces has transformed the nature of the relationship that we have with our State and local partners.

And I think the opportunities for the sort of incidents that you characterized to occur are substantially diminished and that the policies and procedures that we have in place, specifically those with regard to activity of a source that may have the occasion to engage in activity that is otherwise illegal, are designed specifically to address the concerns that you spoke to.

Mr. LUNGREN. If I could just ask my question once again very simply. And that is is there a policy in the FBI to share information with local and State law enforcement officials when you have become aware, that is, the FBI, that your confidential informants have engaged in serious violent felony activity, not all criminal activity, serious violent felony activity in the jurisdiction of the local or the State authorities.

Mr. MURPHY. It is my understanding, Congressman, that there is not a specific documented policy, directly to answer your question, sir.

Mr. LUNGREN. Well, I thank you for that because you may have given me the basis for enacting our legislation to require that—well, do you think it should be?

Mr. MURPHY. I think it is difficult to make a generalization that will fly in every circumstance. And, in fact, in some cases, there are activities which are closely coordinated with the local law enforcement activity but have equities that affect other local law enforcement activities we are being asked to respect and support the equities of one local law enforcement agency against another.

And when I say against, I don't mean in a confrontational, but in terms of balancing the equities and the interests, the long-term interests of a particular investigation. So I don't think it would be fair or accurate for me to try and characterize a general solution, particularly if there is legislation that is under consideration. Our process and our approach is to take onboard criticism and observations about how we conduct our procedures and to consider whether or not we have appropriate measures in place to ensure and preserve the integrity of our process.

Mr. SCOTT. The gentleman's time is expired. But this is such an important point. And I think we need to follow-up because the question was violent, felonious activity.

Mr. LUNGREN. Yes, all I can say is if I were still a law enforcement officer in the state of California and you were to tell me that the FBI was reserving judgment as to whether you could tell me that you have C.I.s in my jurisdiction that are committing serious violent felonies, I would be more than offended.

Mr. MURPHY. I think that is a very fair response, Congressman. But let me clarify in terms of how I understood your question and how I answered your question. You asked directly if we do, in fact, have a policy. And to my knowledge, there is not a policy.

That does not mean that it is not a common practice or an appropriate practice to convey that information. And I would want to be certain about the nature of that response to make sure that you are comfortable with what we do in practice.

Now, saying trust me or saying it is going to happen every time isn't the same as having a policy in place. And I recognize and acknowledge that. And I will take your concerns back with me. Thank you.

Mr. SCOTT. Thank you. And I thank the gentleman for his questions.

Obviously, Mr. Murphy, I don't think this is the last you are going to hear of this issue. So we will follow through when the legislation is introduced.

I apologize to the other Members for allowing the gentleman to take so much time, but I think that was an extremely important issue that we are all interested in.

The gentleman from Michigan, the Chairman of the full Committee and recent recipient of the Spingarn award from the NAACP, the highest award that that organization gives, just last week. Congratulations, Mr. Chairman.

Mr. CONYERS. I thank you very much, Bobby Scott.

And Mr. Nadler has given me permission to go next. The discussion is so important.

And the reason I am so proud of the Judiciary Committee is that Dan Lungren is the former attorney general of the state of California. Bill Delahunt, top prosecutor in—former top prosecutor in the state of Massachusetts. They are working on this issue.

And the first thing I want you to know is that the head of the FBI, Mr. Mueller, and the deputy director met with me last week. And so, we are all working together on this.

And I thank you for your contribution, Mr. Murphy. It is not just what you are doing now. It is what you are going to be doing in the future. And that is what we are working toward.

Because I happen to believe that the Federal law enforcement policy is a very important guideline for all the State and local activities of informants and snitches that is going on that is totally out of control. We can't even record it. We don't have any idea. It is every law enforcement agency for itself.

Now, in this hearing, there are two big issues. Boy, if it was only informants and snitches out of control. We have a problem, a history in America. And listen to me, Members of this Committee, of police lawlessness in American history.

So let us not be naive about this thing. July 23rd is the 40th anniversary of the biggest riot in American history in Detroit, Michigan. Forty-three people lost their lives. President Lyndon Johnson called me to tell me we were sending in the Army on top of the Michigan State Police on top of the Detroit Police.

He sent in a special representative, yes, Cy Vance. And I had never in my life thought I—I will never forget this. Tanks rolling down the street I lived on in Detroit, American tanks. And the National Guard was activated. People lost their lives. They were shooting off rooftops, snipers, Watts riot just before this. This is 1967, the 40th anniversary.

Police lawlessness caused that riot and many of those riots that went through it. So that is why I say that this is an important part of it. But getting police, the only people that are authorized to carry weapons and use them to protect Americans—this is a huge issue. And that is why I am proud of this Committee that can bring in attorney generals and State prosecutors and have these kinds of activities that are going on.

Now, we need an off-the-record hearing with the FBI on this question. We are not going to be able to get into this now.

We are being stiffed on how much money the Byrne grant money, which goes for informants. We can't get that right now. But don't worry, we are going to get it.

And I want to commend both Committees, Nadler's and Scott's. Here are six witnesses. We need to meet again when we are not in the formal strictures of the back and forth of a formal Committee hearing.

We have got to talk about this thing, Reverend Hutchins.

And the lady here—we really have seven witnesses. And then we look at this young man here that risked his life from Atlanta. That is eight witnesses.

We have got the congresswoman from Texas who brought the Tulia incident. There is another incident. It isn't police just there. It is criminal justice out of control there because they imprisoned 13 percent of the whole population before they found out that ev-

erybody that they wanted to put in prison they just accused them of selling drugs.

So I am saying this is a small problem inside of a bigger problem. And we have been addressing it. We are trying to do what we can about it. I talked to our prosecutor in Wayne County or the office of the prosecutor. And we got back this information.

They use confidential informants in 50 percent of all the homicide cases. But they have guidelines built in. The problem at the local level is that everybody has got their own guidelines. There are 15,000 guidelines. And, of course, there are a lot of them that don't have any guidelines. So we have got to get this organized.

Now, I close with this, Reverend Hutchins. What has happened with these Web sites going up now to stop snitches is that they started homicides to retaliate to the snitches. Now, that is just promulgating the problem. That is making it worse.

And that is why we have got to bring this thing under control. The answer is not to start assassinating people that are snitches. And this is corrupting the entire criminal justice process in America, Federal and State. And I ask for unanimous consent to merely have Reverend Hutchins and Professor Natapoff respond to my comment.

Mr. SCOTT. Without objection.

Reverend HUTCHINS. Thank you, Mr. Chairman. Mr. White just slipped me a note, Chairman Conyers, that if police step up like they should be, there would be no room for confidential informants to mess up, as he put it, to start with. I could not agree more.

As a young African-American man, there is a problem with policing and police behavior, the attitude, the disposition, the demeanor of police officers, even the police officer who was not white but a Black man that stopped and harassed and talked to us in a very unpleasant manner as we entered this very building for this very hearing. There is a problem with the culture of policing in America. And because of that culture, far too often police officers feel that they can do what they want to under the cover of law.

Mr. Scott, this Committee has a unique opportunity to help, even protect the law enforcement officers themselves that engage in this kind of behavior by insulating them from the capacity and the potential they have to engage in this kind of corrupt behavior. One of the most tragic aspects of the Johnston shooting was that these were fundamentally good police officers. They were veterans, most of them.

They were not corrupt in the sense that they had criminal intent. They were corrupt only in the sense that they engaged in a pattern of behavior that violated police and procedure and in turn, violated Ms. Johnston's civil rights and then tried to cover it up. The most tragic aspect of this case is that these were decent, reasonable police officers.

I would submit to this Committee that if the fabricated confidential informant that was mentioned and feloniously used in the Kathryn Johnston case had been required to appear before a judge, Ms. Johnston would still be alive today and we would not have had to bury a 92-year-old woman. Magistrate judges, Mr. Chairman, are charged and most often trained to make sound judgments and

decisions based on evidence deemed as reliable and truthful from the officers' perspective.

I would submit to you finally that the judgment of said magistrate is severely impaired without the ability to directly corroborate the statements of certified confidential informants. It was just too easy for these police officers to go in front of a judge and to lie and say we have a confidential informants. And they have been engaged in this kind of practice for years. And it is happening all over the country.

Mr. SCOTT. Professor Natapoff, could you make a very brief statement?

Ms. NATAPOFF. Thank you.

Mr. CONYERS. Not so brief.

Ms. NATAPOFF. If I might very briefly respond back to something that Mr. Lungren said earlier. I didn't intend to suggest at all that fixing and improving matters at the Federal level would take care of the State and local problem. Of course, only about 10 percent of all of our criminal justice system is Federal. Ninety percent is State. So, I agree with your proposition that data collection and guidance monitoring at the State and local level is of paramount importance.

Mr. Conyers, of course, I agree that your proposition—that this question about the use of confidential informants goes to the heart of the problem in police community relations. Of course, this is a historic problem in this country. It is not reducible to the problem of snitching or stop snitching.

But I would submit that the 20-year policy on the part of State, local, and Federal Governments of using confidential informants and sending criminals back into the community with some form of impunity and lenience and turning a blind eye to their bad behavior has increased the distrust between police and community, it has worsened the perception in the community that the police and the government are not responsive to the dangers and the needs that we live with every day.

So, we need measures at the Federal as well State and local level to remedy, not just the reality of the violence and the lack of control, but the perception that the government is not going to regulate this matter. It is of paramount importance and would go to that question of police community trust.

Mr. CONYERS. Thank you so much.

Mr. SCOTT. Thank you very much. I was going to introduce two of the Members that have shown up, but both of them have disappeared.

The gentleman from Texas, Judge Gohmert?

Mr. GOHMERT. Thank you so much, Mr. Chairman.

I appreciate the witnesses all being here. I appreciate your testimony.

It is a difficult problem, but a bit put off by the assertion that there is a problem in the culture of policing right now because there just simply too many fine, upstanding law enforcement officers who put their lives on the line. And as Reverend Hutchins said, you know, in that case he referenced, that tragedy, there were good, decent people involved in that. So it is important to have procedures in place to help people avoid going from being good, decent,

and upstanding to falling into traps and being tempted to do otherwise.

But the old saying when it comes to informants, since everyone wants a perfect angel to come in and testify and to be the witness is that transactions in hell are not witnessed by angels. And so, you have to work with what you have got.

But confidential informants do require a relationship with somebody they can trust because especially when you see violence on people that come forward and do their patriotic, civic duty and indicate there has been a crime so that you don't end up having to lose a family member in such a needless way. So that relationship is important. People can feel comfortable coming forward.

That takes relationship growth. It takes a while to build. And many such relationships have been built, I have seen, with FBI agents who were there for a long enough period of time where local law enforcement is also comfortable with them and they are comfortable with local law enforcement where they do work hand in hand.

But unfortunately we had a new brilliant, innovative policy with the personnel in the FBI that was put in place called the 5-year up or out policy. That may not be the official name. And I know just in my little town of Tyler small FBI office.

We have already had one of the best agents, extremely experienced, well-trained, good common sense. Well, he wasn't going to move to Washington, so it was—if it wasn't up, it was out.

We have got another retirement of another young agent that is not coming to Washington. So if it is not up, it is out.

We are losing them all across the country. When we saw the abuses with the NSL letters and our FBI director said, "Hey, we should have made sure we had more experienced and well-trained people in place." And I am thinking, "Well, you are just running off your best ones right now." And that relationship is so important.

So I am still urging—and I know when Mike Rogers tried to talk to somebody with the FBI, they came in and made everybody in his office leave so they could do a search of his office before they would allow the conversation, a little bit of an intimidation tactic. But anyway, that apparently is not well-received to question this policy. But I think it is one that is creating problems.

As far as the gatekeeper policy, you know, as a judge, I had a lot of those hearings in both civil and criminal cases. But I am concerned about that if you have too widespread a requirement because from my own experience, it seemed like the people that were most adamant to find out the identity of a confidential informant whose identity may not have even been necessary at all because of all the evidence that was gathered otherwise that they were the most violent and unethical defendants, as was proven after trial.

But those are the ones that always wanted to get at it. And you got the impression it was so they could go after the informants and they wouldn't go to trial. And, you know, we have seen the movies from the 1920's and what not where gangs used to do that kind of thing.

So it is an interesting suggestion, Professor. But I have concerns, would be interested in any input. But when you hear that 87 per-

cent of the FBI cases with confidential informants do not have proper procedures that were followed, then it does kind of stagger the conscience and make me want to see that there isn't just a feeling maybe we ought to do something, that we do something, that the FBI has policies in place.

We had some poor folks out in Smith County, my home, that had their home broken into a few years ago. I didn't even know you could get an oral warrant until this happened. But they called a Federal magistrate, got an oral warrant and broke into these people's home. If the father had been home, he would have pulled a gun and probably been shot like the terrible incident before.

But since he wasn't home, his wife and his adult daughter were thrown to the floor, their house ransacked and then eventually they realized it was the wrong home, sorry, and then they went to another home and had the good sense, an hour or so later, not to bust the door down like they did the prior one. It was a good thing because it was the wrong home, too.

So anyway, it really helps—well, and that was the Dallas office that took over because they knew more than Tyler FBI agents. So anyway, it is good if you work with local law enforcement officers. You have that relationship. You have some kind of safeguard with confidential informants. I am hopeful that we get input from the FBI, we get input from professors like Natapoff.

Appreciate your input.

But we have got to come up with a policy. I think it would be better if we had your help because you know what happens when we do it on our own. Thank you.

Mr. SCOTT. Thank you.

I would like to recognize the gentleman from Arizona, the Ranking Member on the Constitution Subcommittee who has joined us.

Well, I was just recognizing his presence. Okay. The gentleman from New York, the Chairman of the Constitution Subcommittee, Mr. Nadler?

Mr. NADLER. Thank you very much.

Professor Natapoff, you state in your testimony that according to Northwestern Law School Center on Wrongful Convictions, nearly half of all wrongful capital convictions in this country are due to bad information obtained from a criminal informant.

Ms. NATAPOFF. Yes, sir.

Mr. NADLER. Well, before I ask you the question, let me say, also, that so you have got a problem with criminal informants who are either wrong or lying. Obviously you have a whole culture in which informants are promised more lenient sentences or perhaps not to be prosecuted at all in response to the information that the prosecution wants to hear. Hopefully it is truthful, although no guarantees. We see from these statistics that a lot of times it is not truthful.

We also have a problem, not with most cops, but with too many, of what has become at least in the New York area known as testilying. We have actually formed a verb, testilying, that is lying in testimony by cops who arrest someone usually for drugs. The drugs are in plain sight on the car seat. How often is that going to happen?

Yet it happens in about two-thirds of all cases. I don't believe that—that really happens in two-thirds of all cases. But convictions are gained on the basis of that.

So my question, first of all, is how do you think we can deal with the question, aside from putting into place procedures and having the Federal Government inform the local government when they are having an informant. We hear that 87 percent of the time in the FBI they don't even follow the procedures that they have.

What changes in the law should we make to minimize the odds that there will be wrongful convictions from either a deliberately dishonest or mistaken testimony or information from an informant or even from a police officer that is not, as has been said before, a bad guy. He knows that these guys have done multiple wrongs. If he has to shade the law a little, the marijuana was out in plain sight, to get them, it is not a terrible thing. How do we get around those two problems?

Ms. NATAPOFF. The short answer, sir, is transparency. The long answer——

Mr. NADLER. What does that mean?

Ms. NATAPOFF. Transparency in the way that we handle criminal informants from the very beginning of the process from the street encounter between a police officer and an addict on the street corner to the use of the information of that addict to the arrest, the obtaining of warrants, to prosecutions and ultimately in a very small number of cases in our system, potentially a trial. The recommendations I have made for data collection and monitoring would seek to make transparent the public policies that we use to handle informants.

As a number have noted——

Mr. NADLER. When you say the public policies, if an informant is telling you that someone is doing something and in return for that he is not being prosecuted for something, should that be public in that instance?

Ms. NATAPOFF. Yes. The fact that the government is trading away criminal liability with an informant should be made public, not the name of that informant, not——

Mr. NADLER. Not the name of the informant?

Ms. NATAPOFF. No, I am not recommending that kind of data be made widely public. What I am recommending is that State and local law enforcement agencies as well along the model of the FBI create aggregate data that will reveal the contours of this national public policy. I see the point of your question is that it does not tell us whether that particular informant is lying at that moment. I acknowledge that it is not a perfect solution to the lying informant. But as a number of members have indicated, the use of informants is itself a risky tool.

Mr. NADLER. Yes. But I have always been bothered—and the more I am hearing this testimony, I am being bothered more and more. But I have always been bothered by the notion, not only of an informant as in the background, but an informant as a witness.

An informant as a witness who says I saw him commit the murder, I saw him do whatever it was he is alleged to have done and is, in effect, paid for that by not being prosecuted for something else or by getting leniency in a sentence and the protection we have

is that we tell the jury—we let that information come out and the jury can judge the truthfulness of it. I mean, the jury is left to judge the reliability information in light of the fact that we are bribing the witness, in effect, to implicate the defendant.

Yet we know that a large proportion—and that is supposed to be the defense. And yet we know that a large proportion of convictions that we now know were wrongful convictions are because, it turned out, the informant was lying in order to get not prosecuted or to get a reduction.

Is there any further protection we can have aside from letting the jury know that the testimony is purchased? Because obviously juries believe the testimony very often anyway. We wouldn't put him on the stand if we didn't think they would. Very often that testimony is not truthful.

Ms. NATAPOFF. Right.

Mr. NADLER. So how do you protect the system from that?

Ms. NATAPOFF. But the vast numbers of wrongful convictions that come about as a result of trial indicate that jurors do believe lying informants, even when they are informed that they are getting a deal.

Mr. NADLER. So should we prohibit informants—should we prohibit that testimony or prohibit them from being paid for that testimony in any way?

Ms. NATAPOFF. I am not recommending that, sir.

Mr. NADLER. Why not?

Ms. NATAPOFF. Because I think that as the number of Members and witnesses today have indicated, there are going to be some cases—in my view, not as many as we currently use them in. But there will be some cases in which a public policy judgment could be made that it is worth it to tolerate the risk of using an informant in pursuit of a larger social good. I think——

Mr. NADLER. So it is worth it. But let me rephrase that.

Ms. NATAPOFF. Yes, sir.

Mr. NADLER. It is worth it to tolerate a certain number, an unknown number of wrongful convictions for serious crimes because we know that juries in most cases will believe purchased testimony, even when informed it is purchased in order to get the convictions of people who are guilty who we couldn't otherwise convict. It is worth it to convict innocent people in a certain number, an unknown number of cases. That is what you are saying.

Ms. NATAPOFF. Sir, we already tolerate the conviction of many innocent people in our criminal and justice system, not only those convicted——

Mr. NADLER. So we should understand, that is the tradeoff we are making?

Ms. NATAPOFF. That is the tradeoff we make in our system that is based on an adversarial process and due process. We tolerate that all the time. I am suggesting that in acknowledgement of the reality of our criminal justice system that we recognize that fact, that we regulate that fact. We barely regulate the process. Now, it is anomaly in our——

Mr. NADLER. Let me ask you the last question because I see the red light is on. Is there anything other than transparency that we could do? And I am not talking about the background informant

now. I am talking about the witness, the informant who is testifying that I saw the defendant do whatever it is.

Ms. NATAPOFF. Yes, sir.

Mr. NADLER. Is there anything we can do and in return for that—now? Isn't it true, Mr. Foreman, Mr. Witness, that you made a plea deal with the prosecutor in order to get this testimony. Yes, sir. The jury believes the testimony anyway? Is there anything we could do to lessen the odds that we are not doing to lessen the odds of false testimony being elicited by this process or being believed by a jury?

Ms. NATAPOFF. Yes, there are a number of things included in my written testimony. One, we can encourage courts to hold reliability hearings, pre-trial reliability hearings so that if a judge decides that the rewards given to that informant and the history of that informant indicate that they are insufficiently reliable, that witness will never go to the jury. By making the court the gatekeeper for the question of reliability and not relying on the jury.

Mr. NADLER. You said encourage. Why should we not require that?

Ms. NATAPOFF. I would suggest that this Committee could require in Federal court, certainly.

Mr. NADLER. To require it.

Ms. NATAPOFF. We can have corroboration requirements. A number of States already require that, including Texas. We could also strengthen the discovery requirements. Currently prosecutors are not required under constitutional law to reveal impeachment Brady material to defense attorneys prior to trial or if the defendant is pleading guilty. This Committee could propose legislation that would require that information to be provided.

We could strengthen the adversarial process, which is our traditional way of ensuring the truth of witnesses to make sure that the deals and the criminal history of informants are earlier and better provided to defense and to the court.

Mr. NADLER. Let me ask one final of Mr. O'Burke and Mr. Murphy.

Do you object to anything that she just suggested?

Mr. SCOTT. You are trying my patience.

Mr. NADLER. That is my last question.

Do you object to anything that Professor just suggested?

Mr. O'BURKE. Well, you asked a fairly simple question, which is what can we do. I would say we ought to criminally prosecute those who lie under oath.

Mr. NADLER. No, no, but the professor just made a number of suggestions of required reliability hearings, give Brady material earlier and a few other things. Is there anything that she said that you think is not a good idea?

Mr. O'BURKE. I am not sure how practical some of those things would be. I think it is very important that we recognize that the informant is merely a tool or a resource used by law enforcement. We need to change some of the paradigms or thinking about which law enforcement operates under to produce arrests.

Otherwise, you know, the two dangers with an informant is that he obviously will lie and then secondarily that law enforcement believes it operates appropriately to achieve higher arrests. I think

that we need to change that type of paradigm or thinking so that it doesn't occur.

Mr. NADLER. Thank you.

Mr. SCOTT. Thank you.

The gentleman from North Carolina, Mr. Coble?

Mr. COBLE. Thank you, Mr. Chairman.

It is good to have you all with us. From the human source tree, I see three tentacles or limbs extending therefrom: confidential informant, witness intimidation and dirty cops or dirty law enforcement.

Mr. Brooks, how profoundly does the witness intimidation issue impact criminal investigations?

Mr. BROOKS. Thank you, Mr. Coble. It does provide a significant impact, especially in our inner cities in America. These are, you know, oftentimes very violent communities where persons cooperating with law enforcement are at significant risk.

We saw the issue of the Dawson family in inner city Baltimore, Maryland. And so, that is a significant issue. And what I am concerned about is if we not only will some of the proposed reliability hearings clog the system, but that will go further to reduce the cooperation.

I mean, some of these witnesses, these informants are already afraid of their cooperation with law enforcement. And if we parade them in and out of courthouses exposing them to potential exposure in their own communities, that will thwart our efforts more. I think the answer really is ensuring that we have better standards of corroboration and better controls over these informants.

Mr. COBLE. Well, you jump ahead of me because that was going to be my next question about parading before. And I could see some risk involved there.

Ms. Speight, let me put a two-part question to you. How has the stop snitching movement affected the city of Philadelphia, A? And B, how does the step up, speak up campaign attempt to counter that movement?

Ms. JOHNSON-SPEIGHT. I think the stop the snitching t-shirts is a culture that is very prevalent in the city of Philadelphia and probably other urban cities across the country. And it intimidates, first of all, sends a message not to speak, not to talk, not to trust law enforcement. So it undermines the whole process of people coming forward with information.

There have been key trials, murder trials that the witness has gotten on the stand and not remembered anything because of the stop snitching culture and the intimidation piece that is associated with that. The step up, speak up campaign in Philadelphia is a collaboration of Mothers in Charge and many other community organizations working to get a message out that it is important to stand up.

Snitching saves lives. And you have got to come forward with information and not to be afraid. But we do need—we need more support around folks who want to come forward.

We need the kind of support that would encourage them to come forward with information. We have many unsolved murders in the city of Philadelphia because of the stop snitching and the fear of intimidation as a result.

Mr. COBLE. I thank you for that.

Mr. Murphy, at the outset you made it clear that much information that this Subcommittee will seek is classified. And with that in mind, I think Chairman Conyers' suggestion that we meet again with you offline or off the record, I think, has merit, and we would probably follow-up on that.

Mr. Murphy, let me put this question to you. I don't think you have answered this. What are the instructions for opening a confidential human source? And how often does a validation process occur?

Mr. MURPHY. The instructions actually overall talk first about challenging whether you need to open a confidential source at all, that there are circumstances under which you should consider whether or not you can acquire the information more effectively, more efficiently, and more consistently without proceeding into that process. But generally the reasons and the circumstances under which you would open a confidential source is to protect the identity of the source, to protect the information that they are providing or the integrity of the information that they are providing.

The validation process, the review process, particularly that which has been implemented since we started our reengineered process in June 2007, not only requires a series of steps by the agent originally opening the source, but there is at a minimum a quarterly review by their immediate supervisor.

There are a series of checks that are associated with determinations about the specific nature of the source that will require or invoke additional checks and additional reviews. And then there is an annual review process for all sources and a revalidation for all sources that is done both at the field level and at the headquarters level by a variety of objective players who make judgments about the appropriateness of the source and the continuation of the source.

Mr. COBLE. Thank you, Mr. Murphy.

And, Mr. Chairman, before the red light illuminates, I would like to yield what time I have left to the gentleman from California.

Mr. LUNGREN. I thank the gentleman for yielding.

Mr. Brooks, there has been discussion here or statements made about wide-scale misuse of confidential informants or a culture of the misuse of confidential informants. Can you give us your assessment as to how prevalent the problem is?

Mr. BROOKS. Certainly. You know what happens? In these cases, and rightfully so, we live in a free and transparent society in the cases such as in Atlanta and in Tulia and in Dallas. The public sees this on the front page of the newspapers and as the lead story in the press. But there are 870,000 police officers roughly in America, most of whom are out there trying to do the job correctly, most of whom will do the job correctly if we give them the right training and guidance.

Thousands and thousands of criminal cases, street gang cases, drug cases, violent crime cases are made every day by America's State, local, and tribal law enforcement officers across this country. By NIJ statistics, some 98 percent of all arrests and prosecutions are made by our Nation's State, local, and tribal law enforcement officers.

And so, it is my experience, not only as a 32-year cop in California, but as the leader of a 60,000-plus-member organization that while these instances are extremely troubling and they definitely need attention, they are not nearly as widespread as one might be led to believe by the press and by some of the testimony that has occurred here today.

Mr. COBLE. Mr. Chairman, I will reclaim and yield back.

Mr. SCOTT. Thank you very much.

The gentleman from Massachusetts?

Mr. DELAHUNT. Mr. Murphy, I was pleased to hear that you are going to take back our concerns to the director in response to observations by my friend and colleague from California, Mr. Lungren. I guess my question is where have you been. Where have you been? The scandal in the Boston office of the FBI occurred in the late 1990's, about a decade ago. And these issues have existed for decades now.

I can't remember—well, maybe I am incorrect. Have you or the director reached out to any Member of Congress to discuss these issues?

Mr. MURPHY. I personally have not. I know the director has had numerous conversations with Members about the issue of the confidential human source program and our management of the confidential human source program.

Mr. DELAHUNT. Well, I don't know. Maybe he had conversations with Mr. Conyers, the director of the FBI. Mr. Lungren, did he have conversations with you?

Mr. LUNGREN. He has.

Mr. DELAHUNT. Well, let me just say as someone who spent 22 years in law enforcement, who spent considerable time participating in the hearings conducted by the Boston office of the FBI, I never heard a word, which leads me to the conclusion that—and you have acknowledged it today again in response to the Ranking Member, that there is no policy. But it confirms my own conclusion that it is time for legislation. It is time for legislation to ensure that confidential informants are used appropriately.

You indicated that the FBI has no policy regarding the need to report or cooperate or provide information relative to the commission of violent crimes to local or State law enforcement agencies. Is there a legal responsibility on the part of the FBI in the case of murder to report information to local or State law enforcement agencies?

Mr. MURPHY. Congressman, the attorney general guidelines and our implementation——

Mr. DELAHUNT. I am not talking about the attorney general guidelines. Do they have a legal responsibility currently to report evidence both exculpatory or evidence of a crime that has been committed when a homicide is being investigated?

Mr. MURPHY. If you will indulge me, Congressman, I would like the opportunity to answer that question offline because there are various circumstances in which that question might be answered differently that would include some of the aspects about how we manage sources and how we make decisions about the management of sources. And I will appreciate the opportunity to answer that question for the record offline from this hearing.

Mr. DELAHUNT. Well, I find it—and again, I am not asking about policy or equities or guidelines of consideration. Does there exist today, in your opinion, a legal responsibility for the FBI to communicate in a homicide investigation either exculpatory information to the State and local authorities or evidence that would indicate that an individual is responsible for murder?

Mr. MURPHY. Congressman, I appreciate the——

Mr. DELAHUNT. That is a yes or no answer.

Mr. MURPHY. I would prefer to answer that question for the record offline, if you wouldn't mind. Thank you, Congressman.

Mr. DELAHUNT. Well, I do mind. And I don't see the reason why that answer has to be provided offline. That is a legal question. Well, I think you have given me all the information that I have needed.

Do I have any time left, Mr. Chairman?

Mr. SCOTT. You have 2 seconds.

Mr. DELAHUNT. I will yield it back.

Mr. SCOTT. Thank you. Thank you. And we will follow-up on that question.

The Ranking Member of the Constitution Subcommittee, the gentleman from Arizona, Mr. Franks?

Mr. FRANKS. Well, thank you, Mr. Chairman.

Thank all of you for being here. I know that it is always a difficult environment when we are dealing with this adversarial legal system that we have that has served us pretty well. But it creates some friction around the interface. So, I know you deal with some pretty complex issues.

Professor Natapoff, you know, it is the contention of the FBI that confidential informants are critical to having the ability to carry out counterterrorism, national security, and criminal law enforcement missions and that a confidential source could have a singular piece of information that the FBI would otherwise be unable to obtain and that are critical to that case. It obviously enables the FBI to execute their primary mission of preventing terrorist attacks and crime.

You cite one example of a case that went wrong, I think is the quote in your testimony. And at the same time we have quite a few pieces of evidence of thwarted terrorist attacks based on tips from confidential informants. How do we bring those two realities together?

Ms. NATAPOFF. I would also direct your attention to the Department of Justice office of inspector general's report, oversight report of the FBI's handling of confidential informants. The reference is contained in my written testimony. The OIG provides actually numerous examples of informants gone wrong, if you will, in its investigation of the FBI's own files and cases.

I would suggest that there are many record incidences of informants gone wrong. And I think nobody here today is disputing the fact that the practice can often go wrong. On the other hand, it is clearly of benefit in some limited set of cases. I would refer back to Mr. Nadler's question about whether we should ban the process altogether, at least in some cases.

I think that your question indicates the potential value of the use. In my view, the public policy question is when do the costs and

benefits recommend that we permit law enforcement, permit the government to use this dangerous and risky tool. And my recommendations here today have been that legislative bodies and the public need more information, particularly about cases that go wrong.

A number of individuals today have made statements such as, "There are relatively few cases in which"—and I would suggest that that is not a statement that is currently supportable across the board. We simply don't have enough information about how informants are used at the State, local, and Federal level to make founded statements about the general state of usefulness and safety of the use of informants. And I am suggesting that this Committee consider legislation to make that mandatory.

Mr. FRANKS. Would you have any suggestions, I mean, related to any alternatives that would be as effective in many cases as the confidential informant in dealing with these very difficult cases where critical intelligence or information is—perhaps the entire case hinges on that and the ability to pursue the case hinges on that? What are our alternatives? What are our best alternatives? And do we have any true alternatives to using confidential informants?

Ms. NATAPOFF. Sir, I think the answer is yes. A number of law enforcement experts here testifying today have indicated several times that the use of confidential informants is merely a tool in the arsenal of law enforcement. We have many tools. We have other investigative resources.

We have undercover operations run not by criminals, but by law enforcement agents themselves. We have wiretaps. We have an increasing array of technology in this world that we live in, ways of obtaining information.

I would suggest that to make a responsible decision about the use of informants requires us to know better what the costs of the use of that particular tool is. And there may be many cases where the responsible judgment is it is not worth the potential for a wrongful conviction. It is not worth the potential for more crimes to be committed. It is not worth the threat of additional violence.

Mr. FRANKS. Thank you, Professor.

Mr. Murphy, what is your contention as to the importance to law enforcement, to the FBI of confidential informants? I am sure that that has been said a dozen ways today. But, you know, sometimes people say there are no simple answers. Usually there are some simple answers, but they are not easy ones.

I know this is one of those cases. Can you give me some perspective of how important do you think confidential informants are to the investigative process? And do we really have a way to essentially deal without them entirely?

Mr. MURPHY. I don't think it would be possible to perform the mission of the FBI without the capability to have confidential human sources. And I believe that we would suffer as a Nation if we didn't have that capacity.

Mr. FRANKS. Thank you, Mr. Chairman.

Thank you, sir.

Mr. SCOTT. Thank you.

And the gentleman from Georgia, Mr. Johnson?

Mr. JOHNSON. Thank you, Mr. Chairman. While first taking the opportunity to offer my condolences on the losses of your sons, Ms. Speight and Ms. Donnelly, I would take this time to point out that there is a big difference between citizens who witness a crime occurring in their neighborhood and then they speak up to the police and give information about the crime. And they do that from the standpoint of being good citizens. And that is not snitching.

Then on the other hand, you have the situation where police, law enforcement officers develop confidential informants for use in long-term investigations, say, of mid-level or high-level drug dealers. And it takes time to make the case.

So, you have a confidential informant that infiltrates the organization and then accumulates enough information to cause law enforcement to be able to take the organization down. It might be a drug organization. It could be espionage. It could be any number of crimes.

The use of confidential informants in that situation is distinguished from the use of what is called a snitch on the street, in a street war on crime, war on drugs, if you will, street war on drugs where local police officers are charged with cleaning up the streets of crime. So, the local police officers go after low-level drug dealers. They recruit persons who are often engaged in criminal activity themselves to give them information, sometimes under coercion and under duress and threat of arrest. They cause that person—and they develop information about, say, drug sales taking place in a house, street level drug sales.

So, an informant, a confidential informant then says that I witnessed at, say, Ms. Johnston's house, Reverend Hutchins, I witnessed the sale of a small amount of cocaine, of a couple of $10 rocks of cocaine at Ms. Johnston's house. And then the police then take that information, go to a neutral and detached magistrate and say that I have a confidential informant who has been reliable in the past, given me information that has resulted in arrests and perhaps some convictions.

That person told me that they witnessed not too very long ago the sale of cocaine in that house. So, based on that uncorroborated information from a person engaged in crime on the streets, the police are able to then obtain a search warrant to go in and search Ms. Johnston's home looking for additional cocaine.

So, in the Kathryn Johnston case, that is exactly what happened. Isn't that true, Reverend Hutchins?

So, when the police got that warrant, they went into Ms. Johnston's house. They were issued a no-knock search warrant, went into the house. Ms. Johnston, who is a 92-year-old lady who happens to live in a community where there is a lot of drug use, a lot of drug sales, typical inner city neighborhood in the war on drugs.

She has got burglar bars on her house to try to maintain her safety. It is dark. Police use a battering ram to bust their way in. She, being a citizen with a weapon, fires at the police because she doesn't know who they are. It is a no-knock search warrant, no announcement.

She fires off a shot. Then, boom, they riddle her with bullets and kill her. So, it was all based on the police officers saying that they

had a confidential informant. But they did not have a confidential informant at that time who gave them information.

So, the whole process is flawed. It puts citizens like Ms. Johnston right in the middle of this war on crime, war on drugs between the police and the drug dealers. Then the drug dealers are being recruited by the police to help them in the war on drugs.

Who is the victim? People like Ms. Johnston. So, that is the issue that we really need to address.

I believe that there needs to be some standards, some parameters, as you say, Reverend Hutchins, that are put on the police in their use of confidential informants in that situation. Because I believe in situations—the second scenario that I pointed out, the long-term investigations where police are working with informants under Department of Justice guidelines—the Department of Justice has some guidelines that regulate the use of those types of individuals.

But I don't believe there are any States that regulate the use of confidential informants or, i.e., snitches in the last scenario that I pointed out. Then when that case comes to court, if there is a jury trial, of course, confidential informant is not available because they didn't actually participate in the arrest of the accused.

So no testing, no corroboration, nothing there to help the victim in that case, which might be an innocent citizen. And I don't know if any of you have anything you would like to comment on about what I have said.

But I certainly believe that citizens should come forward when they have information about a murder or any other crime that took place in their community just as good citizens. But we should not allow a situation where police are able to accumulate snitches, if you will, in this low-level war on drugs that puts people in communities at risk.

Reverend HUTCHINS. Mr. Chairman, I would just like to briefly respond, if I might.

Mr. Johnson, you are correct. Fabien Sheets was a known drug dealer. Mr. Sheets, in fact, was stopped by these same police officers that eventually killed Ms. Johnston. And he said to them, "If you will let me go for selling the small amount of marijuana that I have sold on the street, what I will do is I will tell you where you can go get a kilo of cocaine."

Mr. JOHNSON. And that ended up being——

Reverend HUTCHINS. And that is exactly——

Mr. JOHNSON [continuing]. False information.

Reverend HUTCHINS. Absolutely, it was false information.

Mr. JOHNSON. Because everybody knows Ms. Johnston did not have half a kilo or any amount of drugs at her home.

Reverend HUTCHINS. She did not have—and not only that, as we have suggested and as we have been able to build consensus, at least locally in Atlanta, if police officers do due diligence, they would have known that a 92-year-old woman lived there by herself.

Mr. JOHNSON. So there was no corroboration?

Reverend HUTCHINS. There was no corroboration. There was not any appropriate investigative work done. But I think, Ms. Jackson Lee, probably the most poignant thing about what happened to Ms. Johnston is had she not been 92-year-old and had she been my age,

29-, 30-year-old and a young Black man, then we might not be having this hearing right now.

Mr. JOHNSON. She would have been——

Reverend HUTCHINS. The real issue, in my view—and I respectfully disagree with Mr. Brooks, is that this problem is much, much more widespread than our news headlines would suggest. And that is because far too often those who are most likely to be victimized by a system like the one that we have now that misuses confidential informants tend to be younger, in lower income communities.

They tend to be those that have fewer resources. They are most likely to be profiled and least likely to have the resources to fight against these criminal charges that are put on them because of the misuse of this informant system.

Mr. JOHNSON. Thank you.

I will yield the balance of my time. Thank you, Mr. Chairman.

Mr. SCOTT. Thank you. I think Ms. Speight wanted to briefly make a brief comment.

Ms. JOHNSON-SPEIGHT. While I understand that it is very important for citizens to come forward, you know, law abiding citizens do that. Oftentimes they are in fear of their lives because of retaliation because of folks who are remaining on the street committing crime over and over again. Oftentimes the same people are committing these murders over and over again because they are not taken off the street because no one will come forward.

Oftentimes that is because of the stop snitching piece. People are afraid. And it is sending a message throughout the communities and throughout the cities that you should not cooperate with law enforcement.

That undermines the whole process of citizens wanting to do the right thing, the fear and the lack of the trust of the police officers, especially on county levels, that they will be protected from the people who are going to retaliate. So again, the whole culture of stop snitching is sending a message that undermines the whole process of people wanting to do the right thing.

I went to Ms. Donnelly when I saw her on the news, you know, asking for help because I wanted to—I knew her pain. I knew what she was feeling as the result of the death of her son. I wanted to do the right thing. But oftentimes people want to do the right thing, but because they are not going to, one, be protected and, two, not be supported to do that, they don't come forward.

Mr. SCOTT. Thank you very much.

The gentleman from North Carolina, Mr. Watt?

Mr. WATT. Thank you, Mr. Chairman. And let me start by thanking you and Chairman Nadler and the Chairman of the full Committee for having a hearing like this.

I was here for the original testimony of all the witnesses. One of the pervasive thoughts that I had during that process was that we have spent 6, 8, 10, 12 years unable to have a hearing of this kind that exposes a problem that I think everyone of the witnesses, law enforcement and non-law enforcement people who are here recognize is a serious problem because we have been preoccupied with criminalizing or categorizing Members of Congress as being soft on crime, Black males as being predators, you know, the whole process that we have been going through.

And having a hearing of this kind in that political atmosphere and with the leadership that we have had of the Committee has been impossible. So I think it is wonderful that our Chairs are taking this opportunity to expose a problem and bring light on it because we can't deal with it in the legislative context. Law enforcement is not likely to deal with it in an aggressive law enforcement context unless light and transparency is there and oversight is there.

Professor Natapoff, Mr. Murphy was unwilling to give his legal opinion in a public venue about the legal and ethical responsibilities of law enforcement if they have a snitch who delivers evidence that exonerates. I suppose at some point we will get that information from Mr. Murphy in a private setting.

Help me form the context for it in a public setting. What is the legal and ethical responsibility of law enforcement, Federal law enforcement to provide exculpatory evidence to State law enforcement if they obtain it from a snitch or otherwise?

Ms. NATAPOFF. Thank you, sir. I am unaware of any free-standing legal obligation that law enforcement would have, either police or prosecutors. Of course, we are aware that the rules and ethical obligations pertaining to those two groups might be somewhat different. But I am aware of no free-standing obligation that either group would have to provide that information outside the context of an actual criminal prosecution.

Of course, our Constitution provides the due process right to Brady exculpatory material if indeed a defendant is prosecuted for a crime. That would trigger the obligation of the Federal prosecutor's office, if it were a Federal case, or a State prosecutor's office, if it were a State case, to produce to the defendant any exculpatory information in the possession of that office or agency.

It would not extend to a cross-jurisdictional obligation to go looking for exculpatory evidence, as I mentioned in response to Mr. Nadler's question earlier, about 4 or 5 years ago, the Supreme Court decided a case called the United States vs. Ruiz which went to the question of what are the governmental obligations to provide such exculpatory information when a defendant pleads guilty.

Of course, that is the bulk of our criminal justice system. And 95 percent of all cases, including cases involving snitches, involve a guilty plea. And the courts curtailed the government's obligation to produce such exculpatory information, for example, like the compensation paid to the informant witness in that case because that witness, of course, would never go to trial.

One of the things that these Committees could consider is amending the Federal rules or passing legislation that would require at least Federal U.S. attorneys to provide that information in connection with plea bargaining so that light could be shed on the use of confidential informants in Federal cases in the majority of cases that will, in fact, never be litigated in open court.

Mr. WATT. Mr. Chairman, I see that my time is expired. But I also saw that everybody else seemed to be abusing their time. So——

Mr. SCOTT. Are you going to abuse your time, too? The gentleman is recognized.

Mr. WATT. If I might explore one other area. Because the other thing that struck me, especially in Mr. Brooks' testimony, was that there seemed to be an attitude that if 99 percent of law enforcement was handling this appropriately there is some occupational risk. And they are acceptable.

It strikes me that in cases such as Ms. Johnston's, for example, and other cases where snitches really violate and law enforcement violate, this is one of those circumstances where there ought be a legal term applied in the criminal justice context zero tolerance.

How do you get to what would be necessary to get to a zero tolerance, zero error posture in this area? Because I think it is one of those areas. I mean, you can't bring Ms. Johnston back. For Ms. Johnston, this is not a cost-benefit analysis. When somebody makes an error, when somebody goes awry in law enforcement, you can't do a cost-benefit analysis.

So how do you at least get to a State where you absolutely minimize, if not prevent, these kinds of injustices from happening, Mr. Brooks, Reverend Hutchins, Professor, Mr. Murphy? Maybe if I could get you all to tell me what you think would be a reasonable approach to getting to as close to a zero tolerance posture as we could get to.

Mr. BROOKS. Thank you for the question. I think, you know, first we need to take an absolute hard line posture when law enforcement breaks the rules, like in any other profession.

The conduct at first blush committed in Atlanta and in Tulia and in Dallas and in a host of other places was criminal conduct by law enforcement officers. That conduct should be punished vigorously.

You know, we should have robust and vigorous investigation and prosecution of cops when they do wrong because it taints the public's trust in us. We have been charged with a very solemn duty and a solemn trust. And we cannot violate that trust.

But I can tell you in 32 years in California while there were some small procedural errors in the units that I worked within, we never had a scandal like that, not even close. The reason we didn't was we had strong oversight, strong policies, good training, a California peace officer and standards commission that mandated that.

So, you will never—you know, there is never going to be a point where there are not issues of corruption. There is never going to be a point where there are not cops that are too zealous and carry their charge too far.

But we need to have the oversight, the training, the ethical culture. You know, we need to instill an ethical culture that says that the ends never justify the means.

I have supervised narcotic cops since 1981. When I bring new officers into my unit, you know, I explain to them, you know, we are never going to shade the truth. We are never going to lie on the stand. We are never going to push the envelope because we are going to have a chance to arrest these people again if they are truly out violating crimes. But we only have one opportunity to have credibility in our courts and in our communities.

That is the kind of ethical culture that comes from strong leadership, good policies, and a lot of training and reinforcement of those policies. I wish I could say there would never be a Tulia, there would never be an Atlanta. There will, just like we will always

have abuses in other professions. But we can dramatically reduce that if we change.

One of the other witnesses—I think Mr. O'Burke—talked about a paradigm shift. We certainly need to do this. We don't need to be in a place where everybody is competing for numbers. This should not be where your grant dollars or your stature in the criminal justice community is based on how many people you arrested, how many drugs or guns you took off the street. It is the quality of the work you can do.

Let me just finish by saying while it may be distasteful to use informants, I worked in a community, was called in to help in a community in 1992, the city of East Palo Alto on the San Francisco peninsula. Most of you have probably never heard of it. But in 1992 it was the per capita murder capital of the United States, a city of 15,000 people with 47 drug-related murders.

In 1 year of aggressive enforcement, most of which started with information from informants but led to law enforcement undercover buys and corroborated information, we arrested a lot of drug dealers, the murders were all related to drug turf and gang turf. In 1992, we had 47 murders. In 1993, we had two murders.

It is a valuable tool. It saved lives. But it has got to be used correctly. And I think this Committee has taken the right step in taking a look at ways that we can prevent these abuses.

Reverend HUTCHINS. Mr. Watt, Kathryn Johnston was the high-profile scandal that exposed the problem. But the problem existed long before the scandal came. The Federal prosecutor, David Nahmias put it as a powder keg. He said it was a problem in Atlanta that was waiting to happen but it took the scandal to bring the light. I think that now we have the light.

The real issue, on my view, is that the possibility for not confidential informants, but ghost informants or non-existent informants is far too great. There needs to be a mechanism put in place that while recognizing the need to protect the confidentiality of the informant, also certifies that the informant actually exists and that he or she acknowledges the voracity of the law enforcement professionals' assertions to the magistrate.

Ms. NATAPOFF. Thank you. You asked how can we best minimize the impact of the dangers of the use of informants. It is really a two-part answer. The first is we need to fix our adversarial system, the procedures by which we litigate cases in court with reliability hearings, corroboration hearings, the new rules.

We need to fix our investigative and law enforcement system, which, of course, is a much larger and more difficult process to address. And the various witnesses have spoken to that today.

I would like to second the comments of Commander O'Burke and Officer Brooks that the direction that we give to law enforcement, the goals that we set for them will determine the outcomes and the kind of criminal justice system we have. The tools that we give them shape the outcomes that we get.

If we make it easy to use snitches, they will use snitches and we will get the kinds of cases that snitches produce. If we make it more accountable, transparent, and rigorous to use snitches, then we will get cases that reflect that policy decision. Those are the kinds of decisions that cannot be made by the lone officer on the

street corner. They need to be made collectively by the executive, judicial, and legislative branches.

Mr. O'BURKE. Thank you. I would like to point out something that also occurred in Texas, that Tom Coleman, the officer involved in the Tulia scandal was nominated by his supervisors for police officer of the year and was actually given that award. And that is what I am speaking of when I refer to paradigm shifts.

Mr. WATT. I hope that was before Tulia broke.

Mr. O'BURKE. Yes, sir. And I think that is part of Governor Perry's recognition of the problem of just sheer numbers of counting widgets or arrests without accomplishing anything with drug law enforcement was a failed policy. He worked aggressively to change that.

But I think that we need to look at adequate policies and procedures. We also need to look at collaboration among law enforcement agencies because there is also issues with informants who are able to move freely among law enforcement agencies without some abilities to track that.

You know, we have policies and procedures that cover establishment, you know, utilization, and motivation. They require supervisory oversight and continual review of those things. I think that if all agencies are required to have established policies and training and at least direction of their programs and the goals and objectives they are trying to accomplish by using that informant, I think you can certainly work toward that zero tolerance.

My fear is when you ask of zero tolerance that we are still dealing with human behavior, whether that be for the officer or for the informant being used. So I think we have to shed light on the problem and then work toward those issues and resolutions, as you discussed.

Mr. MURPHY. Thank you for the question, Congressman. I think it is a very important question. I would say I most closely associate my own views with those that were presented by Mr. Brooks. But I think every member of the panel has offered some alternatives that are worth thinking about and deliberating about if we are going to approach zero tolerance, as you suggested, which I think is an honorable goal.

Mr. SCOTT. Thank you.

Mr. WATT. I apologize for abusing——

Mr. SCOTT. You did better than everybody else.

The gentlelady from Texas?

Ms. JACKSON LEE. Let me thank the Chairman of the Subcommittee and the Ranking Member and allow me to echo to this Committee and to this room that we have been living in shades of gray and darkness in being able to respond to a question like this for a number of years in this room. We owe a great deal of gratitude to John Conyers who has made a commitment to go to places where others would not have gone.

I am reminded, since he is from Detroit, of Marvin Gaye's words, what is going on.

Reverend, in your instance, mercy, mercy.

This is a systemic problem. The reason why I say that is because I remember coming as a very, very new Member of Congress and joining Chairman Conyers and Chairman Scott and a number of

others circulating around America and holding police brutality hearings, which had a number of nuances to them.

Some of them were gun incidences, obviously. But brutality is one word. It is the invasiveness or the untowardness of law enforcement.

Now, our founding fathers had it right. Their basic premise wherein the fifth amendment, due process, the eighth amendment, cruel and unusual punishment, the sixth amendment, the right to a trial by jury by your peers—they understood that there had to be legitimate basis that the people could feel that their justice system worked.

I would not trade our justice system for any other kind around the world. But we have a system that is fractured. And until we understand that and accept that as both advocates and law enforcement and legislators, it will continue to be fractured.

So, I join with my colleague from Massachusetts about legislation needs to be—and let me just put on the record because I think the people of Tulia need to be put on the record again, as Ms. Johnston and as Ms. Speight. Let me say to you that as I look at the legislation that I have, No More Tulias, which is the Law Enforcement Evidentiary Standards Improvement Act of 2007, your point of protecting witnesses and funding resources has to be addressed.

And my deepest sympathy to you for the loss of your son. But my greatest joy that you have chosen your work, your life's work to be dedicated to him. would like to work with you, as your congressperson, Congressman Johnson, who has shown such leadership on this Committee, to be able to see how we can protect or provide resources for witnesses.

Because I know that while we speak here in this room—and I always say that the lights are on, we are secure—it is not so easy to tell a witness come forward. Because we are not in their shoes. We need to give them the comfort, the protection, the support.

It should not be for 24 hours. It should not be for the time for the trial. It should be ongoing. I know there is a witness protection program. But in our communities, it has to be a little different.

So, the Tulias need to be on record. Our friend is here from Texas. Fifteen percent of that population were persecuted by uncorroborated testimony of a rogue cop. Lives were broken. Grandmommas lost their life savings to get their children out. I don't think the state of Texas responded as quickly as it should because they went through the judicial system, collaborated with a prosecutor who relied on one voice.

So, the premise of the No More Tulias said, in particular—and I read this one sentence, which it has to do with Federal Byrne grants. The States that do not have laws that prevent conviction for drug offenses based solely on uncorroborated testimony of law enforcement officers or informants. So it goes to the next step of prosecution.

In the instance, Reverend, of your circumstance, I believe there is a trigger as well to the instance of kicking in someone's door not on uncorroborated evidence, no matter how rehabilitated and how much rebornism this so-called informant says that he or she has partaken in.

So my question, Reverend, to you—and I ask this on the basis of my good friend's No More Tulias or zero tolerance. One, I would commend you to H.R. 253, which lays a premise for legislative action. And I look forward to its refining based upon this hearing.

But isn't it tragic that through Federal funding we encourage law enforcement officers to have incentives or competition or pressure to make convictions to keep Byrne grants or Federal funding? That is my first question.

Second, as a municipal court judge, I gave out probable cause warrants. And I don't have the fineness of the points that Ms. Johnston, whether these guys were going with a warrant. It seems that they were no-knock.

But based upon cops coming in undercover, I remember sitting at 11 p.m. at night, 12 midnight on the basis of their evidence. I thought they were good guys. I didn't condemn them. They saw somebody sitting somewhere or somebody had just told them their guy was out in the car, their guy was on the corner that had just given them the word.

This is a very difficult and seedy process. I understand we have got to protect the innocent.

But if you would speak to that question of the pressure of Federal funding that requires you to make deals and get prosecutions to keep that money flowing. And I would appreciate the FBI speaking to it, the professor speaking to it, and Mr. Brooks speaking to it, please.

Reverend?

Reverend HUTCHINS. I think, Congresswoman, that anytime funding and money is tied to arrests and convictions poses a serious problem, particularly for those that look like I look, that live where I live, and that deal with what I deal with on a daily basis. As I suggested before, the people who are most often victimized because of the tying and the inextricably linked resources around arresting and prosecuting people on these kinds of drug charges cannot be removed.

We have to understand that it is directly tied to the kind of misconduct and behavior that led to Tulia, led to Kathryn Johnston, so on, so on, so on, and so on. I think there has not been enough, quite frankly, calling a spade a spade, the way you have done here today. The reality is that most often when resources are tied to arrests and conviction, people that are Black and brown and in lower incomes suffer exponentially and disproportionately.

But I think to further your point, to in some way tie this issue of "stop snitching" to the use and misuse of legitimate citizens who step forward and say I have evidence, I saw something, I heard something, that is a serious disgrace to everyday, ordinary citizens. So I think we have to be clear that there is a distinction between the use and misuse of confidential informants and this so-called stop snitching foolishness that has created a hysteria.

Ms. JACKSON LEE. I am going to ask—and I thank you, Reverend. And not in reference to you, but I am going to ask the next witnesses just to be brief in their answer because I will finish on that with two questions to Ms. Speight and the gentleman from Texas, a quick question.

If you would just be very brief, Mr. Brooks.

Mr. BROOKS. Yes, Congresswoman. You are absolutely right that we should not tie performance to dollars. When we are out chasing dollars based on numbers of arrests, numbers of seizures, that creates a serious problem. And we need——

Ms. JACKSON LEE. Do you think it is fair to have corroboration?

Mr. BROOKS. Absolutely. In fact, I have never done a case where we didn't have corroboration. I have done thousands.

Ms. JACKSON LEE. I thank you. Thank you, sir.

Ma'am, just go quickly on to the other witnesses. Can you just go on, Professor, please? I can't see your names there. Just go on quickly.

Ms. NATAPOFF. Thank you. I agree with the other witnesses. I would also recommend that while we are tying requirements to Federal funding, we considered tying that Federal funding to accountability and transparency and record keeping at the State and local level.

Ms. JACKSON LEE. Excellent. Do you think corroboration of law enforcement and informant evidence is important?

Ms. NATAPOFF. Absolutely.

Ms. JACKSON LEE. Thank you.

The FBI?

Mr. MURPHY. Yes, ma'am. I believe it is a problem that we need to be conscious of the behavior that we are creating when we tie funding to statistics. We need to make certain that we are using an informant program that is based on corroboration.

Ms. JACKSON LEE. I thank you.

Ms. Johnson-Speight, would the protection of witnesses' money—I don't mean to use the term money—resources and assistance to those, as the reverend has indicated, good citizens who come forward that would help in your son's case—is that a valuable consideration for this Committee?

Ms. JOHNSON-SPEIGHT. Absolutely. I think that you expect people to come forward. But they have to be supported. They have to know that they can be supported in that effort legislatively or however it can be done. You shouldn't have a witness coming into a courtroom with a stop snitching t-shirt on. That is absurd. So those are the kind of things that are happening. It is a culture that has just gone crazy. And it has sent a message throughout the communities that you don't talk because of retaliation.

Ms. JACKSON LEE. And we should separate that out from informants?

Ms. JOHNSON-SPEIGHT. Absolutely.

Ms. JACKSON LEE. We thank you much.

My last question is to my good friend from Texas. Let me thank you for being here. I would look forward to working with you. My question to you is were there civil compensation by the State to Tulia victims out of the reform that the governor offered.

Mr. O'BURKE. I am not aware if the governor offered that. I believe——

Ms. JACKSON LEE. No, no, no. Out of the reforms that the governor encouraged you to have, were there suggestions of civil compensation to those victims?

Mr. O'BURKE. I am unaware of that. I know that there was a lawsuit settlement to some of those victims. But I am not privy to

the details of that. I know the city of Amarillo, I believe, paid out a settlement to some of those victims.

Ms. JACKSON LEE. And you agree with corroboration of law enforcement testimony?

Mr. O'BURKE. We currently have a corroboration law in Texas. But it only extends to cover the informant.

Ms. JACKSON LEE. Okay.

Mr. O'BURKE. But as a general practice, we include that for officers as well.

Ms. JACKSON LEE. Let me thank you. I look forward to working with you. I want to read this more extensively on some of your reforms.

Mr. Chairman, I thank you very much. I hope that we can move swiftly to responding to the excellent testimony that we had here today to save lives and to be able to cease the abuses that we have seen over the years on these cases. I yield back.

Mr. SCOTT. Thank you. Thank you very much.

I think the gentleman from Michigan wanted to be recognized for a unanimous consent.

Mr. CONYERS. I would like to introduce into the record the Law Review article of Professor Natapoff which deals with informants and the institutional and communal consequences into the record.

Mr. SCOTT. Without objection.

[The article follows:]

SNITCHING: THE INSTITUTIONAL AND COMMUNAL CONSEQUENCES

Alexandra Natapoff[*]

I. INTRODUCTION

The use of criminal informants[1] in the U.S. justice system has become a flourishing socio-legal institution unto itself. Characterized by secrecy, unfettered law enforcement discretion,[2] and informal negotiations with criminal suspects, the informant institution both embodies and exacerbates some of the most problematic features of the criminal justice process.[3] Every year tens of thousands of criminal suspects—many of them drug offenders concentrated in high-crime inner-city neighborhoods—informally negotiate away liability in exchange for promised cooperation.[4] Law enforcement meanwhile recruits and relies on ever greater numbers of criminal actors in making basic decisions about

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* Associate Professor of Law, Loyola Law School, Los Angeles. J.D., Stanford Law School; B.A., Yale University. alexandra.natapoff@lls.edu. Many of the questions raised in this Article derive from my previous experience as an Assistant Federal Public Defender, and from working as an advocate in low-income communities of color. Many thanks to Kathryn Frey-Balter, Angela J. Davis, Don Herzog, Laurie Levenson, Erik Luna, Naomi Mezey, Julie O'Sullivan, Katherine Pratt, Daniel Richman, and Ian Weinstein for their thoughts and assistance throughout the process, and special thanks to Mark Kelman for his help at the very beginning. Comments by the participants at the 2004 Stanford/Yale Junior Faculty Forum were also greatly appreciated. My gratitude to Sulaymaan Muhammad for his wisdom on the subject.

1. The classic "criminal informant" with whom this Article is concerned is a person who trades information about others in order to obtain lenience for his or her own crimes. This Article does not address informants who work solely for money, or citizen informants who provide information to the police without recompense. *See infra* notes 24-30 and accompanying text for discussion of the distinction.

2. The term "law enforcement" broadly includes state and local police and federal agents, as well as prosecutors.

3. Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1 (1992) (arguing that informant use creates "procedural deformations" with respect to appellate review and double jeopardy); Jan Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563 (1999) (arguing that informants undermine sentencing uniformity and the adversarial process); George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1 (2000) (using compensated informant witnesses undermine legal ethics and reliability); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69 (1995) (cooperation compromises role of defense attorney); Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81 (1994) (documenting the corrupting impact of untruthful informants).

4. Use of informants is most prevalent in drug offense cases, which represent a growing proportion of federal and state criminal caseloads. *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS Table 5.26 (2001) [hereinafter BJS] (40% of federal convictions drug-related); *id.* at Table 5.34 (nearly 30% of drug offenders received a cooperation departure); *see also* Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement* , 56 VAND. L. REV. 1, 7-14 (2003) (describing how combination of sentencing guidelines and mandatory minimums for drug sentences radically increased cooperation). Part II.B *infra* attempts to estimate the actual number of informants at large at any given time.

investigations and prosecutions. While this marriage of convenience is fraught with peril, it is nearly devoid of judicial or public scrutiny as to the propriety, fairness, or utility of the deals being struck.[5] Moreover, it both exemplifies and exacerbates existing problems with transparency, accountability, regularity, and fairness within the criminal process.[6]

The caustic effects of the informant institution are not limited to the legal system; they can have a disastrous impact in low-income, high-crime, urban communities where a high percentage of residents—predominantly young African American men—are in contact with the criminal justice system and therefore potentially under pressure to snitch.[7] The law enforcement practice of relying heavily on snitching creates large numbers of criminal informants who are communal liabilities. Snitches increase crime and threaten social organization, interpersonal relationships, and socio-legal norms in their home communities, even as they are tolerated or under-punished by law enforcement because they are useful.[8]

The global contours of the informant institution are reflected both in the ways that the informant is created and managed by the government

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5. *See* Daniel Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT. REP. 292, 294 (1996) (noting that "the exchange of cooperation for sentencing leniency is under-regulated and never the subject of systematic empirical investigation").

6. *See* Steven Greer, *Towards a Sociological Model of the Police Informant*, 46 BRIT. J. SOCIOL. 509, 509 (1995) (noting generally that informant use "open[s] up a range of opportunities and dilemmas, particularly for law enforcement professing commitment to due process and the rule of law."). This approach mirrors that of other recent scholarship that looks beyond substantive criminal rules to focus on enforcement practices as a central aspect of the law's nature. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001) (criticizing the academic tendency to focus on normative rules instead of practice); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000) (analyzing the corrosive effect of hidden police enforcement discretion on democratic principles); *see also* Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998) (arguing that the administrative process of prosecutorial decision-making violates adversarial ideals but functions fairly in practice).

7. In low-income urban communities in cities such as Baltimore and Washington D.C., a staggering 50% or more of the African American male population between the ages of 18-35 is under criminal justice supervision at any given time. Eric Lotke, *Hobbling a Generation: Young African American Men in D.C.'s Criminal Justice System Five Years Later* (Nat'l Ctr. on Insts. and Alternatives, Alexandria, VA), Aug. 1997, *at* http://66.165.94.98/stories/hobblgen0897.html; Jerome G. Miller, *Hobbling a Generation: Young African-American Males in the Criminal Justice System of America's Cities: Baltimore, Maryland* (Nat'l Ctr. on Insts. and Alternatives, Alexandria, VA), Sept. 1992, *at* http://66.165.94.98/stories/hobblgen0992.html. Nationally, 30% of that demographic group was under criminal justice supervision as of 1995. MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER (1995). Nearly 40% of African American offenders are incarcerated for drug-related offenses. *Incarcerated America*, HUM. RTS. WATCH BACKGROUNDER (Human Rights Watch, New York, NY), Apr. 2003, at 3, *available at* http://www.hrw.org/backgrounder/usa/incarceration/.

8. This approach builds on a growing literature that identifies the collateral social consequences of criminal justice policies in high-crime communities. For two very different approaches compare INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds. 2002) [hereinafter INVISIBLE PUNISHMENT] with Tracey Meares & Dan Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'TY REV. 805 (1998).

and how the informant in turn interacts with his community.[9] The following example represents a classic drug informant scenario drawn from actual cases:

> Drew, a low-level drug dealer who is also an addict, is confronted by [federal Drug Enforcement Agency (DEA)] agents and local police on his way to make a deal. They offer to refrain from pressing charges at that moment in exchange for information and the active pursuit of new suspects. Drew agrees, immediately provides the name of one of his suppliers to whom he owes money, and is released.[10] As an informant, Drew's investigative activities require him to meet with his police officer handler every two weeks to provide information and make a controlled buy every month or so. In the meantime, with his handler's knowledge, Drew continues to consume drugs and carries a gun illegally. Unbeknownst to (but suspected by) his handler, he skims drugs from his controlled buys and continues to deal drugs on the side.[11] In the course of his cooperation he also provides the police with truthful incriminating information about a competing drug dealer, his landlord to whom he owes rent, and his girlfriend's ex-boyfriend whom he dislikes. The police arrest all three. When Drew is arrested in another jurisdiction for simple drug possession, his handler calls the prosecutor and those charges are dropped.[12]

As the example demonstrates, not only do informants' past crimes go unpunished, but authorities routinely tolerate the commission of new crimes—both authorized and unauthorized—as part of the cost of maintaining an active informant.[13] The phenomenon is particularly

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9. Because the majority of criminal defendants are male, the rest of this Article refers to informants by the male pronoun. The growing problem of the female informant is specifically addressed below. *See infra* Part IV.C.2.

10. In another common practice, the suspect is arrested, brought to court, and then released with the understanding that he will cooperate during the pendency of his case in order to "work off" his sentence. The defendant's sentencing may be postponed indefinitely in order to give him the opportunity to cooperate as extensively as possible. The federal criminal procedure rules expressly promote such arrangements. *See* FED. R. CRIM. P. 35.

11. *See* JEROME SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 123-29 (2d ed. 1975) (documenting instances where police did not pursue suspicions that their informants were simultaneously dealing drugs); Bruce A. Jacobs, *Contingent Ties: Undercover Drug Officers' Use of Informants*, 48 BRIT. J. SOCIOL. 35, 43-44 (1997) ("[I]t is not uncommon for informants to take advantage of their protected status by pursuing more criminal opportunities." (quoting M.R. Pogreba & E.D. Poolle, *Vice Isn't Nice: A Look at the Effects of Working Undercover*, 21 J. CRIM. JUST. 383, 387 (1993))).

12. This example is a composite of facts drawn from published cases, *see, e.g.*, United States v. Willis, 300 F.3d 803 (7th Cir. 2002) (documenting use of crack addict informant); Pyles v. Johnson, 136 F.3d 986 (5th Cir. 1998) (documenting use of heroin addict on probation as informant receiving lenience for burglary charge), sociological studies, *see* SKOLNICK, *supra* note 11; Greer, *supra* note 6, and my own experiences as a former Assistant Federal Public Defender.

13. *See, e.g.*, Greer, *supra* note 6, at 514-15; Hughes, *supra* note 3, at 21, 22 n.72 (cooperation agreements "carry a special danger of licensing continuing criminal acts"). This phenomenon increases with

troubling because it represents under-enforcement and tolerance of criminality in high-crime communities.[14] Authorities may also indirectly ratify the interests of informants when those informants provide information selectively and in self-serving ways. This scenario is repeated over and over, both within the criminal system and in the community, creating dynamics of scale. Within the system, the effect is a shift in the adjudicatory process whereby police and prosecutors informally adjudicate the criminal liability of informants based primarily on expediency and investigative usefulness. Within the community, large numbers of criminals remain active who, due to their role as government informer, obtain some degree of immunity (and, arguably, arrogance) even as they continue their antisocial behavior.

Many aspects of this type of informant practice are in obvious tension with principles of public accountability, consistency, predictability, and other "rule of law"-type precepts.[15] In its most extreme form, bare-knuckled negotiations between suspect and agent take place unsupervised and unrecorded, without judicial or public review or even the presence of counsel.[16] Informants consistently are treated differently from other equally culpable defendants, and informants themselves are routinely treated inconsistently. Similarly situated informants often receive widely disparate rewards for comparable cooperation.[17] Although written cooperation agreements resemble contracts and formal plea bargains, they are generally vague and open-ended. The earlier and more informal the negotiation, the less is written down.[18] Informant

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informality and therefore is of most concern in drug enforcement, which is characterized by informal and active snitch-agent relationships.

14. *See infra* notes 196-97 and accompanying notes discussing Randall Kennedy's theory of underenforcement in minority communities.

15. These informant "adjudications" mirror the more general shift in adjudicatory power away from courts toward law enforcement decision-makers. *See* Stuntz, *supra* note 6, at 519 (noting that the breadth and depth of criminal codes "shift lawmaking from courts to law enforcers . . . . [and] give prosecutors the power to adjudicate"); Lynch, *supra* note 6, at 2120 ("[F]or most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor, who acts essentially in an inquisitorial mode."); *see also* text *infra* (analyzing informant use as a problematic subspecies of prosecutorial discretion).

16. *See* Mark Curriden, *The Informant Trap: Secret Threat to Justice*, NAT. L.J., Feb. 20, 1995, at A1 (noting the "explosion" in the numbers of confidential informants who never testify or go to court).

17. *See* Weinstein, *supra* note 3, at 602-11 (documenting sentencing discrepancies among cooperators among judicial districts); Frank O. Bowman, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 61 (1999) (worrying that Weinstein's findings of disparity might indicate that prosecutors are "seizing control of the entire sentencing process by sub rose manipulations"); Laurie P. Cohen, *Split Decisions: In Federal Cases, Big Gap in Rewards for Cooperation*, WALL ST. J., Nov. 29, 2004, at A1 (documenting racial disparities in cooperation credit).

18. *See* Hughes, *supra* note 3, at 3 (describing cooperation agreements as the "privatization" of criminal adjudication); Richman, *supra* note 3, at 73 (describing cooperation as relational contract rather

deals thus have become an all too common way of circumventing more formal adjudications of guilt and penalty, or even the counsel-dominated process of plea bargaining. Indeed, the use of informants can be seen as a relaxation of public, rule-bound decision-making in the most practical sense: secret negotiations lead to the application of secret rules in which crimes are forgiven, or resurrected, by state actors without defense counsel, judicial review, or public scrutiny.

The legal literature on snitching has not addressed its potential impact on high-crime, low-income communities in which the practice is common.[19] The omission is glaring if only because of the potential scale of the phenomenon. Given rates of criminal involvement for some young black male populations at fifty percent or more,[20] the predominance of drug-related arrests, and the pervasiveness of informant use in drug enforcement, the logical conclusion is that these communities are being infused with snitches and that informing has become part of the fabric of life. Active informants impose their criminality on their community, while at the same time compromising the privacy and peace of mind of families, friends, and neighbors. Informants also are a vivid reminder that the justice system does not treat suspects even-handedly and may even reward antisocial or illegal behavior. In this scheme, the individual willing to sacrifice friends, family, and associates fares better than the loyalist;[21] the criminal snitch is permitted to con-

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than executory agreement).

Hughes criticizes extensively the vague open-endedness and other irregularities in what he terms "informal" cooperation agreements, by which he means written plea agreements or letter immunity. *See* Hughes, *supra* note 3, at 2-3. The irregularities associated with unwritten terms and agreements are infinitely greater as there is almost no possibility of identifying, much less enforcing the terms of an informal, unwritten agreement between a suspect and a police officer or prosecutor. Depending on the authority of the agent, an agreement between a suspect and an agent may simply be unenforceable on its face. *Id.* at 10 n.32.

19. It is with some trepidation that I use the term "community." *See* Robert Weisberg, *Norms and the Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY. 467, 514 (2003) (criticizing law-and-social-norms scholarly assertions about normative behavior in poorblack neighborhoods, noting that "the very fluidity of the population in these neighborhoods only underscores the difficulty of conducting any useful discourse about norms when one relies on an unexamined word like 'community'"). I mean to focus on that relatively well-recognized socio-economic phenomenon of the economically disadvantaged, urban community of color in which poverty, unemployment, crime, and incarceration rates are disproportionately high. *See* Marc Mauer & Meda Chesney-Lind, *Introduction* to INVISIBLE PUNISHMENT, *supra* note 8, at 1, 2-4 (describing some of the socio-economic characteristics of poor black communities). I do not mean to suggest that every individual in these "communities" is necessarily black, poor, or, most importantly, shares the same opinions or is impacted in the same way by criminal justice policies. On the other hand, I do argue that informant policies should be expected to have a greater impact on the people who live in such communities than those in low-crime neighborhoods with low arrest rates where residents are economically better off.

20. *See supra* note 7.

21. *See* Jacobs, *supra* note 11, at 44 ("As one of that study's [police] officers explained, 'You can't turn your back on [informants] for a second or they will bite you. They lie to you all the time. They are untrustworthy. They have the morals of an alley cat.'" (quoting Pogreba & Poolle, *supra* note 11)).

tinue violating the law even as those on whom he snitches are punished.[22]

Sociological studies have documented the harmful impact that pervasive informant presence can have on communities and individuals.[23] In the context of poor, urban, American communities already suffering from high crime, reduced personal security, and distrust of law enforcement, the informant institution may function as a destructive social policy in ways that are not commonly recognized.

This Article is organized into five parts. Part II describes key features of the informant institution: it outlines the classic informant practice, surveys the limited public data on the scope and nature of the practice, describes the pervasive secrecy that surrounds the institution, and raises some theoretical difficulties with classic utilitarian justifications for the practice. This Part is not intended as an exhaustive description of informant practices; rather, it aims to identify the key features of the institution that render it systemically problematic in light of the analyses below.

A major task of this Article is to recognize the informant institution not as an aberrant or extreme practice but as a paradigmatic feature of the modern criminal system, both in its operation and its expressive value. To this end, Part III theorizes the informant institution in terms of three related doctrinal analyses: plea bargaining, prosecutorial discretion, and the administrative, non-adversarial nature of the American criminal justice system. This reframing de-emphasizes the traditional doctrinal criticism of informants based on their unreliability and reconceptualizes informant use as a quintessential yet under-appreciated practice that implicates some of the most contentious characteristics of the modern criminal system—a system dominated by law enforcement discretion, secrecy, and informal adjudications. Part of this reconceptualization draws on scholarship regarding legal norms and the expressive values of the law in an effort to identify what might be the broader normative impact of the informant institution. The conclusion of this Part is twofold: first, the informant institution is best understood as part and parcel of some global concerns about the criminal justice system, and second, the system's current woes cannot be fully understood without taking into account the pervasive influence of the informant institution.

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22. *See* Luna, *supra* note 6, at 1144-48 (arguing that secret police behavior exacerbates community distrust of and resistance to law enforcement).

23. *See infra* Part IV.C.1. The sociological research is a review of case studies of Eastern Europeans during the Cold War.

Part IV describes the concrete harms created by the informant institution to socially disadvantaged, high-crime communities, harms that include increased crime and the erosion of trust in interpersonal, familial, and community relationships. This Part also hypothesizes some ways that the informant institution may erode the relationship between high-crime communities and law enforcement, both in terms of communal loss of faith in the state and the undermining of law-abiding norms. This Part also argues that heavy informant use represents a devaluation of the dignitary interests in target communities and is part of a larger problem of the official, negative construction of poor black communities.

Part V proposes reforms, mainly of the "sunshine" variety. Although there are numerous ways of tinkering with the informant institution, the proposed reforms reflect the conclusion in Part III that what ails the informant institution is centrally a function of the increasingly secretive, undocumented, discretionary exercise of law enforcement authority that constitutes the bulk of the criminal justice system. Accordingly, the proposed reforms aim to reduce the secretiveness surrounding the informal adjudication of informant liability and the concomitant lack of official accountability that flows from the lack of public information, and to increase legislative and public awareness of this quintessentially secretive executive practice.

II. THE INFORMANT INSTITUTION

A. *What are Criminal Informants?*

"Snitching," "ratting," "flipping," "informing," "cooperating," "whistleblowing," "turning state's evidence": this range of terms illustrates the conflicted and sometimes dramatic nature of the informant's practice. From Judas Iscariot to "Sammy the Bull," the snitch often represents betrayal and unreliability, even as "Deep Throat" and corporate whistleblowers may be celebrated for their roles in bringing wrongdoing to light. The focus here, however, is not on the complex moral posture of the informant and his disloyalties, or even his questionable value as a witness. Rather, it is the meaning and consequences of the very specific law enforcement practice of rewarding informants by forgiving them their crimes. This information-liability exchange between informants and the government thus distinguishes criminal snitching in part from other forms of whistleblowing in which betrayal is not rewarded by official forgiveness for other crimes.[24] While the use

24. I am indebted to Dan Kahan for pressing me on this distinction.

of criminal informants still raises the disloyalty concerns raised by the more general use of informants,[25] the government-sponsored market in betrayal and liability adds a unique dimension.[26]

In practice, an informant provides information about someone else's criminal conduct in exchange for some government-conferred benefit, usually lenience for his own crimes, but also for a flat fee, a percentage of the take in a drug deal, government services, preferential treatment, or lenience for someone else.[27] The term "flipping" refers to the government practice of persuading a suspect to cooperate and, so to speak, change sides. The arrangement can be retrospective or prospective, in the sense that an informant can provide information about past events or promise to continue providing information about future events.[28] This Article focuses on the common, staple arrangement in which an informant trades information about other people's activities—both past and future—in exchange for leniency.[29] Such cooperation can range from simple reporting, to wearing a wire, to making controlled drug sales and buys, to actively recruiting new participants. Rewards range from the considerable—outright forgiveness, in which the suspect escapes all charges—to the conditional—a non-binding recommendation by the prosecutor to impose a lower sentence, to nothing at all if the government decides the informant has been insufficiently useful. Arrangements generally remain fluid. Agents and prosecutors often wait to evaluate the usefulness of an informant's cooperation before making final charging decisions, and an informant's obligation to the police can last for years.[30]

Criminal informants interact with numerous actors in the legal system, but it is the police "handler" or agent who is primarily responsible for creating, maintaining, and controlling the informant. While a defendant may agree to cooperate as a result of direct discussions with

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25. *See* Richman, *supra* note 3, at 77-84 (surveying historical distaste for snitching as an anti-loyalty norm).

26. Weinstein, *supra* note 3, at 564 (describing "overheated cooperation market").

27. *See* 21 U.S.C. § 886(a) (2000) (authorizing DEA payments to informers as the Attorney General "may deem appropriate"); 18 U.S.C. § 3059B (2000) (authorizing discretionary informant payments up to $100,000 and providing that award determinations are not subject to judicial review); United States v. Boyd, 833 F. Supp. 1277 (N.D. Ill. 1993) (while in prison, gang member informants were permitted contact visits, sex, illegal drugs, gifts, clothing and telephone privileges).

28. *See* Greer, *supra* note 6, at 510-13 (categorizing informant arrangements by four criteria: Outsiders and Insiders, and Single Event informants and Multiple Event informants, and describing the "Inside Multiple Event Informants, [as] the classic police informers").

29. This Article does not address the additional cash incentives provided to some criminal informers, although the practice is extensive. *See* Curriden, *supra* note 16, at A1 (federal payments to informants totaled nearly $100 million in 1993).

30. *See* Hughes, *supra* note 3, at 2-3, 22 (documenting fluidity and length of informant obligations).

a prosecutor, usually it is the police officer or agent—not the prosecutor—who maintains the closest contact with him.[31] If that informant is eventually charged or used as a witness, the prosecutor then becomes responsible for providing information regarding the informant's activities to the court and thereby to the public.[32]

Most importantly, using informants entails the official toleration of crime, both past and present. By their nature, informant deals require that law enforcement ignore or reduce liability for an informant's past misdeeds. Although drug defendants famously cooperate, no class of offenders is off-limits: snitching can reduce or eliminate liability for crimes as diverse as kidnapping, arson, gambling, and murder.[33]

As part of the process of gathering information, active informants necessarily continue to engage in criminal activity. Drug informants, for example, are routinely authorized to buy, sell, and even use drugs in pursuit of targets. More broadly, U.S. Department of Justice guidelines expressly contemplate ongoing informant criminality, with two tiers of "Otherwise Illegal Activity" that can be authorized by the handler. Tier 1 Otherwise Illegal Activity includes violent crimes committed by someone other than the informant, official corruption, theft, and the manufacture or distribution of drugs, including the provision of drugs with no expectation of recovering them. Tier 2 activity includes all other criminal offenses.[34]

Above and beyond even this criminal activity is the well recognized fact that active informants continue to commit unauthorized crimes even while cooperating with the government.[35] While there is some

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31. *See* Jacobs, *supra* note 11, at 36 (sociological study of how police handlers interact with their informants); Zimmerman, *supra* note 3, at 99-100 (discussing common abuses of handler-informant arrangements).

32. The gap between what the police or agent handler knows and what the prosecutor learns creates additional opportunities for details to be lost in the translation, requiring prosecutors to rely heavily on agent judgments about informants. As one prosecutor described it, "the black hole of corroboration is the time that cooperators and agents spend alone." Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 936 (1999) (quoting an interviewed Assistant U.S. Attorney).

33. BJS, *supra* note 4, at Table 5.34 (showing federal cooperation rates in excess of 20 percent for kidnapping, arson, bribery, money laundering, racketeering, gambling, antitrust (47 percent), and national defense offenses).

34. *See* Department of Justice Guidelines Regarding the Use of Confidential Informants (Jan. 8, 2001) [hereinafter DOJ Guidelines], *at* http://www.usdoj.gov/ag/readingroom/ciguidelines.htm. Tier 1 criminal activity must be authorized in writing in advance by a Special Agent or prosecutor; Tier 2 criminal activity must be authorized in writing in advance by a Senior Field Manager. *See also* Gregory D. Lee, *Drug Informants: Motives, Methods, and Management*, FBI LAW ENFORCEMENT BULLETIN, Sept. 1993, at 10, *available at* http://www.fbi.gov/publications/leb/1989-1995/leb89-95.htm.

35. Hughes, *supra* note 3, at 21 (cooperation agreements "carry a special danger of licensing continuing criminal acts"); *id.* at 47 ("Practices like these . . . can place the State in the suspect role of licensing and managing some crime and some criminals in order to hit the target of the day."); Jacobs, *supra*

sociological debate about the extent to which law enforcement expressly tolerates it, the fact of the tolerance is undisputed.[36] Police, for example, routinely accept the reality that informants will continue to consume illegal drugs during their cooperation period, either because they have a substance abuse problem or because they must use drugs in order to maintain their credibility within the drug-trade community.[37] Continued unauthorized drug dealing and theft of government drugs are also commonly tolerated.[38] Other unauthorized but accepted activities that have made their way to the public record include carrying weapons, prostitution, fraud, and tax evasion.[39] It is this compromise of the goal of crime-prevention, law enforcement's putative raison d'etre, that generates the central irony of the informant institution: in high-crime communities, law enforcement's central crime-fighting strategy may itself exacerbate crime. Likewise, it is this aspect of criminal snitching that distinguishes it from other types of informing in which the informant's own criminality is not at stake.

B. Data on the Informant Institution

The informant institution is one of the most secretive aspects of the criminal justice system. Data on its key aspects simply do not exist. How many informants are there? What percentage of suspects become informants? How many are "flipped" without ever being arrested or formally charged? How many arrests or solved cases are due to informant tips? What types of crimes are tolerated when committed by active informants? We can only answer such questions partially and indirectly, based on general principles and the small percentage of informants who actually surface either because they eventually come to court or because some aspect of their cooperation becomes public.

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note 11, at 43; SKOLNICK, *supra* note 11, at 124-30.

36. Jacobs, *supra* note 11, at 43-44.

37. SKOLNICK, *supra* note 11, at 128-29.

38. Jacobs, *supra* note 11, at 43-44.

39. United States v. Boyd, 833 F. Supp. 1277 (N.D. Ill. 1993) (while in prison, gang member informants were permitted contact visits, sex, illegal drugs, gifts, clothing and telephone privileges); United States v. Flemmi, 225 F.3d 78, 81-82 (1st Cir. 2000) (FBI handlers permitted and even facilitated their informants' extortion and murder); Michael D. Sorkin, *Top U.S. Drug Snitch is a Legend and a Liar*, ST. LOUIS POST DISPATCH, Jan. 16, 2000, at A1; David Rovella, *Some Superinformant: Lies, Rap Sheet of DEA's Million Dollar Man Stains a Legal Fire*, NAT'L L.J., Nov. 22, 1999, at A1 (DEA agents covered up their informant's tax fraud, prostitution, perjury); *see also* Bennett v. DEA, 55 F. Supp.2d 36 (D.D.C. 1999) (Freedom of Information Act lawsuit seeking to compel DEA disclosure of Chambers's activities and payments).

It is undisputed that informant use is on the rise.[40] Our justice system has become increasingly dependent on criminal informants over the past twenty years, primarily as a result of the confluence of several related trends: the United States Sentencing Guidelines (USSG), mandatory minimum sentences, and the explosion of drug crime enforcement efforts.[41] With regard to sentencing, the USSG make cooperation the central basis for lenience: indeed, only a defendant's cooperation permits a court to depart from the high statutory mandatory minimum drug sentences.[42] On the enforcement end, nearly every drug case involves an informant, and drug cases in turn represent a growing proportion of state and federal dockets.[43]

Informant use, however, is not limited to drug cases; the culture of cooperation permeates the entire system, from burglary to white collar crimes.[44] Police and prosecutors rely on cooperation as a way of managing new suspects, conducting investigations, and resolving cases in court. Courts in turn see an increasing number of cases that involve informants, either as witnesses or—because trials are so rare—more often as defendants seeking a reduced sentence based on their cooperation.

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40. Simons, *supra* note 4, at 3 ("Cooperation has never been more prevalent than it is today."); Weinstein, *supra* note 3, at 563-64 (describing "significant increase in cooperation").

41. *See* Simons, *supra* note 4, at 7-14 (describing how combination of sentencing guidelines and mandatory minimums for drug sentences radically increased cooperation); Weinstein, *supra* note 3, at 563 (describing these as "boom times for the sellers and buyers of cooperation").

42. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002); 18 U.S.C. § 3553(e) (2000). While this Article was going to press, the Supreme Court decided *United States v. Booker*, 125 S. Ct. 738 (Jan. 12, 2005), holding that the U.S. Sentencing Guidelines are advisory in nature. To what extent this decision will impact the use of the § 5K cooperation provision is unclear at this stage. Assuming that *Booker* gives sentencing courts more flexibility in evaluating cooperation, this should neither alter the core law enforcement practice of using informants, nor eliminate judicial deference to the government's description of an informant's usefulness.

43. *See* Greer, *supra* note 6, at 515 ("[I]nformers are almost invariably used in crimes of vice . . . ."); Curriden, *supra* note 16; Weinstein, *supra* note 3, at 579-81 (describing the prevalent role of cooperation in drug cases). In federal court, 64% of on-the-record sentencing reductions for cooperation involve drug cases. BJS, *supra* note 4, at Table 5.34.

The number of drug-related offenses, however, actually understates the role that drug informants play in the criminal justice system. Sixty-five percent of adult male arrestees test positive for drugs upon arrest. *Id.* at Table 4.30. Seventy-five percent of prisoners have a history of substance abuse. Mauer & Chesney-Lind, *supra* note 8, at 2. This means that most defendants are in contact with the world of drug trafficking even if their offense was not itself directly drug related, while drugs often motivate the offense in the first place. Such defendants may have drug-related information, and therefore be treated by law enforcement as valuable drug informants, even where their offenses are not ostensibly drug-related. *See, e.g.*, SKOLNICK, *supra* note 11, at 126 (documenting pervasive use of addict informants in burglary investigations).

44. BJS, *supra* note 4, at Table 5.34 (statistics on cooperation for each type of offense, showing rates in excess of 20% for kidnapping, arson, bribery, money laundering, racketeering, gambling, antitrust (47%), and national defense offenses); Bowman, *supra* note 17, at 15 (as a general matter, the focus on cooperation has "changed the way federal prosecutors bargain and, perhaps, the way criminal defendants think about cooperating").

Federal and state legislatures promote the practice both directly and indirectly. In the federal system, cooperation is the favored and sometimes the only basis for lenience,[45] while mandatory minimum sentences generally strengthen the prosecutorial arsenal with respect to charge and sentence bargaining thereby making cooperation more likely.[46] Defendants and their attorneys have likewise grown accustomed to the practice.[47] As one court lamented:

> [n]ever has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration.[48]

So prevalent is the practice that critics complain that the justice system has devolved into a "culture" of snitching.[49] In this way, snitching—and the creation and maintenance of snitches—has come to permeate the criminal process in ways the United States Supreme Court likely did not contemplate when it comprehensively authorized the use of informants nearly forty years ago.[50]

The first clue to the empirical magnitude of informant use lies in the massive drug docket. There were approximately two million drug-related arrests in 2000, representing approximately thirty percent of federal arrests and ten percent of state arrests.[51] Another type of case that commonly relies on informants is burglary, which accounts for another two million state arrests each year.[52]

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45. *See* U.S. SENTENCING GUIDELINE MANUAL § 5K1.1 (authorizing courts to reduce sentences where the defendant has provided "substantial assistance" to the government); 18 U.S.C. § 3553(e) (2000) (cooperation only basis for departure below mandatory minimum sentence). *But see supra* note 42, regarding the impact of *Booker*. See *infra* text for expanded discussion of 5K practice.

46. *See* SKOLNICK, *supra* note 11, at 138 ("Penalties thus are the capital assets of the informer system. High penalties for such relatively minor violations as possession of [drugs or drug paraphernalia] increase the capital assets of the policeman and create conditions under which the information system will work most efficiently."); Stuntz, *supra* note 6, at 508 (describing prosecutorial leverage derived from mandatory minimum sentences).

47. Richman, *supra* note 3, at 75-76 (arguing that informant use deforms role of defense attorney); Weinstein, *supra* note 3, at 617-21 (noting corrosive effect of pervasive informant use on defense counsel).

48. Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1123 (9th Cir. 2001).

49. Bowman, *supra* note 17, at 46 (chronicling complaints of "snitch culture").

50. Hoffa v. United States, 385 U.S. 293, 311 (1966) (governmental use of compensated, secret informer "not per se unconstitutional"); *see* Bowman, *supra* note 17, at 45 (noting sea change in way informants are used since *Hoffa*).

51. BJS, *supra* note 4, at Table 4.1 (1,579,566 state drug-abuse arrests); *id.* at Table 4.33 (32,630 federal drug arrests); *id.* at Table 4.40 (40,000 DEA arrests). Drug convictions make up a higher percentage of the total docket—40% of federal convictions and 30% of state convictions. *Id.* at Tables 5.32, 5.42.

52. For the year 2000. *Id.* at Table 3.109 (2002); *see* SKOLNICK, *supra* note 11, at 126-30 (documenting heavy use of informants in burglary cases).

More explicitly, approximately twenty percent of federal offenders received on-the-record cooperation credit under USSG § 5K1.1,[53] as did thirty percent of drug defendants.[54] Those recorded percentages in turn represent less than half of defendants who actually cooperate: some co-operators receive no credit,[55] while others escape the process altogether by having charges dismissed or never being charged at all.

Other indicia of informant use can be gleaned from warrant statistics. The San Diego Search Warrant Project found that the majority of the approximately 1,000 search warrants issued in 1998 were targeted to inner-city zip codes and that eighty percent of those warrants relied on a confidential informant.[56] Studies in Atlanta, Boston, San Diego, and Cleveland produced comparable results, finding that 92 percent of the 1,200 federal warrants issued in those cities relied on an informant.[57] It thus is reasonable to conclude that informants are involved in a high percentage of the hundreds of thousands of search warrants issued in inner-city communities every year.

Finally, additional factors suggest that standard data collection efforts are insufficient to determine the actual number of informants. Police jealously guard the identities of their informants, often failing to reveal that an informant has contributed to a case.[58] Police and prosecutors will sometimes go so far as to drop cases or agree to reduced charges in efforts to maintain the confidentiality of informants who contributed to the investigation. In sum, the data suggest that there are hundreds of thousands of informants at any given moment, that informant use is concentrated around, although by no means limited to, drug enforcement in inner-city communities, and that public records severely understate the extent to which informants are used throughout the criminal process.

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53. *See infra* note 61 and accompanying text.

54. BJS, *supra* note 4, at Table 5.34.

55. *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1503, 1504 (2001) (citing sentencing commission report that "fewer than half" of cooperating defendants receive a departure).

56. Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants*, 6 J. GENDER, RACE & JUST. 183, 200 & n.60 (2002); *see also* Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. WEST. L. REV. 221 (2000) (same data). This study noted, however, that estimating actual informant use from search warrants is not completely reliable in light of the police's concomitant practice of using "boilerplate" warrants and fabricating informants.

57. Curriden, *supra* note 16 ("[P]ractically all warrants now rely on information from [confidential informants] in some manner."). Federal magistrate judges issued 31,571 search warrants in 2001. BJS, *supra* note 4, at Table 1.62.

58. Jacobs, *supra* note 11, at 43, 51 n.1 ("Officers were extremely protective of their 'snitches' because they depended so heavily on them to initiate and develop investigations.").

C. Secret Adjudications: The Inscrutable Nature of Informant Arrangements

The core challenge presented by the informant institution is the informal, ad hoc way it eliminates or reduces criminal liability off the public record. The informant institution "adjudicates"[59] criminal liability without the benefit of rules or regularity, while its secretiveness immunizes its irregularities from the checks and balances traditionally provided by other government branches and public scrutiny. It is this combination, discussed further below, that makes informant use institutionally problematic and demonstrates the need for the types of sunshine reforms proposed in Part V of this Article.[60]

Not all aspects of informant deals are secret; rather, the spectrum of informant practices range from the partially public and transparent to the completely opaque and confidential. At the most transparent end are the so-called "5K" agreements, named after the provision in the federal sentencing guidelines that permits judges to reduce sentences for cooperation.[61] If a defendant cooperates or promises to cooperate with the government, that defendant's plea agreement may contain a 5K provision in which the prosecution promises to inform the Court whether the defendant has provided "substantial assistance" and, if he has, to recommend a downward sentencing departure. If the government makes such a motion, the defendant may seek a greater reduction. If the government declines to make a motion, the court is precluded from awarding the defendant any benefit for his cooperation.[62] In this way, the fact of the defendant's cooperation and the extent of the reward become public record.[63]

Even in 5K agreements, very little information about informant activities becomes public. Salient details of the cooperation may or may not be provided to the court; if they are, such proceedings are routinely

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59. *See* Stuntz, *supra* note 6, at 519 (applying the term "adjudicate" to law enforcement determinations about liability, noting that it is not true adjudication in the traditional, judicial sense); Lynch, *supra* note 6, at 2120 (same).

60. *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1566 (1981) (arguing that with respect to prosecutorial discretion generally, "[w]e presently tolerate a degree of secrecy in one of our most crucial decisionmaking agencies that is not only inconsistent with an open and decent system of justice, but that may not even be efficient in avoiding the additional effort necessary to make the system accountable").

61. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002) provides that a defendant may receive a downward departure for providing "substantial assistance" to the government. *See also supra* note 42.

62. *See, e.g.*, *In re* Sealed Case, 181 F.3d 128, 130 (D.C. Cir. 1999) (en banc) (court cannot award cooperation benefits absent a government motion). This aspect of 5K practice is likely now improper under *Booker*. *See supra* note 42.

63. *See* Hughes, *supra* note 3, at 19 (delineating the limited extent of judicial review of informant activities).

sealed.[64] The full extent of an informant's activities is almost never shared: the respective parties provide the court merely with enough information to support their respective sentencing recommendations. The limits on information-sharing flow from the circumscribed purpose of the proceeding: the 5K provision is not designed to permit the court to evaluate the use of the informant per se, but only to determine the extent to which that informant should benefit from his cooperation.[65]

At the other end of the spectrum, the least transparent and therefore most problematic informant arrangement occurs where the informant is "flipped" by a law enforcement agent at the moment of initial confrontation and potential arrest. The mutual promises of the agent and suspect at that moment are shrouded in secrecy and if that particular informant never makes it to court, so they will remain.[66] The scope and methodology of those negotiations, moreover, depend on the idiosyncrasies of the particular officer, making the process remarkable for its lack of rules or uniformity. As one prosecutor described it, "the black hole of corroboration is the time that cooperators and agents spend alone."[67] Actual practices vary widely: an informant may be flipped initially by an agent in secret but eventually end up with counsel, or talking to a prosecutor, or in court, at each stage subjected to additional scrutiny and a new set of increasingly formal rules. Similarly, a charged defendant may morph into an informant during the progress of his case and recede from public view. Parts of a cooperation agreement may be memorialized in writing in a plea agreement or proffer letter, while other aspects will remain unrecorded.

An informant's activities may become public in another, less common way:[68] when that informant is used as a witness against another defendant. This is the paradigmatic process described by the Supreme Court in *Hoffa v. United States*,[69] which approved the propriety of using informants as witnesses. This approval was based in part on the requirements of disclosure of aspects of the informant relationship through discovery, cross-examination, and jury instructions.[70] A defendant is

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64. *See, e.g.*, *In re* Sealed Case, 349 F.3d 685, 690 (D.C. Cir. 2003) (noting that trial court sealed sentencing record for two years based on "circumstances of the [defendant's] cooperation").

65. *See* Yaroshefsky, *supra* note 32, at 926-29 (describing guidelines practices).

66. Such transactions may be later revealed in proffer sessions if the informant ends up being charged. Those proffer sessions are likewise confidential. *See* Yaroshefsky, *supra* note 32, at 952-62 (describing the processes and perils of the proffer session); Bowman, *supra* note 17, at 12 & n.62 (describing formal proffer sessions).

67. Yaroshefsky, *supra* note 32, at 936 (quoting an interviewed Assistant U.S. Attorney).

68. Informant witnesses are necessarily few as compared to non-witnesses because 90 to 95 percent of cases are resolved by plea, requiring no witnesses at all. BJS, *supra* note 4, at Tables 5.32, 5.55.

69. 385 U.S. 293, 311 (1966).

70. *Id.* at 311.

entitled to exculpatory evidence and, eventually, prior statements and impeachment material if an informant testifies.[71]

From a systemic perspective, the scope of the inquiry produced during litigation by these methods is limited in several ways. First, it addresses only the role played by that particular informant in that particular case. In addition, even where a defendant actively seeks information about the informant's activities, much of that information may be protected by law enforcement privilege.[72] Finally, because over ninety percent of cases never go to trial, most cases in which informants are active are never vetted through the discovery and trial process.

In sum, it is hard to determine what portions of the universe of informant activities are revealed through public processes, but the data suggest that it is meager. Although 5K and comparable state agreements constitute a growing proportion of cases, they necessarily represent a fraction of the informant pool, because many defendants cooperate without receiving any on-the-record recognition and others avoid going to court at all by cooperating off the record. Likewise, while revelations of informant malfeasance are most likely to be revealed when individual defendants litigate the use of informant witnesses against them, most cases remain unlitigated. In sum, only the tip of the informant iceberg ever reaches the public record where a judge, legislator, or other independent observer might scrutinize it.[73]

D. The Utilitarian Problem

The informant institution raises numerous social utility problems.[74] The classic justification for informant use is that it is a necessary evil. As one court put it:

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71. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150 (1972); Roviaro v. United States, 353 U.S. 53, 59-60 (1957); FED. R. CRIM.P. 26; Jencks Act, 18 U.S.C. § 3500 (2000). The Supreme Court recently decided that the government need not provide impeachment evidence to defendants who plead guilty. United States v. Ruiz, 536 U.S. 622 (2002) (upholding guilty plea requiring waiver of right to impeachment evidence). As mentioned above, 90 to 95% of all cases are resolved by plea, *see* BJS, *supra* note 4, at Tables 5.32, 5.55, and a great deal of discovery about informants comes in the form of impeachment evidence, the Court's decision drives informant activities even further from public view. *But cf.* Lynch, *supra* note 6, at 2148 & n.22 (advocating greater pre-charge discovery for defendants as a way of balancing prosecutorial charging authority).

72. *See* Roviaro, 353 U.S. at 59 (balancing government's investigatory need for confidentiality against defendant's right to exculpatory information); 18 U.S.C. § 3500 (2000) (limiting defense access to cooperating witness statements).

73. I do not include "scrutiny" of the process by informants' defense counsel, although it may be extensive, since the information obtained is privileged and therefore cannot directly contribute to the public understanding of the institution.

74. *Compare* Bowman, *supra* note 17, at 43 ("The true justification for exchanging leniency for cooperation is a utilitarian argument from necessity.") *with* Simons, *supra* note 4, at 25 (arguing that the investigative utility of informants is suspect and, alone, insufficient to justify their use).

> our criminal justice system could not adequately function without information provided by informants . . . . Without informants, law enforcement authorities would be unable to penetrate and destroy organized crime syndicates, drug trafficking cartels, bank frauds, telephone solicitation scams, public corruption, terrorist gangs, money launderers, espionage rings, and the likes.[75]

The use of informants makes possible certain sorts of investigations and convictions. It is also valuable as a labor-saving device for prosecutors. Behind this traditional story, however, is the unstated assumption that as a result of their invaluable assistance in certain types of cases, active informants abate more crime than they generate. The main acknowledged countervailing arguments against informant use are moral and procedural: the propriety of the government's reliance on criminals and the fairness of using paid criminal witnesses to convict defendants.

There is, however, a third possibility: that the use of informants on balance may not always be an effective crime fighting tool. The fact that some types of cases cannot be pursued without informants does not address the problem that the informant institution tolerates and generates a certain amount of crime. In addition, there is no reason to assume that a given informant, even if he is useful to law enforcement in a particular case, is producing a net benefit to his community. Indeed, he may be a neighborhood scourge, a source of violence and fear, and a bad influence on local youth, fueled by his personal knowledge that as long as he remains useful to the authorities his collateral bad behavior will remain essentially unchecked. In this sense, like the "broken window," the impact of informant criminality must be measured not merely in terms of his individual conduct, but also by his impact on others' experiences, behaviors, and the perception of the community that he creates.[76]

This question of whether the net benefits conferred by the informant institution outweigh the harm imposed by individual informants cannot be answered satisfactorily because of the lack of data on snitch use and because of the way flipping decisions are made by the government. No

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75. United States v. Bernal-Obeso, 989 F.2d 311, 335 (9th Cir. 1993); *see also* John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1722-27 (2003) (arguing that bargaining over the death penalty with cooperating murder defendants, and using cooperation in murder cases more generally, is an "effective" crime control strategy, albeit one "fraught with difficult issues").

76. *See* Bernard Harcourt, *Reflecting on The Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order Maintenance Policing New York Style* , 97 MICH. L. REV. 291 (1998) (discussing "broken windows" theory of policing that visible disorder promotes crime).

mechanism exists to permit public scrutiny of the institution.[77] It has been suggested that prosecutors engage in a sort of general "balancing" test in which the investigative utility of the informant is weighed against some combination of factors including the seriousness of the instant offense and potential danger to the community.[78] But such an inquiry is at best implicit and incomplete;[79] at worst this "balancing test" represents merely a post hoc description of the fact that some decision must be made. Rather, like all highly discretionary decisions, the decision to convert a traditional defendant into an informant is made on an ad hoc basis, subject to everyday bureaucratic and individual pressures. In this vein, Ian Weinstein argues that "[t]he current rate of cooperation is particularly troubling because a significant portion of snitching brings relatively few concomitant law enforcement benefits."[80] Based on inter-district studies, he concludes that prosecutors manipulate cooperation to reach a variety of goals: "in the current overactive market in cooperation, prosecutors use cooperation to achieve docket control and influence case outcomes to achieve particular results in individual cases, as well as to further law enforcement goals," and that some cooperation is simply "not motivated by the scope of its law enforcement impact."[81]

In sum, informants serve many law enforcement needs that may be unrelated to their value in solving crimes. Because of its inherent

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77. One counterexample might be the Bail Reform Act, which provides for limited judicial review of the question of a defendant's dangerousness to the community in the context of deciding whether to release that person pre-trial. *See* 18 U.S.C.A. § 3142(e) (West 2000 & Supp. 2004) (court to evaluate whether conditions of release will ensure "safety . . . [to] the community"). Where a defendant is cooperating and the government supports his release, however, the Court will usually lack any factual basis to countermand the government's priorities.

78. It is hard to identify precisely how prosecutors actually make informant decisions. According to Yaroshefsky, "[w]ithin the Justice Department there are few, if any, internal standards for substantial assistance to guide the discretion of prosecutors." Yaroshefsky, *supra* note 32, at 927. The Principles of Federal Prosecution generally instruct prosecutors to consider "the importance of the case, the value of the person's cooperation to the investigation or prosecution, and the person's relative culpability and criminal history." *Id.* at 927 n.44. Noting these general contours, Hughes argues that for prosecutorial decision-making "the utilitarian approach is surely the correct one." On the other hand, he also assumes "prosecutors always should perceive immunization as a last resort," and that prosecutors should be able to evaluate an informant's "future danger to the public." *See* Hughes, *supra* note 3, at 14-15 & n.48 (noting the 1980 DOJ guidelines recognize "in very general terms the propriety of permitting the prosecutor to make a utilitarian calculation."); *see also* Amanda Schreiber, *Dealing with the Devil: An Examination of the FBI's Troubled Relationship with its Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301 (2001) (pointing out that no enforceable guidelines exist to control informant use or behavior). By contrast, Bowman presumes the general utility of informants, focusing only on the question of whether the informant will lie on the stand. Bowman, *supra* note 17, at 45 ("Only untruthful accomplice testimony is bad.").

79. Simons, *supra* note 4, at 25 (utilitarian balancing is incomplete).

80. Weinstein, *supra* note 3, at 565.

81. *Id.* at 614; *see also* Cohen, *supra* note 17, at A1 (documenting the same tendency).

secrecy, however, the process evades public inquiry into whether those values served and the discretionary decisions to flip and reward particular suspects enhance the public good. The reforms proposed below are designed in large part to remedy this systemic blindness and to create both data and mechanisms for review that would permit genuine inquiry.

III. DOCTRINAL PROBLEMS WITH INFORMANT USE

The core doctrinal issues concerning informant use are in some sense variations on a familiar theme: they are problems inherent in the exercise of broad police and prosecutorial discretion in connection with the practice of plea bargaining.[82] The growth of informant use is also part of larger systemic trends: the expansion of prosecutorial control; the overwhelming dominance of the plea bargain; the centrality of drug cases in criminal dockets; and the increasingly administrative, non-adversarial nature of the criminal system. At the same time, informant use is an under-appreciated engine of these very trends. Heavy reliance on informants exacerbates the culture of secrecy and untrammeled discretion that permeates law enforcement. The sheer scale of informant practices and the gravitational force they exert on other aspects of law enforcement make the informant institution a unique window into some of the most contentious aspects of the American criminal justice system.[83]

A. Beyond Unreliable

Judicial as well as much scholarly discomfort with informants traditionally has flowed from their infamous unreliability as witnesses. Courts have held that without procedural protections against unreliability, using criminals who testify in exchange for benefits may raise due process and other fairness issues for defendants against whom

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82. *See* Hughes, *supra* note 3, at 4 (identifying the plea bargaining process and prosecutorial discretion as keys to understanding informant deals); Weinstein, *supra* note 3, at 565 ("The problem of externalized costs in the criminal justice system is not unique to cooperation. It is part of the story of the ascendancy of the plea bargain and its centrality in the American criminal justice system.").

83. These secretive adjudicatory practices in turn distort traditional aspects of criminal practice in additional ways described by other authors. *See* Richman, *supra* note 3, at 111-26 (prevalence of cooperation undermines ability of defense attorney to give good advice to client); Harris, *supra* note 3, at 7-9, 49-58 (compensating criminal informants for testimony compromises legal ethics and evidentiary integrity); Hughes, *supra* note 3, at 10, 13, 21, 57, 60 (informant agreements distort the processes and protections of plea bargaining, appeals, and double jeopardy).

informant testimony is levied.[84] Commentators have documented numerous horror stories of fabrication and perjury by informants.[85]

The conventional focus on unreliability reflects the realities of snitch litigation. The Supreme Court's decision in *Hoffa* apparently foreclosed the argument that the use of informants itself violates due process, while at the same time directing attention to the formal procedures guaranteeing reliability: discovery, cross-examination, and the jury's evaluation.[86] Attention thus has focused on unreliability and the procedures surrounding it as the dominant ground for realistic legal challenges to the use of informants.[87]

This analytic shift away from informant use as a species of public policy to the narrower question of the snitch's unreliability obscures the nature of the mechanisms by which that unreliable testimony is created —secretly negotiated deals between criminals and law enforcement in which information is exchanged for reduced liability and penalties. Insofar as those mechanisms distort the criminal justice process and affect communities, they may cause more widespread damage than any false information that might be generated. In other words, while informants may well be inherently unreliable, that is not their worst feature. Rather, their use is problematic because it undermines the uniform application of criminal liability rules, the accountability of law enforcement, and, for some neighborhoods, the well-being of a community.

B. Mechanics of the Deal: Informing as a Problematic Type of Plea Bargain

Some of the systemic challenges posed by snitching can be understood by conceptualizing cooperation as an extreme form of plea bargain.[88] The government (provisionally) agrees to reduce or eliminate a suspect's

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84. *See* Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1123 (9th Cir. 2001); United States v. Bernal-Obeso, 989 F.2d 331, 335 (9th Cir. 1993).

85. *See, e.g.*, Harris, *supra* note 3, at 2 (noting study result that fabricated snitch testimony has been a factor in 21% of wrongful capital convictions) (citing JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE (2000)); ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 63-105 (2002) (documenting numerous instances of informant lying); Zimmerman, *supra* note 3, at 90-99 (same); Schreiber, *supra* note 78 (describing FBI difficulty in preventing informant fabrication).

86. Hoffa v. United States, 385 U.S. 293, 311 (1966) (use of compensated informant did not violate due process). *But see* United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998) (holding that use of compensated informant violated federal bribery statute), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999).

87. *Bowie*, 243 F.3d at 1110 ("[T]he Constitution required a prompt pretrial investigation of the integrity of the government's [informant] evidence before the witnesses were called to the stand" and prosecution's failure to investigate informant testimony warranted new trial.); *Bernal-Obeso*, 989 F.2d at 337 (dismissal of indictment would be appropriate remedy if trial court were to find that prosecution propounded perjured informant testimony); *see also supra* note 85 (listing scholarship focused on reliability).

88. *See* Richman, *supra* note 3, at 73 (analyzing cooperation agreements as a problematic type of plea); Hughes, *supra* note 3, at 2 (same).

liability, while the suspect (temporarily) forswears his right to contest liability and promises to provide information incriminating others. Unlike a typical plea bargain, the informant deal is secretive and changeable. Many of its aspects are unenforceable because details often remain unspoken and unwritten. It involves the constant exercise of law enforcement judgment as to the utility of the informant's cooperation, and in the end, it may be jettisoned if the government decides the informant is unhelpful or lying, or the informant decides belatedly to go to trial.[89] Formal written agreements, when they exist, address only the broadest parameters of cooperation without revealing details of informant activities or obligations,[90] and even these agreements are "exotic plants that can survive only in an environment from which some of the familiar features of the criminal procedure landscape have been expunged."[91]

As such, the informant deal lacks the safeguards of the typical plea: specificity, completeness, finality, enforceability, judicial review and publicity, and, in the case of the most informal negotiations, counsel. It is precisely these safeguards, however, on which courts and scholars have relied in justifying the system's heavy reliance on plea bargaining.[92] Absent these protections, the informant deal pushes plea bargaining to the limits of its legitimacy.

For example, unlike a classic plea bargain, informant deals lack finality because an informant's obligations are ongoing. Written cooperation agreements often extend a defendant's obligations into perpetuity,[93] while informal, unwritten agreements last as long as the police

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89. Hughes analyzes in detail the uncertainty associated with written, formal cooperation agreements. Hughes, *supra* note 3, at 2-3. The analysis here attempts to extend that inquiry into the more elusive and problematic practice of informal, unwritten snitch arrangements.

90. Typical federal cooperation agreements are often generic: they require defendants to engage in all possible activities—surveillance, controlled buys, testifying—in the event that the prosecutor decides she wants them. They also frame the government's obligations broadly, stating that in the event that substantial assistance is provided the government will inform the court. Such agreements reveal little or nothing about actual defendant activities or obligations. Richman, *supra* note 3, at 96-100 & nn.98-108 (describing government practice of keeping cooperation agreements vague).

91. Hughes, *supra* note 3, at 3. What Hughes calls "informal" agreements are written agreements for cooperation and lenience, either in the form of a written plea or letter immunity. This Article treats such agreements as formal: the informality discussed here refers to the unwritten, implicit terms of informant deals.

92. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 30-38 (1991) (describing the classic judicial justifications for plea bargaining); Brady v. United States, 397 U.S. 742 (1970) (upholding constitutionality of plea bargain based in part on active participation of defense counsel, defendant's opportunity to fully assess scope of agreement, and taking of the plea in open court before a judge).

93. Hughes, *supra* note 3, at 3, 19-22, 41-49 (noting special contractual problems with cooperation agreements, including lack of requirement that agreement be reduced to writing at any particular time, lack of consensus on what constitutes unconscionability or material breach, and unfettered discretion of

or prosecutor wishes to use that informant.[94] In general, snitch relationships with the government tend toward the open-ended and indefinite; they may outlast a particular charge and go on for years.[95] The promise of cooperation does not bring closure to a case. Rather, it creates an ongoing relationship between a criminal actor and the government. Particularly with high recidivism rates, an informant may carry old relationships with the police from case to case, leveraging old and new cooperation in an effort to escape liability for new crimes in new jurisdictions, while police in turn may manipulate arrest and charging decisions to preserve and encourage their information sources.[96]

While written cooperation agreements are enforceable, many aspects of a cooperation remain unwritten, discretionary, and impossible to litigate. More broadly, informant deals are contingent upon police or prosecutor satisfaction with an informant's usefulness, and therefore the benefits to be conferred remain indeterminate and discretionary. Ironically, one of the most powerful protections available to informants may not be the court but the market: police who "burn" their snitches or prosecutors whose rewards are meager may have difficulty recruiting future informants.[97]

Informant deals evade judicial review and publicity to an even greater extent than do traditional plea bargains because the only aspect of the arrangement over which the court has jurisdiction at sentencing is the question of how much benefit, if any, the defendant should receive for his cooperation.[98] When a defendant pleads guilty, the court must independently question him as to whether he understands the rights he is giving up and whether he is entering into the plea knowingly and volun-

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prosecutor in setting the terms).

94. SKOLNICK, *supra* note 11, at 121-24 (describing police dependence on regular contact with and supply of addicts informants).

95. Hughes, *supra* note 3, at 46-49.

96. *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 298 (1966) (pending state and federal charges were dropped against informer). I personally witnessed or negotiated numerous such interjurisdictional deals on behalf of cooperating clients.

97. Jacobs, *supra* note 11, at 43 (quoting J. R. Williams & L. L. Guess, *The Informant: A Narcotics Enforcement Dilemma*, 13 J. PSYCHOACTIVE DRUGS, 235-45 (1981) ("The narcotics unit's success in protecting informants establishes a reputation on the basis of which the unit can recruit new informants. A unit which 'burns' their informants usually has difficulty in recruiting new [ones]." (alteration in original)); Richman, *supra* note 3, at 109-10 (The snitch's protection "lies in the discipline of the marketplace. The prosecutor who mistreats snitches risks not being able to attract such assets in the future."). Richman also notes the importance of the experienced repeat player defense attorney who can advise clients as to the reliability of prosecutorial promises. *Id.* Such protections are obviously unavailable to the informant who deals only informally with police agents.

98. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002); *In re* Sealed Case, 181 F.3d 128, 130 (D.C. Cir. 1999) (en banc) (court has limited jurisdiction to review cooperation).

tarily.[99] This inquiry usually includes questions about the performance of defense counsel and whether the defendant has been threatened or coerced in any way.[100] By contrast, there is no such colloquy administered to a prospective informant, inquiring as to whether his decision to snitch is "knowing and voluntary" and warning him of the rights he is about to waive, the risks he is about to incur, the government's complete latitude in deciding his fate, and the impossibility of predicting what benefits might accrue.[101] Judicial oversight is also narrow in the sense that courts do not review the propriety of the cooperation per se. The sentencing inquiry does not account for charges never brought, for cooperation unrevealed, potential fruits of the informant's work, other misdeeds of the informant, or for that matter, any other information not brought forward by the parties.[102]

Insofar as judicial review guarantees a measure of publicity for plea agreements, even this element may be lacking for informants. Informant plea agreements and sentencings are routinely sealed in order to protect the informant, preventing the public from knowing of the particular arrangements.[103]

Finally, the suspect approached by police and invited to snitch has no right to counsel, even though the decision to inform may have a greater and more lasting impact on his life than the decision whether or not to plead guilty.[104] By contrast, the defendant who decides to exercise his constitutional right to proceed to enter a guilty plea without counsel will receive a lecture from the judge on the heavy risks of doing so and a probing inquiry as to whether he understands those risks.[105]

Lack of counsel characterizes even formal informant agreements. A typical cooperation agreement requires the defendant to waive the presence of counsel for conversations with the handling agent. An infor-

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99. FED. R. CRIM. P. 11 (requiring courts to establish knowing and voluntary entry of plea); Boykin v. Alabama, 395 U.S. 238, 242 (1969) (that plea is "intelligent and voluntary" is sine qua non of its constitutional validity).

100. *See* FED. R. CRIM. P. 11.

101. Even when the informant is represented by counsel, Richman worries about the complex pressures on defense counsel that undermine their ability to fully advise defendants about the costs and benefits of cooperating. Richman, *supra* note 3, at 75-76, 99 & n.105, 111-13. Yaroshefsky also points out that the "race" to cooperate—early cooperators usually get the best deals—means that defense counsel simply may have insufficient information at the early stages of the case to give good advice. Yaroshefsky, *supra* note 32, at 929-30.

102. *See* Yaroshefsky, *supra* note 32, at 937-39 (describing chaotic, unreliable process by which narcotics and violent gang cooperations are conducted).

103. *See supra* note 64-65 and accompanying text (on sealing).

104. *See* Richman, *supra* note 3, at 74 (noting value of experienced counsel in explaining risks of cooperation to potential cooperator).

105. Godinez v. Moran, 509 U.S. 389, 400 (1993) (describing constitutional requirements of knowing and voluntary self-representation).

mant, even one who has been formally charged and has an attorney, will routinely work and communicate independently with law enforcement in the course of cooperation.[106] Insofar as defenders of the plea bargaining system rely on defense counsel to mitigate the authority of prosecutorial discretion, this balance is largely absent in informant deals.[107]

Informant deals differ so deeply from plea bargains, of course, because their purposes are different: they aim not merely to resolve the criminal liability of the informant but to obtain incriminating information about others. In this sense, the informant deal is more akin to an investigative tool like a wiretap or search warrant, implicating the privacy rights of others. The law, however, does not treat this alternative purpose as giving rise to any cognizable rights or protections, either for the informant or the targeted defendant.[108]

Despite its dominance, the plea bargain still stirs considerable academic discomfort. Scholars complain that plea bargaining exacerbates the problems of excessive prosecutorial discretion, shortchanges defendants' rights to due process, and generally evades the mechanisms of public openness and accountability.[109] In this sense, informant deals represent a problematic extension of what is most suspect in the plea bargaining process. With the reduced safeguards and increased secrecy involved in snitching, doctrinal concerns about thin due process, arbitrary official decision-making, and weakened rule of law are at their highest.

C. Informants as a Problem of Broad Law Enforcement Discretion

In a related vein, the heavy use of informants can be conceptualized as a troubling result of the breadth of law enforcement discretion and authority. Much ink has been devoted to criticizing the immense power vested in American prosecutors,[110] and many of those complaints apply

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106. *See, e.g.*, Yaroshefsky, *supra* note 32, at 959-60 (describing lack of counsel during cooperation process).

107. *See* Lynch, *supra* note 6, at 2125-26, 2131, 2148.

108. The Supreme Court held in *Hoffa* that the Fourth Amendment does not govern informant use. An individual has no reasonable expectation of privacy when he reveals information to another person and therefore assumes the risk that that person will reveal that information. Hoffa v. United States, 385 U.S. 293, 301-03 (1966); *cf. id.* at 319 (Warren, C.J., dissenting) (calling the informer a "bugging device which moved with Hoffa wherever he went"); *see also* Zimmerman, *supra* note 3, at 128 (summarizing scholarship in support of enhancing Fourth Amendment protection against informants).

109. *See* Wright & Miller, *supra* note 92, at 30-38 (describing scholarly debate over plea bargaining); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1038-40 (2000) (describing the powerful institutional incentives of administrative ease and assurance of victory that encourage prosecutors and courts to promote the practice of plea bargaining).

110. *See generally* Vorenberg, *supra* note 60, at 1521; Stuntz, *supra* note 6; Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001); Wright & Miller, *supra* note 92. *But see generally* Lynch, *supra* note 6 (defending prosecutorial discretion).

equally if not more strongly to informant use. James Vorenberg's classic treatment identifies "prosecutors' virtually unlimited control over charging as inconsistent with a system of criminal procedure fair to defendants and to the public."[111] His concerns about the prosecutorial institution—that the lack of standards, publicity, and judicial review of prosecutorial decisions, combined with the executive institution's immense power, is inconsistent with political accountability and subject to excessive abuse—are precisely those raised by the use of informants. Indeed, Vorenberg recognized in 1981, long before the war on drugs made snitches a law enforcement fixture, that the prosecutor's "power to bargain for information is so broad that it has probably led to some abuses."[112]

William Stuntz identifies the trend toward prosecutorial dominance as flowing from the over-inclusiveness of the criminal law itself. "As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long."[113] Snitching is prototypical of this phenomenon. By using snitching rather than formal adjudication or even conventional plea bargaining to resolve liability, law enforcement accretes power to itself. Police and prosecutors decide what laws are to be suspended or enforced against the informant, balance his liability against his usefulness before a jury ever has a chance to decide his guilt or innocence, negotiate the informant's ultimate punishment by manipulating charges, and may even defend the informant against judicial or other public scrutiny. Stuntz goes further still, arguing that the delegation of adjudicatory authority to the unbounded discretion of police and prosecutors represents "the antithesis of the rule of law."[114] This observation correlates with the analysis above that informant practices are inherently unregulated, ad hoc, secretive, and generally in tension with rule-of-law ideals.

In a slightly different vein, Angela Davis identifies unfettered, secretive prosecutorial discretion as an invitation to official abuses such as coercion, misrepresentation, and racially biased policymaking.[115] Infor

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111. Vorenberg, *supra* note 60, at 1525; *see also id.* at 1527 ("One major exception [to the prosecutorial habit of charging serious crimes to the maximum] arises when the prosecution needs information or testimony to convict a more important target . . . .); *id.* at 1536 ("The leverage of plea bargaining is important in eliciting information and cooperation.").

112. *Id.* at 1553.

113. Stuntz, *supra* note 6, at 509. Stuntz does not specifically address informants.

114. *Id.* at 578.

115. Davis, *supra* note 110, at 397 (arguing that conventional prosecutors share the same flaws as the much-criticized Independent Counsel Kenneth Starr, who was accused of being unaccountable, politically motivated, unscrupulous, and prone to abusing his power); *see also* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998) (documenting the operation and effect of

mants likewise represent a strong example of this problem. The creation of a snitch represents a rule-poor application of discretionary, non-public standards by public officials who lack accountability and who may be driven by inappropriate motives such as personal gain, race, politics, or even laziness.[116]

Even those scholars more comfortable with broad exercises of prosecutorial discretion might flinch at the way that discretion expresses itself in the context of informant use. Gerald Lynch, for example, openly acknowledges that that the current system driven by prosecutorial discretion "is not . . . an adversarial or judicial system. It is an inquisitorial and administrative one, characterized by informality and ad hoc flexibility of procedure."[117] He defends the system as a rational compromise among the ideals of due process embodied in the adversarial model, the realities of overbroad criminal codes, and the need for flexibility in the selection of enforcement targets.[118] Lynch relies heavily on the phenomenon, prevalent in white collar cases, that vigorous defense counsel can engage prosecutors pre-indictment, giving rise to a quasi-administrative, informal adjudication before charges are filed. He points to this process as a rational, flexible one that incorporates many of the same inputs as do trials.

Lynch acknowledges, however, that the opacity of the process and its lack of uniform rules tend toward unfairness. He thus proposes enhanced discovery and a more rigorous defense counsel role in the charging process in order to make the process more formal, transparent, and uniform.[119]

The informant institution, however, is inherently hostile to such reforms. Lynch relies on prosecutorial evaluation of fairness, but informant deals are swayed by immediate investigative utility. Lynch proposes increased transparency, but cooperation drives suspects into the most informal, privileged recesses of the system. Insofar as scholars such as Lynch rely on informal counsel negotiations to ease the apparent arbitrariness of the charging process, informants often proceed without counsel. Most troubling for Lynch's model, an informant's guilt is adjudicated by agents and prosecutors who may be driven by immediate investigatory needs that conflict with the need to ensure fairness and balance.

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unconscious racial bias in the exercise of prosecutorial discretion).

116. Davis does not specifically discuss informants.

117. Lynch, *supra* note 6, at 2129.

118. *Id.* at 2141-45.

119. *Id.* at 2147 ("[G]reater formality of procedure could enhance the fairness of the process."); *see also* Wright & Miller, *supra* note 92, at 34-35, 57 (proposing internal prosecutorial screening mechanisms to enhance the transparency and uniformity of charging decisions).

In these senses, the creation of a snitch is a quintessential exercise of law enforcement discretion, subject to the same and even heightened types of abuses and concerns. The growth of the informant institution should thus be seen as an important development for the prosecutorial function. Above and beyond this descriptive claim, however, informant deals raise additional unique issues connected to law enforcement discretion, in part because of the influence that using informants can have on law enforcement decision-making and in part because of the central role played by the police.

1. The Impact of Informant-Dependence on Law Enforcement

The informant institution affects the integrity of the law enforcement process because it influences how police and prosecutors do their jobs. These influences can be divided into three related categories: identification, focus, and ratification. By using informants, law enforcement identifies its mandate with the creation and maintenance of criminal informants. By relying on informants, law enforcement focuses its resources based on informant information. And by wielding the state's power based on informant information, law enforcement ratifies informant interests. In essence, the highly discretionary nature of police and prosecutorial power renders it vulnerable to influence from the very informants on which it depends. The three categories, identification, focus, and ratification, are discussed below.

a. Identification

"You're only as good as your informant," explained the police officers to the sociology professor.[120] "Informers are running today's drug investigations, not the agents," complained a twelve-year veteran of the DEA.[121] "[A]gents have become so dependent on informers that the agents are at their mercy."[122] "I can't tell you the last time I heard a drug case of any substance in which the government did not have at least one informant," related District Judge Marvin Shoob.[123] "Most of the time, there are two or three informants, and sometimes they are worse criminals than the defendant on trial."[124] Even prosecutors com-

120. Jacobs, *supra* note 11, at 51 n.1 (study of U.S. city police, describing "sentiment echoed by every officer").

121. Curriden, *supra* note 16 (quoting Celerino Castillo, 12-year veteran DEA Agent).

122. *Id.*

123. *Id.*

124. *Id.*

plain: "These [drug] cases are not very well investigated. . . .[O]ur cases are developed through cooperators and their recitation of the facts. . . . Often, in DEA, you have little or no follow up so when a cooperator comes and begins to give you information outside of the particular incident, you have no clue if what he says is true. . . ." Another prosecutor revealed that "the biggest surprise is the amount of time you spend with criminals. You spend most of your time with cooperators. It's bizarre."[125]

This dependence can become so great that it creates a sort of perverse romance known as "falling in love with your rat."[126] Another prosecutor explains the phenomenon:

> You are not supposed to, of course. . . . But you spend time with this guy, you get to know him and his family. You like him. . . . [T]he reality is that the cooperator's information often becomes your mind set. . . . It's a phenomenon and the danger is that because you feel all warm and fuzzy about your cooperator, you come to believe that you do not have to spend much time or energy investigating the case and you don't. Once you become chummy with your cooperator, there is a real danger that you lose your objectivity.[127]

In all these ways, the prosecution of drug cases has become synonymous with official cultivation of and reliance on informants. As a result, protecting and rewarding informants has become an important part of law enforcement, identifying informants with the law enforcement function not only in the eyes of agents, lawyers, and judges, but insofar as the favorable treatment becomes known, in the eyes of the public as well. Because the system relies so heavily on the purported neutrality and independence of prosecutorial decision-making, the identification of that authority with informant protection and reward threatens the core of the institution.[128] In particular, the identification of law enforcement with criminal interests should be expected to strain police-civilian relations in high-crime communities of color in which many residents already distrust law enforcement.[129]

b. Focus

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125. Yaroshefsky, *supra* note 32, at 937-38.

126. *Id.* at 944.

127. *Id.*

128. *See* Morrison v. Olson, 487 U.S. 654, 727-28 (1988)(Scalia, J., dissenting)(describing paramount importance of prosecutorial neutrality); *see also generally* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003) (arguing that public perception of law enforcement fair treatment of individuals is central to its legitimacy).

129. *See infra* Part IV.D.

In relying on snitches, police and prosecutors receive information about the community of that informant, thereby ensuring a concentration of resources directed not by independent law enforcement decision, but by the identity and choices of the informant. To put it another way, snitches can only snitch on people they know. They are unlikely to know people outside their community or socio-economic group. The use of snitches thus becomes a kind of focusing mechanism guaranteeing that law enforcement will expend its resources in the snitch's community whether or not the situation there independently warrants it. The use of informants as a racial focusing mechanism in the use of search warrants has already been recognized.[130] In addition, heavy reliance on informants displaces more independent decisional processes. According to one former DEA and Customs agent, "reliance on informants has replaced good, solid police work like undercover operations and surveillance."[131] Prosecutors in Yaroshefsky's study described violent gang cases as "all based on cooperators . . . [and evidence] for which there is only one rat after another."[132] This is a particularly troubling development in the context of the war on drugs, which has led to disproportionate levels of drug-related arrests and law enforcement presence in black communities.[133] The possibility arises that the concentration of law enforcement resources in black communities flows in part from law enforcement overdependence on informants.

c. Ratification

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130. Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System* , 93 J. CRIM. L. & CRIMINOLOGY 827, 837 (2003):

> With the search warrants that were issued for neighborhoods that were predominantly African American and Latino, eighty percent relied on confidential informants. This was not the case for warrants issued in majority-white neighborhoods. . . . If, as some studies have found, drug users are more likely to purchase drugs from dealers of the same race, one expects that the racial pattern of traffic stops and searches would increase exponentially the racial disparity in search warrants. Even if there are low rates of success, significant racial disparities in warrant issuance will likely result in race disparities in drug arrests and incarceration.

See also Benner, *Racial Disparity in Search Warrants*, *supra* note 56 at 200-01 (attributing concentration of drug arrests in urban zip codes in part to heavy reliance on confidential informants).

131. Curriden, *supra* note 16 (quoting Michael Levine, 25-year veteran of the DEA and Customs).

132. Yaroshefsky, *supra* note 32, at 938.

133. *See* VINCENT SCHIRALDI ET AL., JUSTICE POLICY INSTITUTE, POOR PRESCRIPTION: THE COST OF IMPRISONING DRUG OFFENDERS IN THE UNITED STATES 3-5 (2000), *available at* http://www.justicepolicy.org/article.php?list=type&type=49 (blacks make up 13% of drug users but 63% of imprisoned drug offenders; black males are imprisoned for drug offenses at a rate 13 times higher than whites although there are 5 times more white drug users); MARC MAUER, RACE TO INCARCERATE 145-47, 149-50 (1999) (documenting disproportionate increases in drug arrests of African Americans although whites constitute "vast majority of drug users" and drug sales in white neighborhoods were comparable to those in black neighborhoods).

By relying on informant tips in making their own investigative and prosecutorial decisions, police and prosecutors often inadvertently validate the interests of the informants who provide the information.[134] When informants snitch on competitors or other enemies, the state effectively places its power at the disposal of criminals. The question is not whether those competitors and enemies are guilty: they often are. But the integrity of law enforcement discretion turns heavily on how the system selects among a vast pool of potentially culpable targets.[135] Indeed, it is the quintessential role of the prosecutor to choose what crimes are to be prosecuted and how, in a way that validates broad public values of fairness and efficiency.[136] The more reliant police and prosecutors become on snitches in the selection process, the more this aspect of the system's integrity is compromised.

2. Increasing Police Authority

The informant institution further shapes the law enforcement process by shifting ultimate decisions about liability away from prosecutors to police.[137] Most informants are created and managed by police officers whose highly discretionary activities evade judicial and public scrutiny.

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134. There are of course instances where police purposefully validate the interests of informants, in the form of favors, warnings, and other misuses of official power. *See, e.g.*, United States v. Flemmi, 225 F.3d 78, 81-82 (1st Cir. 2000); United States v. Boyd, 833 F. Supp. 1277 (N.D. Ill. 1993). Such behavior constitutes corruption and is not the focus here. The point here is that reliance on informants necessarily leads to ratification of some informant interests even absent corrupt intentions on the part of law enforcement.

135. Morrison v. Olson, 487 U.S. 654, 727-28 (1988) (Scalia, J., dissenting) (quoting Justice Robert Jackson's view that the most dangerous and important power of the prosecutor is her ability to pick defendants); *see also* Vorenberg, *supra* note 60, at 1524-25 ("The core of prosecutors' power is charging, plea bargaining, and, when it is under the prosecutor's control, initiating investigations.").

136. Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

137. Daniel Richman offers a global description of federal prosecutor-agent relationships, revealing a highly interdependent and complex working relationship. *See* Daniel Richman, *Prosecutors and their Agents, Agents and their Prosecutors*, 103 COLUM. L. REV. 749, 778-79, 789-91, 817 (2003) (describing agent control over informant creation and deployment). Otherwise, little legal scholarship exists on how police impact prosecutorial decisions. According to Stuntz, "it is difficult, maybe impossible, to determine how much influence police have over prosecutors' case selection. . . . No good work has been done on police officers' effect on local prosecutors' case selection. The scholarship on the parallel phenomenon at the federal level is thin." Stuntz, *supra* note 6, at 539 & n.135. What little scholarship there is reflects the primacy of the police officer. *See* Lynch, *supra* note 6, at 2124 ("Most commonly, in all likelihood, the prosecutor simply accepts the results of the police investigation, and any process of independent adjudication occurs at the instigation of defense counsel."); Yaroshefsky, *supra* note 32, at 945 (anecdotal evidence that agents influence prosecutorial decisions of less experienced U.S. Attorneys); Davis, *supra* note 115, at 25-31 (prosecutors usually do not become involved in a case until after an arrest has been made). The few sociological studies of informants describe the primary role of the police officer in creating and maintaining informants. *See, e.g.*, SKOLNICK, *supra* note 11, at 112.

Even in more formal settings, the agent's narrow investigatory goals can dominate the informant management process. One of Yaroshefsky's defense counsel interviewees described a "typical scenario" at a confidential proffer session: the agent believes that "Jones" was at a particular illegal meeting. The cooperator does not mention Jones. The agent asks the cooperator:

> Was anyone else there? The cooperator says no. Are you telling me that Jones was not there? At that juncture, the cooperator knows what the agent wants to hear. Moreover, the agent might then say, look, I know that Jones was there. Let's take a break. The agent then walks off with your client. After the break, when the client is asked again, he knows that Jones was there.[138]

Prosecutors in turn rely heavily on police agents to handle informants, sort through and relay their information, and evaluate their usefulness.[139] Indeed, the law expressly deems investigatory decisions to be police work, depriving prosecutors of their traditional absolute immunity when they participate in investigative stages of a case.[140] In effect, the first order decisions about informant culpability are being made by the least accountable players, with the most expedient world view, farthest from the judicial process. Whatever justifications support broad prosecutorial discretion in determining the relative liability and utility of

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138. Yaroshefsky, *supra* note 32, at 959.

139. *Id.* at 945 (describing how less experienced AUSA's are particularly dependent on their agents).

140. Kalina v. Fletcher, 522 U.S. 118, 126 (1997) (quoting Buckley v. FitzSimons, 509 U.S. 259 (1993)) (distinguishing functions of police and prosecutors and concomitant degrees of immunity); Burns v. Reed, 500 U.S. 478, 494-95 (1991) (prosecutor loses absolute immunity when participating in "investigatory phase" of police work).

This treatment of prosecutorial involvement in investigations raises the question of whether a civil rights action might be available against informants as agent of the state. In practice, the Supreme Court's suggestion that informants might be treated as state agents for constitutional purposes, *see* Hoffa v. United States, 385 U.S. 293, 311 (1966) (referring to "secret government informer" as "government agent" and noting that as such the informant would be subject to "all relevant constitutional restrictions"), appears to have gone unheeded. More often, courts find that informant activities take place at arms length from government handlers and therefore do not qualify as state action. *See* Ghandi v. Police Dep't of Detroit, 823 F.2d 959 (6th Cir. 1987) (activities of paid informant are not per se government actions for purposes of civil rights statute). Informants are deemed to be acting under color of law when they are directed to perform specific actions such as recording a conversation. *See* 18 U.S.C. § 2511(2)(c) (2000) (wiretap statute authorizing interception of communications by person acting under color of law who is also party to the communication). A search of Westlaw reported cases and the scholarly literature reveals few cases in which informants were deemed state agents for liability purposes. Matje v. Leis, 571 F. Supp. 918, 927 (S.D. Ohio 1983) (undercover agents acting under state law); United States v. Cella, 568 F.2d 1266, 1282 (9th Cir. 1978); United States v. Bennett, 729 F.2d 923, 924-25 (2nd Cir. 1984); *see also* Zimmerman, *supra* note 3, at 166-71 (noting that courts rarely hold informants accountable and arguing that courts should apply a rebuttable presumption that informants act under color of law in order to bring them within the purview of 42 U.S.C. § 1983).

informants, those same justifications apply only weakly to the investigative decisions being made by police officers and agents.[141]

One response might be to require greater prosecutorial oversight of police "flipping" decisions. Such an approach has several potential benefits.[142] First, it would reduce the invisibility of the most ad hoc and secretive informant practices, if only by injecting another institutional decision-maker into the process. It also would shift decision-making about informant liability back to the public sector actor generally assumed to be making such decisions in the first place—a government attorney who has a broader obligation to justice than investigative expediency, whose job also includes making judgments about the propriety and legality of police conduct, and who is an officer of court.

The problem with this partial solution is that it is both impractical and fails to address the inability of prosecutors to cure what ails the informant institution. First, prosecutors, who already have more cases than they can prosecute, must rely on their agents to handle so-called investigative matters. Even when prosecutors make the initial decision to permit a defendant to cooperate, the more active the cooperation the more it is dominated by agents, not by the prosecutor.[143] The delegation of authority to the police thus is inherent in the definition of the informant as an investigative tool and the reality of an overcrowded docket.

Second, prosecutors are susceptible to the same workplace pressures that afflict police: the desire to avoid trial, manage their dockets, and clear cases.[144] It is far easier to flip a suspect than to go to trial or even to negotiate a conventional plea.[145] In informant deals the prosecutor is in the paramount position of authority. Even before a plea deal is negotiated the informant is at a severe disadvantage, having already admitted guilt and provided evidence against himself and others. Although this information may technically be inadmissible at trial, the

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141. *See* Stuntz, *supra* note 6, at 537 (contrasting prosecutorial concerns with convictions with police concerns with arrests).

142. *See* Wright & Miller, *supra* note 92, at 55-58 (arguing that reformers of the criminal system should focus more on better internal prosecutorial policies than trying to impose external regulations on prosecutors).

143. *See* Stephen S. Trott, *Word of Warning for Prosecutors Using Criminals as Witnesses*, 47 HAST. L.J. 1381, 1397 (1996) (cautioning prosecutors about the difficulties in controlling their agents).

144. Various scholars have noted that the pressure on prosecutors to keep conviction rates high and trial rates low leads to heavy reliance on plea bargaining. Stuntz, *supra* note 6, at 536; Wright & Miller, *supra* note 92, at 38-39; Fisher, *supra* note 109, at 1038.

145. *See* Bowman, *supra* note 17, at 59 (criticizing heavy prosecutorial use of 5K as indicating that cooperation has "degenerated into a convenient caseload reduction tool"); Cohen, *supra* note 17, at A1 (quoting Attorney General Ashcroft memo stating, "It is not appropriate to use substantial assistance motions as a case management tool" as evidence of the growing tendency among prosecutors to do so).

dynamic of having confessed and informed puts heavy pressure on suspects to continue being cooperative. Prosecutors thus are susceptible to the ease and lures of the informant institution as much as their police counterparts.[146]

Finally, as noted above, traditional concerns about the unfettered exercise of prosecutorial discretion apply equally, if not more strongly, in the context of informant creation. The secret, ad hoc nature of the informant mirrors the worst aspects of prosecutorial authority: even if prosecutors were to make all flipping decisions, the process would still be non-public, unregulated, unaccountable, and lacking in rules.

For all these reasons, although the role of the police in the informant institution is troubling, the solution cannot lie solely in shifting more authority to the already overextended prosecutor. Driven by law enforcement exigencies and case-specific concerns, individual police and prosecutors are ill-equipped to make holistic decisions about the overall public utility of informants. Such evaluations are better made through greater judicial, legislative, and public scrutiny. The proposed sunshine reforms discussed in Part V of this Article would enable such evaluations.

D. Transparency and Expressive Problems

The institution of informant use sits squarely at the intersection of a number of generalized concerns about the criminal justice system. On the one hand, scholars have zeroed in on the fact that the criminal system is increasingly administrative, informal, and secretive in practice despite long accepted ideals about its adversarial, formal, public, truth-seeking function. At the same time, scholars are paying increasing attention to the expressive role that criminal law plays as a "teacher": by conveying or reinforcing specific behavioral norms, or more generally by playing a role in society's ongoing dialogue about what behavior is right and wrong.

Although they represent distinct concerns and areas of scholarship, the transparency and expressive inquiries can converge with regard to the legitimacy of the criminal law. The expressive model presupposes transparency of the law and its workings. As an expressive matter, secrecy in the law and its application undermines the dialogue between the law as teacher and its citizen-students.[147] Similarly, the concern that

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146. *See generally* Trott, *supra* note 143 (surveying concerns about prosecutorial overdependence on informants).

147. The term "citizen" is used in its broadest sense to refer to participants in the socio-political process.

the criminal law has become an administrative bastion of secretive, informal decision-making by law enforcement officials threatens its democratic legitimacy, at least in part because it represents a retreat from the law's public, expressive character.[148]

Taken together, these two trends of analysis—one concerned about the criminal law's lack of transparency and one concerned with its expressive function—illustrate important facets of the informant institution and its damaging effects on the efficacy and legitimacy of the criminal system. In turn, the informant institution poses interesting conundrums for these two schools of thought. They are discussed in turn.

1. Administrative Transparency

There is growing recognition that the criminal system has changed: the public adversarial ideal has given way to a more informal administrative reality.[149] Cases are negotiated, not litigated. The prosecutor, not the judge, makes central decisions about liability and punishment. Most decisions, negotiations, and exchanges of information take place off the record, in offices and hallways and not in court. Some argue that the prosecutor has become a quasi-administrative law judge, resolving charge and liability questions based on a pre-trial record with the input of defense counsel.[150] Others point out the highly secretive, discretionary nature of police work and how it leads to police abuses and community distrust of police.[151] Reform proposals focus on making overt this transformation by officially acknowledging the demise of the adversarial model and increasing the transparency of the system.[152]

The informant is the quintessential creature of this opaque administrative reality. Born of informality and discretion, the informant survives at the whim of police and prosecutors, surfacing only if and when he is needed in a formal court proceeding or when he comes forward to be sentenced. The use of an informant inevitably involves the bending or breaking of rules, blurring formal lines between lawful and unlawful conduct. The heavy reliance on informants represents the logical conclusion of a process in which the adjudication of criminal liability has moved out of the public sphere into the hands of law

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148. *See* Luna, *supra* note 6, at 1154-63 (surveying democratic concerns raised by lack of transparency).

149. *See* Lynch, *supra* note 6, at 2118-20.

150. *Id. at* 2118; Wright & Miller, *supra* note 92, at 38-39.

151. Luna, *supra* note 6, at 1157-60.

152. Lynch, *supra* note 6, at 2147; Luna, *supra* note 6, at 1166-71; Wright & Miller, *supra* note 92, at 48-56.

enforcement actors, and in which the public has lost the ability and the right to observe how the laws are enforced.

Although he does not specifically mention informants, Erik Luna's proposals for increased transparency in policing resound in this context. Luna argues that secretive police practices promote official abuses and reduce the public's trust in law enforcement.[153] These concerns apply with equal if not greater force to informants. Luna proposes greater public access to data on police practices, crime mapping, and other mechanisms to promote public knowledge and reduce police secrecy. Such proposals would shed light on informant practices as well, increasing the public accountability of the informant institution generally and making it available for public evaluation.[154]

Likewise, the informant institution could benefit from Ronald Wright and Marc Miller's proposal for a more formalized, publicly accessible prosecutorial screening process.[155] Wright and Miller argue that current plea bargaining practices in which prosecutors have complete discretion to reduce charges at any point in the process promotes dishonesty and distrust of official judgments about criminal liability. They recommend a more formal screening process in which prosecutors make stronger, more informed judgments about liability and charges early in cases, after which charge reductions would become strongly disfavored.[156]

Although Wright and Miller do not address informant use, their proposal would have significant implications in this realm. An official commitment to formally charging defendants early in the process would reduce the ease with which informants could obtain charge reductions and curtail the free-wheeling trade in liability for information. It also would shed public light on the process when cooperators do receive charge reductions, thereby injecting more public accountability into the process.[157]

Although the transparency debate represents just one facet of the informant institution problem, it addresses some of the central issues of secrecy and lack of accountability that plague informant use. Con-

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153. Luna, *supra* note 6, at 1155-58.

154. *See also* Davis, *supra* note 110, at 461-64 (recommending increased data on and public scrutiny of prosecutorial practices through the creation of Public Information Departments and Prosecution Review Boards); Davis, *supra* note 115, at 54-56 (proposing that racial impact studies be conducted documenting the race of defendants and victims in order to shed light on prosecutorial decisions).

155. Wright & Miller, *supra* note 92, at 48. Vorenberg also advocates for a more rigorous, formal screening process. Vorenberg, *supra* note 60, at 1565.

156. Wright & Miller, *supra* note 92, at 51-55.

157. On the other hand, formal screening might drive informant use even further underground so as to avoid premature decisions about liability and to maximize bargaining power. Wright and Miller generally acknowledge the possibility of law enforcement avoidance of screening but do not specifically address the problem of open-ended informant deals. At the very least, under a screening system prosecutors' offices would have to confront openly the problem of ongoing charge negotiations with informants.

versely, informant use represents one of the worst symptoms of the lack of systemic transparency. Insofar as transparency continues to gain recognition as an important and threatened value in the criminal system, informant use should be part of that dialogue.

2. The Expressive Value of the Informant

A burgeoning legal literature attempts to understand the relationship between social norms and the law. The literature is diverse in its focus and analytic tools. Some proponents use social norms as a way of expanding and refining the economic model of the citizen as rational actor, while others focus more broadly on the law's expressive function. Despite the controversy surrounding specific analyses and proposals, the impulse behind the inquiry rests on some relatively uncontested notions, namely, that people react to laws in the context of broader notions of right and wrong, and that the law both influences and is influenced by these informal social constructs.[158]

The brief discussion here does not attempt to summarize the norms debate or to follow any particular school of norms analysis. Rather, it aims to show that informants pose interesting and difficult problems for norms scholarship and that the expressive quality of the law makes informants particularly problematic as a law enforcement mechanism.[159] It also provides a theoretical background for some of the discussion in Part IV, which explores the concrete manifestations of these normative problems in high-crime communities of color.

The criminal informant embodies conflicting and contradictory values. Part of the conflict flows from the two-faced nature of the informant as simultaneous law enforcer and law breaker, and part from the widespread practice of letting incidental informant criminality slide. On the one hand, criminal informants help law enforcement.[160] Becoming an informant can constitute a kind of punishment or even repentance.[161]

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158. *See* Weisberg, *supra* note 19, at 472. Weisberg criticizes the law-and-norms school as overly general, conclusory, insufficiently original, and generally lacking scholarly rigor with respect to criminal law and policy analysis. Weisberg does not, however, appear to discount the general usefulness of normative descriptions, noting that "[v]arious phenomena that can be called 'social norms' surely influence crime and the criminal law, and criminal law scholarship surely benefits from attending to these phenomena in their various concrete forms – indeed, that is what much of criminology is all about." *Id.* at 473.

159. Like the transparency scholarship discussed in Part III.D.1, norms literature is practically silent on the issue of informant use. The informant scholarship likewise tends to address snitching's social implications in passing; only Michael Simons focuses exclusively on the societal, normative aspects of informant use. *See generally* Simons, *supra* note 4.

160. *See* Gleeson, *supra* note 75, at 1724.

161. *See* Simons, *supra* note 4, at 33-38. Another potentially positive message sent by informant deployment is that the government is working hard to prevent crime. *See, e.g.*, Jay Whearley & Mark Melady,

One potential normative message sent by the informant institution is that bad actors can repent and give back to society by informing on others. The robustness of this picture depends, of course, on the public perception that informants help law enforcement, reduce crime, and repent.[162] The problems with such empirical assumptions are discussed above.[163]

The informant-as-helpful-repentant, however, is not the only normative message sent. The criminal informant also teaches that culpability for legal transgressions can be mitigated by participating in illegal conduct at the behest of the police in order to catch other transgressors, who in turn may mitigate their own liability in the same fashion. At the same time, the fact of ongoing informant criminality sends an even more troubling signal: for those who cooperate with the police, other illegal acts such as taking or dealing drugs or carrying a weapon may be excused.[164]

Thus there are two negative expressive lessons to be drawn from the criminal informant. The first is that criminal culpability is relative and fungible. The market exchange of liability through the informant institution reduces the strength of absolute claims about the inherent wrong of a particular illegal act, because liability for that act can so easily be traded away.[165] Second, the informant institution elevates the official decision-maker over the law itself. With the help of a supportive handler, an informant can slip beneath the radar of the criminal justice system, evading legal liability for a host of offenses. Because informant rewards depend on the discretionary preferences and habits of the particular police officer or prosecutor in charge, snitching sends a message not about the value of law abiding behavior, but about the value of

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The Drug Toll: Examining a War Fought on the Streets of Worcester, TELEGRAM & GAZETTE (Worcester, Mass.), Mar. 2, 2003, at A1 (major police campaign to stop drug trafficking involved careful cultivation of informants). Insofar as informants are permitted to continue criminal activities, however, this positive message is undermined.

162. There may be further divergence between what informants actually accomplish and what the public perceives to be their accomplishments. Such reality-perception variances may themselves differ between communities. One purpose of the sunshine reforms proposed in Part V is to provide actual evidence of the value of informant use and make possible an educated public debate.

163. *See supra* Part II.B.

164. Simons acknowledges, for example, that the crime-fighting potential of the cooperator may be "outweighed by the counterdeterrent message of cooperation discounts: You can escape punishment for your crime so long as you have someone to rat on." Simons, *supra* note 4, at 25.

165. *See, e.g.*, Weinstein, *supra* note 3, at 624-25; Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835 (1993) (questioning whether pressure to inform created by the USSG promotes respect for the law among defendants).

opportunistically currying favor with powerful government actors. In other words, it suggests that we live in a government of men, not laws.[166]

Norms literature offers a range of ways to express these general conclusions. Richard Pildes and Elizabeth Anderson describe the expressive function of the law broadly as that aspect of the law that conveys normative, moral rules for how people should behave and why.[167] They define a norm as "a rule that tells us what to count (and reject) as reasons for adopting particular ends,"[168] and expressive norms as those norms that "regulate actions by regulating the acceptable justifications for doing them." The expressive analysis focuses on the principled reasons and justifications conveyed by the law, as opposed to the material results promoted or prohibited. State action harms people and society expressively, therefore, "when it expresses impermissible valuations" about individuals, communities, or their relationships to each other or to the state.[169]

In these terms, the informant institution is comprised of a set of assumptions, rules, and state actions that reflect potentially harmful expressive norms. The institution validates relativistic evaluations of criminal wrongdoing, in the sense that it puts a "price" on informant wrongdoing. It promotes secretive, opportunistic, rule-less relationships between the state and criminal actors. It devalues the pain experienced by victims of informant criminality. And finally, it disrespects the privacy of the people around informants. Anderson and Pildes point out that "public discourse over certain policy issues is often carried out in consequentialist language despite the fact that people's views appear actually rooted in expressive considerations."[170] It could be said that the public discourse regarding informants, revolving primarily around consequentialist issues of unreliability and the impact on defendants, has suffered from a lack of attention to the expressive harms inflicted by informant use.

In a slightly different vein, Tracey Meares and Dan Kahan apply norms analysis directly to issues of criminal policy that affect high-crime communities of color.[171] They argue that social norms play a central role in promoting or discouraging crime, and that the vehicles of social

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166. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

167. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

168. *Id.* at 1510-11.

169. *Id.* at 1531.

170. *Id.* at 1532.

171. *See, e.g.*, Meares & Kahan, *supra* note 8, at 805; *see also* Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998).

organization, social influence, and social meaning together create a framework for the conveyance and enforcement of normative rules about acceptable behavior. In particular, they argue that law enforcement policies that promote collective action and build trust between a community and law enforcement will have greater success in stemming crime than deterrent and punitive strategies.[172]

Assuming the validity of the Meares/Kahan norms strategy, the deployment and rewarding of criminal informants appears at best conflicted and at worst counter-productive. On the one hand, informant use might be associated with positive norms such as cooperating with police, repudiating old criminal companions, and abandoning criminal behavior. On the other hand, insofar as informants are perceived as "getting away with murder," continuing to commit crime, and exploiting personal relationships in order to obtain favors from law enforcement, the institution promotes norms of criminal duplicity, disloyalty, opportunism, and moral relativism.

This brief discussion of norms literature illustrates the potential ironies of the informant institution as a law enforcement strategy. If one goal of the law is to instill law-abiding norms, the informant institution may be counterproductive. Put more strongly, the informant institution conveys destructive and contradictory normative messages that may undermine the moral and expressive validity of the law itself.[173]

IV. COMMUNITY HARMS

Increasing attention is being paid to the collateral consequences of criminal justice policies—particularly high incarceration rates and long sentences—to high-crime, low-income, urban communities of color.[174] Although this literature has not addressed the informant phenomenon,

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172. Meares & Kahan, *supra* note 8, at 809-20. Meares and Kahan explicitly advocate one form of snitching, namely, rewarding youth who report their peers for gun possession, arguing that such programs undermine the social status associated with gun possession and promote law abiding behavior. *Id.* at 824. As noted above, however, *supra* note 1, the normative concern here is not with innocent snitches or those who inform for money, but specifically with criminal snitches whose own liability is reduced in exchange for information about others. Thus, while such gun rewards programs may indeed reinforce law abiding norms, when the snitch is a criminal the normative message sent by the snitch's own reduction in liability, compounded by the tolerance of his ongoing criminality, undermines or even contradicts such positive messages.

173. Further extrapolation of these insights to informants in high-crime disadvantaged communities is explored in Part IV.

174. *See generally* INVISIBLE PUNISHMENT, *supra* note 8 (surveying wide range of communal consequences of mass incarceration including disenfranchisement, loss of social and governmental resources, psychological damage, damage to families and economic opportunity); Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918 (1997) (arguing that social dislocation and disadvantage undermine collective efficacy of communities which in turn disables those communities from internally regulating violence and crime).

the logical conclusion is that like mass incarceration, heavy informant use in such communities imposes collateral harms: tolerance of informant criminality, erosion of personal relationships and trust, and the normative message conveyed when the state secretly permits criminals to evade punishment by snitching on friends and family.[175]

This portion of the Article hypothesizes several types of consequences that can be expected to flow from law enforcement's heavy reliance on snitching in high-crime, socially disadvantaged communities.[176]

A. African American Community Vulnerability

Poor black urban communities suffer from a wide range of problems that make them likely loci of informant activity. First and foremost is the high rate of criminal exposure of African American men. Nationally, one in three black men between the ages of 20 and 29 are under some form of court supervision at any given time, while in poor urban neighborhoods the percentage can reach fifty percent or more.[177] The nature of criminal involvement is also heavily weighted toward drug

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175. Consequentialist concerns about rampant informant use and community harm are strongest with respect to drug enforcement in which informant use is both most informal and prevalent. Those same concerns may be weaker or even absent in areas such as white collar fraud where informants are deployed more sporadically, where defense counsel plays a greater role, and the "communities" in which informants operate are of a different nature. As Yaroshefsky explains:

> The entry of a cooperator into the criminal justice process differs by type of case. In "white collar" . . . it is not uncommon for the target of an investigation to secure the services of a lawyer, and begin the cooperation process to ward off an indictment. In the "street crime" . . . context, defendants are typically indicted by grand jury, obtain the services of a lawyer, and begin the cooperation dance with the government. . . . In some instances, cooperation begins by the agents' discussions with a defendant or target of prosecution prior to the time that the prosecutor meets the cooperator.

Yaroshefsky, *supra* note 32, at 929 n.52; *see also* OMRI YADLIN, THE CONSPIRATOR DILEMMA: INTRODUCING THE "TROJAN HORSE" ENFORCEMENT STRATEGY (U.C. Berkley School of Law John M. Olin Found. Program in Law, Econ. & Insts., Working Paper 2001-2, Spring 2001), *available at* http://www.bepress.com/blewp/default/vol2001/iss1/art2 (arguing that informants are a good way to internally regulate corporate fraud while acknowledging that they may exacerbate violence in other contexts). *But see generally* Hughes, *supra* note 3 (arguing that even formal white collar cooperation agreements present rule-of-law and fairness problems).

176. Although this Article primarily hypothesizes the impact of snitching on poor African American communities, this is not a race-based argument per se. Rather, it derives from the confluence of other social factors, such as high rates of criminal system involvement and social disadvantage which themselves have racial components. The arguments with respect to snitching apply equally to any high-crime community with high arrest rates and a comparable lack of social resources. Of note, some Hispanic communities may be suffering from similarly heavy drug enforcement attention. *See* BJS, *supra* note 4, at Table 5.26 (24.1% of federal drug defendants were white, 29.8% were black, and 44.3% were Hispanic).

177. *See supra* note 7; MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA 4 (1995).

offenses,[178] the type of offense most often associated with informant use. In particular, the trend toward high mandatory sentences for common drug offenses makes informing one of the only ways a drug suspect can avoid certain long-term incarceration. In addition, even where the individual's offense is not ostensibly drug-related, as many as seventy-five percent of offenders have a history of substance abuse; they routinely intersect with the drug trade in some way and are therefore potentially valuable drug-crime informants.[179]

In this context, the routine law enforcement practice of pressuring drug offenders and users to cooperate has special significance for poor black communities. With half the male population under supervision at any given time, and with more than half of this group connected with the illegal drug trade, it is fair to estimate that more than one quarter of the black men in the community are under some pressure to snitch. Assuming that thirty percent of those succumb, approximately one in twelve men in the community are active informants at any given time.[180] By way of comparison, at the height of its power the East German secret police—one of history's most infamous deployers of informants—had 174,000 informants on its payroll, approximately one percent of the entire 16 million East German population.[181]

The communal impact of these informants flows not only from their sheer numbers but from the social disarray and lack of resources in low-income urban communities, and the connectivity between criminal offenders and the communities in which they live.[182] The combination of high rates of poverty, unemployment, single parent households,

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178. It is estimated that approximately 40% of African American convictions are drug related. *See Incarcerated America*, *supra* note 7; *see also* MAUER, RACE TO INCARCERATE, *supra* note 133, at 145 (documenting disproportionately increased drug arrest statistics); s *ee also* BJS, *supra* note 4, at Table 5.26.

179. *See supra* note 7.

180. The 30% figure is drawn from the DOJ statistic that 30% of federal drug defendants receive actual sentencing credit for cooperation. *See supra* note 54. We also know that twice that percentage of defendants cooperate, although half do so without recognition. On the other hand, in states where drug sentences are less draconian than the USSG, the percentage of cooperating drug offenders may be lower. In light of these competing trends, 30% seems like a reasonable and conservative hypothesis. *See, e.g.*, Bowman, *supra* note 17, at 47 (estimating in 1999 that 30 to 40% of federal defendants cooperated).

181. BARBARA MILLER, NARRATIVES OF GUILT AND COMPLIANCE IN UNIFIED GERMANY: STASI INFORMERS AND THEIR IMPACT ON SOCIETY 4 (1999); Roger Boyes, *Swift Solution to Stasi's Jigsaw Puzzle of Secrets*, LONDON TIMES, June 17, 2003, at A15.

182. As Randall Kennedy puts it, we cannot "neglect[ ] the webs of commonality that connect criminals to law abiding members of communities. Crime war 'hawks' sometimes forget, as Glenn Loury observes, 'that the young black men wreaking havoc in the ghetto are still "our youngsters" in the eyes of many of the decent poor and working class black people who are often their victims.'" RANDALL KENNEDY, RACE, CRIME AND THE LAW 19 (1997); *see also* INVISIBLE PUNISHMENT, *supra* note 8; Todd R. Clear, *Backfire: When Incarceration Increases Crime*, *in* THE UNINTENDED CONSEQUENCES OF INCARCERATION 1, 2-3 (1996) [hereinafter THE UNINTENDED CONSEQUENCES] (criticizing the dominant "atomistic" model of criminal behavior and its impact), *available at* http://www.vera.org/section3/section3_4.asp.

substance abuse, and involvement in the criminal justice system makes these communities uniquely insecure. Individuals not only lack material and educational resources but also are often related to someone who is incarcerated, a drug abuser, a parentless child, or otherwise needs special support. In addition, residents of high-crime, disadvantaged neighborhoods suffer psychological impacts such as high rates of depression and substance abuse.[183]

It is within this context of personal and social insecurity that the large numbers of informants operate. Related scholarship suggests that they probably do so with relative ease. Community networks in socially disadvantaged neighborhoods are more fluid and informal, often lacking ties with external economic institutions. As one researcher puts it:

> High unemployment means that people remain at home, living with their families, and on the streets much of their time. The gradual informalization of the labor market places more emphasis on friendship and kinship networks. Increased neediness means that these networks are more active than ever.[184]

The informal, personal nature of these community networks makes them particularly susceptible to law enforcement disruption. The open dynamics in low-income urban neighborhoods contribute to the ease with which informants and even police officers can penetrate otherwise private zones. As Michael Tonry explains:

> For a variety of reasons it is easier to make arrests in socially disorganized neighborhoods . . . . [Specifically] it is easier for undercover narcotics officers to penetrate networks of friends and acquaintances in poor urban minority neighborhoods than in more stable and closely knit working-class and middle-class neighborhoods.[185]

Heavy pressure on large numbers of people to inform is taking place in communities that already are characterized by high levels of personal insecurity, fluid social relationships, and lack of private space. From this scenario several things can be inferred: informants can obtain information easily about a wide range of people; most residents are connected to someone who is vulnerable to law enforcement pressure; and it is

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183. Carol Aneshensel & Clea Sucoff, *The Neighborhood Context of Adolescent Mental Health*, 37 J. HEALTH & SOC. BEH. 293 (1996) (documenting mental health effects associated with living in high-crime, economically depressed conditions).

184. Joan Moore, *Bearing the Burden: How Incarceration Weakens Inner-City Communities*, *in* THE UNINTENDED CONSEQUENCES, *supra* note 182 at 69, 78.

185. TONRY, *supra* note 177, at 105-06; *see also* MAUER, *supra* note 133, at 148 ("[I]t is far easier to make arrests in [inner city neighborhoods], since drug dealing is more likely to take place in open-air drug markets. In contrast, dealing in suburban neighborhoods almost invariably takes place behind closed doors.").

common knowledge in the community that people are snitching. Social insecurities are thus being exacerbated by an undocumented but growing informant culture.

B. Increased Crime and Violence

1. Informants Generate Criminal Activity

As described above,[186] a central harmful aspect of informant use is the official toleration of crime. Ongoing crimes committed by active informants directly harm the communities in which they live. The crimes may involve violence, drug dealing, substance abuse, and other destructive activities that exact an immediate toll on their surroundings. The informant "revolving door," in which low-level drug dealers and addicts are arrested and released with orders to provide more information, arguably perpetuates the street-crime culture and law enforcement tolerance of it.[187] At the very least, it violates the spirit of "zero tolerance" and "quality of life" community policing policies aimed at improving the communal experience in high-crime communities.[188] Drug trafficking, for example, correlates highly with violence and petty theft, crimes that render the streets more dangerous, depress property values, and may compel those who can afford it to leave.[189]

Scholars also have attempted to assess the psychological and social impacts of visible street crime on residents' sense of well-being[190] as well as the destructive "education" it provides to the neighborhood's youth.[191] For communities already suffering from high crime rates, criminally active informants exacerbate a culture in which crime is commonplace and tolerated.

As noted above, the classic utilitarian justification for informants is that they enable the prosecution of certain types of crime that otherwise would be impenetrable to law enforcement, and therefore, that they produce a net crime-fighting benefit.[192] Assuming for the sake of argu

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186. *See supra* notes 8-12, 33-39 and accompanying text.

187. *See* Orena v. United States, 956 F. Supp. 1071, 1102 (E.D.N.Y. 1997).

188. *See* Meares & Kahan, *supra* note 8, at 822-23 (describing virtues of order-maintenance community policing).

189. *See* Clear, *supra* note 182, at 13; Moore, *supra* note 184, at 79.

190. *See* Sampson et al., *supra* note 174, at 921-22.

191. John Hagan, *The Next Generation: Children of Prisoners*, *in* THE UNINTENDED CONSEQUENCES, *supra* note 182, at 21, 25-27; *see also* MAUER, *supra* note 133, at 185-86 (documenting negative impact of incarceration on children, families, and communities); Aneshensel & Sucoff, *supra* note 183 (documenting mental health effects associated with living in high-crime, economically depressed conditions).

192. *Compare* Simons, *supra* note 4, at 22-24 (summarizing and criticizing utilitarian argument) *with*

ment that this is true on average across the entire criminal justice system,[193] it cannot be assumed in the context of high-crime urban communities. There, informants may well produce more criminal activity on any given day than they prevent. Informants participate in and facilitate ongoing crimes, generate crime, contribute to the tolerance of crime, and are forgiven for their crimes, all in their home communities. While providing information about an investigation, they are simultaneously participating in, even generating, a wide range of activities destructive to their surrounding community. A given informant, even a useful one, may be a neighborhood problem in his own right, a "broken window" that is tolerated by the authorities while his activities degrade his community.

The expansive nature of the drug trade further suggests that despite their usefulness in particular prosecutions informants may exacerbate crime in their home communities. Arresting specific individuals often does not dent the drug trade because when one drug trade participant is removed another one springs up to take his place.[194] Researchers theorize a constant supply of young, jobless, undereducated males willing to power the drug trade.[195] If so, snitch information leading to the arrest of a particular individual may have less of an impact on overall criminality in the community than does the informant's ongoing criminal behavior, which is tolerated by law enforcement.

Police tolerance of informant criminality further reflects the devaluation of law and order within disadvantaged communities of color. Randall Kennedy argues that the central criminal justice problem for African American communities is not overenforcement, i.e., the singling out of blacks for prosecution and punishment, but rather underenforcement, namely, the failure to prevent crime in black communities, the tolerance of more crime than is tolerated in white communities, and the imposition of lesser punishments when the victims are black.[196] Pointing out that African Americans experience higher victimization rates than

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Bowman, *supra* note 17, at 45 (vigorously defending utility of cooperators for law enforcement).

193. *But see supra* notes 74-81 and accompanying text (discussing problems with the utilitarian assumption). *See also* Weinstein, *supra* note 3, at 565, 614 (questioning law enforcement value of using informants); Bowman, *supra* note 17, at 43 (acknowledging lack of empirical proof of value of informants); SKOLNICK, *supra* note 11, at 526 (acknowledging lack of empirical proof). The problem of informant criminality is likely stronger for informal practices associated with drug enforcement than for more formal white collar investigations in which targets often have counsel, but the lack of data on informant criminality in either realm makes them hard to compare.

194. Richard Winton, *41 Arrested in Police Sweep through Nickerson Gardens*, L.A. TIMES, Jan. 22, 2004, at B1 (quoting public housing resident as saying that arresting one drug dealer simply makes room for another).

195. *See* Meares & Kahan, *supra* note 8, at 817 & n.13 (documenting economic role of drug trade in inner city and noting that drug arrest policy "doesn't do much to stifle the drug trade").

196. KENNEDY, *supra* note 182, at 69-75.

whites and that black neighborhoods are more crime-ridden, Kennedy asserts that the nation's history of racial segregation and discrimination plays out most disastrously in the form of official tolerance of black-on-black crime.[197]

The heavy use of informants in black communities arguably constitutes a species of Kennedy's underenforcement phenomenon. Police tolerate, even foster, informant criminality in exchange for information. Some of this criminality constitutes a direct threat to the safety and well being of the residents who live in the communities in which informants operate. Not only does this dynamic potentially increase crime, but it degrades those communities' experience of the criminal justice system. If the immediate costs of snitch use outweigh its benefits, or even if community members perceive the official use of snitches as devaluing the security of the community, the informant institution may be eroding law enforcement effectiveness and legitimacy. This potential state of affairs is another reason why more and better information on the informant institution is needed both to assess the efficacy of the public policy in high crime communities and to evaluate public perceptions of the policy.

2. Increased Gang Violence as a Response to Increased Snitching

Informant use also may cause increased violence within drug gangs and other illegal networks as a mechanism for ensuring loyalty. The use of violence against snitches is neither new nor surprising. Criminal gangs and organizations routinely use violence to prevent snitching and punish informants.[198] More generally, widespread violence against informants has infected communities as diverse as the Palestinian territories and Northern Ireland.[199]

Even proponents of snitching admit the possibility that it increases violence. Omri Yadlin, for example, has proposed a "Trojan Horse"

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197. *Id.* at 11, 19.

198. *See, e.g.*, Henry E. Cauvin, *Witness Says Slain Girl Was Warned*, WASH. POST, Feb. 11, 2004, at B01 (14-year-old who threatened to tell authorities about murder she witnessed unless she was paid was told day before she was killed: "For real, little sis, you better not be snitching."); Paul Gustafson, *Three Gang Members Found Guilty of Killing 4-year-old*, MINNEAPOLIS STAR TRIB., June 13, 2002, at A1 (noting that "[d]espite offering a large reward, authorities said they were unable to crack the case because of the Rolling 60s' [gang] reputation for violence against informants and its own code of silence"); Simons, *supra* note 4, at 29 & n.134 (noting pervasive violence against informants).

199. Lee Hockstader, *Palestinians Battle the Enemy Within: Menace of Israeli Collaborators Spurns Executions, Vigilantism, Revenge Killings*, WASH. POST, Feb. 2, 2001, at A1; Editorial, *Haunted By an Informer*, BOSTON GLOBE, May 20, 2003 ("For generations, informers' whispers have sowed distrust, fear, and violence in Northern Ireland.").

enforcement mechanism in which criminal participants would be encouraged to exit the criminal scheme early, inform on their colleagues, and as a result receive a portion of the fines and penalties assessed against their colleagues.[200] Yadlin candidly admits, however, that an expected response to the Trojan Horse model is violence, and that the creation of snitches "might actually increase the level of violence among criminals."[201] This analysis and the fact that drug-related violence is increasing raises the possibility that heavy informant use could be exacerbating violence in high crime areas. If so, this would be an extremely costly aspect of the informant institution.

C. Harm to Interpersonal, Family, and Community Trust

Another type of harm inflicted by heavy informant deployment is the damage done to the fabric of interpersonal trust and psychological security in already beleaguered communities. While we lack empirical studies of individual responses to criminal snitching in the United States, recent scholarship has examined the impact of widespread informant use in other contexts, in particular Cold War Eastern Europe. The comparison is admittedly inexact: pre-1990 East Berlin differs in large and obvious ways from today's inner city Baltimore. Nevertheless, the example illustrates the ways in which the presence of large numbers of informants in a community can exact a heavy psychological price from residents.[202]

1. The East German Informant Experience

The pre-unification East German government was well known for conducting pervasive surveillance of its own citizens through the state secret police or "Stasi." The Stasi recruited informants—as many as 174,000 at its peak—throughout East German society to spy on each other, gather information, infiltrate dissident organizations, and turn on their own friends and family.[203] In the early 1990s, after reunification

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200. YADLIN, *supra* note 175; *see also* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L. J. 1307, 1390-92 (2003) (arguing that publicizing the extent to which co-conspirators flip will deter entry into conspiracies).

201. *Id.* at 16.

202. Anecdotal evidence suggests that a similar culture of suspicion may be a by-product of the Israeli reliance on informants in the occupied Palestinian territories. *See* Catherine Taylor, *How Israel Builds its Fifth Column: Palestinian Collaborators Face Mob Justice and Fuel a Culture of Suspicion* , CHRISTIAN SCI. MONITOR, May 22, 2002, at P1. This reporter described a "culture of suspicion such that anyone who runs a successful business or has access to hard to get permits is often suspected." *Id.*

203. MILLER, *supra* note 181, at 4; James O. Jackson, *Fear and Betrayal in the Stasi State*, TIME, Feb. 3, 1992, at 32.

with West Germany, Stasi files were made available and the full extent of the surveillance of millions of citizens became known. Husbands had informed on wives, neighbors on neighbors, writers and intellectuals on each other, and many well-known anti-communist dissidents had co-operated in one way or another with the Stasi.

Recent studies examine how the East German informant culture destroyed the social fabric in vital areas of politics, culture, and community. It did so in part by undermining interpersonal relationships and in part by literally damaging the individual psychologies of citizens who had to cope with constant, pervasive, officially sponsored duplicity.[204] Barbara Miller's in-depth study of former informants reveals the deep psychological and political scars left by the informant culture on intellectuals and activists. What Miller calls the "indirect harm" of informants consisted of the widespread undermining of personal and social relations, a kind of personal and social "malaise, described by some as a form of schizophrenia, which developed in response to the permanent suspicion that one might be under surveillance."[205]

In interviews, East German citizens described the change in their own personalities: "These informers determined my life, changed my life over those ten years. In one way or another—because they poisoned us with mistrust. They caused damage simply because I suspected that there could be informers in my vicinity."[206]

After finding out the extent to which her friends and family had given the Stasi information, one activist confessed, "I'm also shocked about the fact that there was so much mistrust within me and that also one of the informers' tasks, to plant mistrust, and I didn't trust a lot of people."[207] One intellectual summed it up this way:

> In the defeated system we lived in deformed interpersonal relationships and conditions. We did not act freely in casual encounters with others—like with the neighbours. We automatically blocked our reactions, we turned away as soon as a look seemed too curious to us, a question too probing, an interest in us not sufficiently justified. We lived in many respects like oysters.[208]

The uncoordinated, widespread use of informants in the United States by thousands of different police departments and various federal agencies does not, of course, amount to the focused, purposeful political mission of the Stasi. But if anywhere near eight percent of the male

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204. Jackson, *supra* note 203, at 32-38.
205. MILLER, *supra* note 181, at 133.
206. *Id.* at 101 (quoting Katrin Eigenfeld of the Neues Forum).
207. *Id.* at 127 (quoting Irena Kukutz of Women for Peace).
208. *Id.* (quoting Gunter Kunert).

population in inner city communities is snitching,[209] that figure meets or surpasses Stasi levels of between one and ten percent of the total population as informers. Other parallels are illuminating as well. In the Stasi's "War on Dissent," dissenters were the most valuable informants, and the Stasi recruited heavily within the very world it was trying to destroy, employing the very people it was trying to eliminate. As a result, East German dissident-informants often paradoxically "helped the [anti-government] movement, partly simply by swelling its ranks, but also by actively working on opposition activities."[210] Many informants had what Miller calls a "reciprocal relationship"—helping the Stasi while helping the movement at the same time.[211]

In the same vein, the "War on Drugs" likewise recruits and relies on the very criminals it is designed to catch. Drug informants often continue their drug operations while providing the government with partial information, even manipulating their cooperation to eliminate competition and otherwise serve their own ends. Finally, like the U.S. police, the Stasi experienced great difficulty assessing the reliability of their informants, causing them to accept vast amounts of inaccurate or fabricated information.[212]

U.S. criminal informants obviously differ from Stasi collaborators in their motivations, their rewards, and the context in which they operate. At the same time, their friends, families, and neighbors are not immune from the social and personal "malaise," "schizophrenia," "mistrust," and "deform[ity]" suffered by East German citizens overexposed to informants. The erosion of the social fabric that accompanied the East German experience thus raises the possibility that overuse of informants in high-crime communities could be fueling comparable damage.

2. Women Snitches

Although criminal system participants (and therefore informants) are predominantly male, the dramatic rise in the numbers of women in the criminal justice system bears attention because of the special potential for the disruption of family and personal relationships.[213] The "girlfriend" snitch is a well-known character in fiction and the media: it mirrors the actual practice of targeting women in order to reach male

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209. *See supra* note 180 and accompanying text.

210. MILLER, *supra* note 181, at 101.

211. *Id.* at 102.

212. *Id.* at 15.

213. Women constitute a growing proportion of offenders, doubling from about 4% of the prison population to nearly 7% by 1999. Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment*, *in* INVISIBLE PUNISHMENT, *supra* note 8, at 79, 80-81.

suspects with whom they have a relationship.[214] Moreover, the increase in female arrest and incarceration rates is heavily tilted toward drug crimes: One-third of female inmates are serving time for drug offenses.[215] Given the prevalence of informant practices in the drug context, it is fair to surmise that, like their male brethren, women in the criminal system experience significant pressure to provide the government with information.

The pivotal role of women in poor urban communities of color could make the policy of widespread "flipping" particularly caustic for the community at large. In communities where employable, non-incarcerated men are in short supply, women are the central societal and economic glue. Women earn the bulk of the community's income; they head up families in which several generations of children and seniors may rely on them. They also often provide for the men who are on average less educated and who routinely have trouble obtaining employment and public benefits.[216] As more women are exposed to criminal liability and more of them are pressured to exploit the networks of people who rely on them for information, it seems inevitable that the already delicate fabric of informal reliance will be further strained.

The point is not that female suspects should be insulated from liability or given special treatment, but rather that widespread use of female informants, particularly to pursue their male partners, creates a remarkably destructive dynamic. Given the staggering vulnerability of black males and the high incidence of female-headed households, exploiting those intimate relationships for law enforcement purposes through snitching can only exacerbate the difficulty in maintaining long-term, stable familial relationships.[217]

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214. Chesney-Lind discusses the Kemba Smith case in which a drug kingpin's girlfriend received a 24-year sentence although she never actually handled any drugs, primarily because she refused to cooperate. *Id.* at 90. Chesney-Lind actually complains that women are disadvantaged in the informant institution because

> one of the few ways that mandatory sentences can be altered is if the defendant can provide authorities with information that might be useful in the prosecution of other drug offenders. Because women tend to be working at the lowest levels of the drug hierarchy, they are often unable to negotiate plea reductions successfully. Added to this is the ironic fact that it is not uncommon for women arrested for drug [offenses] to be reluctant to testify against their boyfriends or husbands.

Id. at 89.

215. *Id.* at 88.

216. Beth Richie, *The Social Impact of Mass Incarceration on Women*, *in* INVISIBLE PUNISHMENT, *supra* note 8, at 136, 145-48. In a subsection entitled "Women as Family Members and Community Caregivers," Richie documents the central role of women as economic and social caregivers in high-crime communities. She argues that mass incarceration has a particularly destabilizing effect on the community by undermining women's ability to perform these roles.

217. *Id.* at 148.

D. Harm to Communal Faith in Law Enforcement and the Law

The discussion of norms literature in Part III.D above describes various scholarly treatments of the interaction between public perception of the law and the law's efficacy. Nowhere is this expressive, normative inquiry more troubling than in low-income African American communities that are simultaneously overexposed to the justice system and have a historic distrust of law enforcement.[218]

For high-crime communities, informant use sends problematic messages about the exercise of state power. First, it involves the official tolerance of crime, which can be seen as an abdication of the state's guardianship role in the very communities most in need of protection.[219] Second, it sends the message that criminal liability is negotiable and rife with loopholes for those willing to betray others. In communities suffering from the collateral consequences of mass incarceration, the state-sponsored suggestion that this devastation is based on morally flexible standards adds insult to injury. Third, it institutionalizes secretive official decision-making and an arbitrary rewards system in which similarly situated individuals are treated differently depending on their personal relationships with and usefulness to law enforcement actors. For a population well acquainted with the dangers of unconstrained police authority and discretion, this might well be a fearsome state of affairs.[220]

While the predictive value of norms analysis is controversial,[221] it is fair to say that any of these hypothetical developments would be deeply undesirable. Any public policy that contributes to further alienation in communities already in tension with the justice system needs to be reconsidered.

E. Harm to Dignitary Interests: The Negative Construction of the Black Community

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218. *See* KENNEDY, *supra* note 182, at 24-27 (describing history of distrust). Thirty percent of black respondents rated their confidence in the police as "very little" or "none." This is a stark contrast to white respondents, 63% of whom expressed a "great of deal" of confidence and another 30% reported "some" confidence. BJS, *supra* note 4, at Table 2.16. Similarly, 56% of blacks reported that they felt police in their community treated different groups unfairly. *Id.* at Table 2.29.

219. *See* KENNEDY, *supra* note 182, at 110-35 (surveying modern history of underenforcement).

220. *See* James Forman, Jr., *Children, Cops and Citizenship: Why Conservatives Should Oppose Racial Profiling*, *in* INVISIBLE PUNISHMENT, *supra* note 8, at 150, 151-55 (arguing that racial profiling and other racially-biased police conduct damages the norms and values of inner city youth).

221. *See* Weisberg, *supra* note 19, at 472.

Public policies that regulate a community reflect official attitudes towards the people who live there. In turn, those policies contribute to the public understanding of that community.[222] In that sense, the public policy of unlimited and widespread informant deployment represents part of the social construction of the black community. Whether it is a conscious construction intended by policymakers, or, as is most likely, the unintended collateral consequences of a series of other policy decisions, the effect of the construction is the same: the community becomes defined by the policies that are visited upon it.

In this case, the vast informant deployment taking place in poor urban communities contributes to a negative identity for those communities. The policy presupposes a community filled with criminals that needs to be infiltrated in order to be saved. It is a community with reduced privacy interests in which it is permissible for the state to use informants to penetrate the most private zones in pursuit of prosecutorial goals.[223] It is, in essence, a community with lessened dignitary interests in the eyes of the state that due to its high crime rates, is treated as having relinquished some of the basic rights to privacy and to be let alone. In this sense, the widespread use of informants can be seen as an informal control mechanism created by the police to attempt to regulate behavior in high-crime communities.[224]

In this context it is useful to recall the outcry against informant bounties that followed the Linda Tripp episode in which Independent Counsel Kenneth Starr used Tripp—an informant—to extract information about President Clinton from her close friend Monica Lewinsky. Distaste for the exploitation of those private relationships led to a public assault on Starr's use of Tripp, as well as an attack on the IRS informant bounty program.[225] Senator Harry Reid decried the program as "[r]ewards for [r]ats."[226] It is precisely this distaste that has been sus-

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222. Devon W. Carbado, *(E)raising the Fourth Amendment*, 100 MICH. L. REV. 946, 964-70 (2002) (describing the negative construction of black identity through Fourth Amendment jurisprudence); Meares & Kahan, *supra* note 8, at 818 (noting that the disproportionate burdens imposed by drug law enforcement tactics on inner city black residents "construct the social meaning of drug-law policy").

223. *See* Geoffrey R. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1 AM. B. FOUND. RES. J. 1193, 1195 (1976) (arguing the use of informants "could all too easily jeopardize the very foundation of personal privacy and security upon which a free society must ultimately rest").

224. *See* Jonathan Simon, *Crime, Community, and Criminal Justice*, 90 CAL. L. REV. 1415, 1416-17 (2002) (arguing that the war on drugs and mass incarceration in poor communities of color constitute a policy of "governing through crime").

225. Marsha J. Ferziger & Daniel G. Currell, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 1999 U. ILL. L. REV. 1141, 1142, 1160 (1999) (documenting opposition to use of Tripp and IRS bounty programs, while defending use of such programs).

226. *Id.* at 1142, 1160.

pended when it comes to the infiltration of poor, high-crime communities.

More hypothetically, one can inquire whether the polity would tolerate similar scales of informant infiltration into other communities. Imagine, for example, if the IRS was to institute a policy of informant recruitment such that tax evaders could relieve their own tax liability by snitching on their neighbors.[227] The neighborhood holiday party would be transformed into an opportunity for snitches to report to the IRS on neighbors' acquisitions of art, automobiles, and other high-income indicators. Tax time would become an occasion of civil strife. Many would consider such a policy to be an inappropriate governmental intrusion,[228] and yet it is effectively the policy in place in high-crime communities where so many people are vulnerable to law enforcement.

For all these reasons, informant use should be understood in the context of other destructive conditions that hobble inner city communities, such as poverty, unemployment, crime and incarceration rates, single-parent households, and the like. The informant institution has taken on a systemic character and should therefore be reconceived, not merely as an ethically questionable law enforcement tactic, but as a social problem in its own right.

V. PROPOSALS FOR REFORM

The war on drugs and concomitant legislative enactments of the 1980s raised the profile of informants in the criminal justice system without increasing protections against their overuse. Two decades later, a systemic reconsideration is due. The above discussion points to three areas in which reforms are needed: openness, accountability, and community protection.

These reforms share a common thread: they are largely "sunshine," or public accountability, measures rather than substantive limits on informant use. Insofar as the reforms below suggest substantive limits, they constrain informant rewards rather than informant activities. The reasons for this focus are both pragmatic and analytic. First, it would be very difficult to impose meaningful substantive constraints on the day-to-day operations of law enforcement's investigative and prosecutorial discretion.[229] Indeed, without more information about the institution of

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227. It could be argued that the IRS cash bounty program already does precisely that by rewarding informants in cash. The program does not, however, expressly relieve the legal liability of informants.

228. *See id.* at 1142, 1160 (documenting Senator Harry Reid's attack on the moral propriety of the IRS bounty program which provides cash rewards, calling it "rewards for rats").

229. *See* Stuntz, *supra* note 6, at 580 (rejecting reforms that eliminate or reduce prosecutorial discretion

informant use, it is hard to say at this stage what such rules should look like.[230]

Second and more fundamentally, the harms of the informant institution flow largely, albeit not exclusively, from its tendency to operate in secret and to make official decisions without accountability. As Vorenberg wrote:

> [o]ne consequence of giving an official broad discretionary power is to relieve pressure on the public and the legislature to make important and painful decisions. . . . The results [of unfettered prosecutorial discretion] are disheartening for one who believes that the legislature and the public should have sufficient information to improve the way government works. Prosecutorial discretion precludes access to such information.[231]

Discretion and secrecy are thus inextricably linked, and while direct cabining of law enforcement discretion with respect to informants may be unrealistic, increasing information about informant use is not.

Access to information about the informant institution would temper law enforcement discretion and permit public consideration of a variety of "important and painful decisions" about what substantive limits, if any, should be placed on informant use. With the exception of a few case-specific measures, the reforms proposed here thus aim not to constrain but to reveal the contours of the informant institution—levels of informant-dependence, the frequency with which informants are created and used, and the usefulness of informants in generating arrests and convictions. This design acknowledges the current realities of broad police and prosecutorial discretion, and it respects core values of confidentiality that protect specific informants while increasing public understanding of and access to the informant institution more generally. It also tracks the types of reforms proposed by scholars concerned more generally with the secrecy and discretion surrounding prosecutorial discretion and plea bargaining.[232]

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because "discretion is not so easily abolished, or even cabined"); Wright & Miller, *supra* note 92, at 52-55 (outlining difficulty in imposing guidelines or other external restrictions on prosecutorial discretion).

230. While no scholar has, to my knowledge, advocated an absolute ban on using informants, some have proposed significant limits or changes to the practice, or both. *See* Weinstein, *supra* note 3, at 630-31 (proposing a 15% quota on prosecutorial use of cooperation credit to restrict use of informants); Harris, *supra* note 3, at 60-66 (proposing drastic increases in defense counsel's access to informant witnesses, including the recording of all government preparations with the witness, as well as judicial review of informant compensation, and government compensation of informants who testify favorably to the defense).

231. Vorenberg, *supra* note 60, at 1559.

232. *See supra* notes 115-19, 153-57 and accompanying text (describing sunshine reform proposals of Luna, Davis, Wright & Miller, and Lynch).

By reducing the veil of secrecy surrounding informant practices, several effects can be expected. First, informant use will lose some of its appeal to police and prosecutors because of the attendant burdens and exposure that it will incur. While specific names of informants would not be revealed, the fact of their use and the numbers of cases influenced by informants would become public knowledge. What are now discretionary, unrestricted transactions would have to account for the possibility of public disapproval of the extent of the practice. Reporting requirements and openness thus might reduce the ease with which liability is currently traded as well as the centrality of snitch deals in resolving cases.[233]

Second, increased information would enable the other branches of government to evaluate informant practices and regulate them as appropriate. Data on the extent of snitching might, for example, influence courts to take a harder look at informant testimony and informant-based warrants, while prompting legislatures to demand more accountability from prosecutors, or even rethink the extent to which liability for certain crimes should be exchangeable. Finally, the true public costs of informant use will come into view more clearly, permitting a debate over the impact of snitching, particularly for those communities most impacted by the practice. The following proposals offer initial reforms.

A. Increase Openness in Individual Cases

Various commentators have called for increased disclosure of informant information in the context of litigation. Those proposals generally aim at increased fairness for individual defendants. They are appropriate here for a different reason: it is in individual litigation that informant excesses are most likely to be revealed by zealous defense counsel. That mechanism should be strengthened to serve both as an accountability check on the use of informants and a way of making public the extent and manner of informant use. To that end, specific reforms should include increased discovery, reliability hearings, and depositions.

1. Discovery

Defense counsel should have more and earlier access to information about informants, including their complete criminal records, any co-

233. Increased information would also have the benefit of reducing the opportunities for corruption and malfeasance. *See* BLOOM, *supra* note 85, at 159 ("Each scenario [of perjury and corruption] in this book shows in some way how public scrutiny can lead to reform.").

operation provided in or promised in any other cases, copies of any statements made regarding the case, and a description of all promises—implicit and explicit—made by the government.[234] While such discovery is already provided to a limited extent,[235] the government's ability to limit and postpone production of information should be curtailed. This might require, for example, legislatively superceding the Supreme Court's decision in *United States v. Ruiz* that impeachment material need not be produced to defendants who plead guilty.[236]

2. Reliability hearings

In *Daubert v. Merrell Dow*, the Supreme Court held that expert testimony is at once so potentially powerful and so potentially unreliable that courts must act as "gatekeepers" of its admissibility.[237] As George Harris has described, informant witnesses share many of the attributes of expert witnesses: they are one-sided, potentially unreliable, compensated witnesses with personal motivations who may have great sway over a jury.[238] For these reasons, courts should evaluate the reliability of informant witnesses in the same way that they evaluate experts. "Reliability hearings," comparable to *Daubert* hearings, should be used to help courts evaluate the likelihood that an informant is fabricating evidence or is otherwise so unreliable that his testimony should be excluded.[239]

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234. *See* Harris, *supra* note 3, at 61-64 (spelling out discovery proposals). The Oklahoma Court of Appeals has institutionalized these requirements for all jail house snitches as follows:

> At least ten days before trial, the state is required to disclose in discovery: (1) the complete criminal history of the informant; (2) any deal, promise, inducement, or benefit that the offering party has made or may make *in the future* to the informant (emphasis added); (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; (5) whether at any time the informant recanted that testimony or statement, and if so, a transcript or copy of such recantation; and (6) any other information relevant to the informant's credibility.

Dodd v. State, 993 P.2d 778 (Okla. Crim. App. 2000).

235. *See supra* note 78 (listing discovery rules).

236. *See* United States v. Ruiz, 536 U.S. 622 (2002). Since 90-95% of defendants plead guilty, this ruling effectively shields from discovery vast amounts of data related to informant credibility.

237. Daubert v. Merrell Dow, Inc. 509 U.S. 579, 593-94 (1993) (requiring courts to evaluate reliability of expert scientific evidence before permitting its admission into evidence or letting the jury hear it).

238. Harris, *supra* note 3, at 55-57.

239. *See* Harris, *supra* note 3, at 63-64 (advocating reliability hearing). At least one court has imposed such a requirement. *See* Dodd, 993 P.2d at 785 (Strubhar, J., specially concurring).

3. Depositions

Informant testimony is particularly hard to challenge on cross-examination,[240] yet courts rely explicitly, sometimes exclusively, on cross-examination as the primary protection against fabrication and irregularity. Defendants should therefore have the opportunity to depose informants before trial. The more informal nature of depositions and the absence of the jury will permit defendants to expose inconsistencies and fabrications prior to trial in a way that in-court cross-examination does not allow. If depositions are not made available, courts should order them subsequent to or in lieu of reliability hearings where necessary.

B. Increase Democratic Accountability

Informants should no longer be treated as an exclusively law enforcement concern. Legislatures should expressly evaluate the practice and its impact on the judiciary and the community to determine appropriate regulations of the practice.[241] In order to do this, legislatures need information. The following reforms are aimed first at increasing the information available to the legislative branch, and second, at suggesting ways in which legislatures might usefully impose limits on current executive informant practices.

1. Create Public Data

In order to permit legislatures and the public to evaluate the true costs and benefits of informant policies, the extent of informant use must be made public.[242] Like tax information, law enforcement agencies could be required to provide annual compilations of redacted informant profiles, or perhaps aggregate statistics, so that public policies can be made on an informed basis.[243] The types of information to be culled are: the

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240. *See* Harris, *supra* note 3, at 52-53.

241. *See* Vorenberg, *supra* note 60, at 1562-67 (arguing generally that prosecutors should be made more accountable for their decisions and that legislatures should take a stronger oversight role). *But see* Stuntz, *supra* note 6, at 534-37 (noting natural confluence of legislators and prosecutors goals leads to legislative expansion of prosecutorial authority).

242. Hughes proposes that prosecutors be required to file details of formal immunity and plea agreements in order to track the extent of cooperation. Hughes, *supra* note 3, at 20-21. Hughes's focus on formal agreements, rather than the informal scope of the informant practice, makes this proposal a useful starting point. Luna and Davis likewise argue for more public data on law enforcement practices as a way of increasing accountability, transparency, and strengthening the democratic process. Luna, *supra* note 6, at 1166-70; Davis, *supra* note 110, at 451-64; Davis, *supra* note 115, at 54-56.

243. *See* 26 U.S.C.A. § 6103 (West 2002 & Supp. 2004) (permitting release of tax information that

actual number of informants created and maintained by police and prosecutors; the extent to which informants are not being formally charged (and therefore do not show up in public arrest records); the uses to which informants are being put; the number of arrests and convictions that arise, in part or in whole, from informant information; the race, gender, age, and location of informants; and the offenses that are being traded for information.[244]

Although the production of such information would clearly impose an administrative burden on police and prosecutors, it would not jeopardize a single investigation, nor would it prevent the flipping of a single suspect. What it would do is provide a clear picture of the informant institution, its role in the criminal process, the concentration of informants in certain communities, and the types of liability decisions being made.

2. Restrict Informant Rewards

Legislatures should consider restricting informant compensation and lenience. These should take the form, not of mandatory informant guidelines,[245] but rather restrictions on the types of criminal offenses that can be mitigated through cooperation.[246] For example, legislatures could decide that liability for murder, rape, and other particularly heinous crimes could never under any circumstances be reduced as a result of a defendant's cooperation. That would insert a braking mechanism into law enforcement's consideration of using a particular informant if there was a possibility that he might be subject to such charges. It also would send an important expressive message to the

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cannot be associated with a particular taxpayer).

244. Sometimes it will not be obvious what charges could eventually be brought against a suspect in the absence of his cooperation. Police charging statements, however, routinely contain numerous potential or suggested charges based on as little as the initial arrest. Prosecutors then decide whether to go forward on these or other charges. While thus not perfect, such initial police estimations would at least provide an indication of what kind of charges are being traded for information.

245. Weinstein argues persuasively that guidelines are too rigid an approach to the realities of prosecutorial discretion in the cooperation area and would be ineffective. Weinstein, *supra* note 3, at 626-27. *But see* Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 245 (advocating national prosecutorial guidelines governing the award of cooperation credit).

246. Weinstein proposes imposing quotas on informant use to limit the ability of prosecutors to award cooperation credit. *See* Weinstein, *supra* note 3, at 630 (proposing quotas on USSG § 5K1.1 motions to reduce informant use). The difficulty with quotas is that they would generate competition among informants to provide better information and among defense counsel to obtain valuable concessions, a dynamic that could produce more unreliability and place more pressure on defendants rather than on prosecutors or law enforcement. The problem lies less with the rewards that informants receive on the record than with the ones that take place more informally. In order to reduce the centrality of informants, cooperation should be made less, not more, valuable.

public, namely, that certain crimes will not be tolerated even where the defendant is otherwise useful to the government.

Legislatures should also restore judicial oversight of sentencing for informants. The government motion requirement in USSG § 5K1.1 should be eliminated[247] and judicial discretion restored in order to break the prosecutorial monopoly over cooperation-based rewards. Additional bases for departures below statutory minimums should also be created to reduce the pressure on defendants to inform.

Even with such reforms, the problem remains of the informant who, by virtue of his cooperation, completely evades criminal charges and thereby any external evaluation of the propriety of his use. Because there is no possibility of judicial review for these potential defendants, police and prosecutors should implement institutional mechanisms for heightened review when a particular informant receives rewards greater than a certain criminal liability limit. For example, a board composed of police supervisors and prosecutors could periodically review informant files in which informant-suspects (1) have been active without being charged for more than one year, and (2) the potential charges for that suspect would give rise to a sentence in excess of ten years.[248]

C. Community Protection and Public Debate

If the purpose of criminal laws is to protect individuals and communities, the mere fact that informants are useful law enforcement tools does not alone justify their use. No longer should the benefits of the informant institution be evaluated solely by the law enforcement community; rather, legislatures should explicitly attempt to evaluate and balance law enforcement benefits with the community costs of informants. The additional public information about law enforcement practices proposed above will permit the debate to begin. In addition, confidential research should be performed specifically on the impact of informants on high-crime communities.[249] Based on such information, policy-makers can begin to evaluate whether high informant use produces sufficient benefits or whether it should be constrained in other

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247. *See* Lee, *supra* note 245, at 240 ("By far the most common—and in my opinion the best—proposal for reform is elimination of the government motion requirement."); Bowman, *supra* note 17, at 8-9 (hypothesizing judicial discomfort with the government motion requirement). *Booker* may have effectively eliminated this requirement already. *See supra* note 42.

248. DOJ Guidelines begin this process by creating uniform review mechanisms for the use of CI's by agents. *See* DOJ Guidelines , *supra* note 34. The process should be extended to prosecutors. *See* Wright & Miller, *supra* note 92, at 55-57 (arguing for the efficacy of internal prosecutorial mechanisms).

249. Such research would presumably be difficult to conduct without strict confidentiality guarantees, given the potential shame and danger associated with snitching or being associated with informants.

ways. Perhaps most importantly, information will permit an authentic public debate and invite the communities most affected by informant use to share their perspectives on the practice.

VI. CONCLUSION

Recent developments in the law have placed excessive weight on the use of informants, damaging communities as well as the legal system. The heavy use of informants undermines fundamental principles of accountability, publicity, and regularity within the criminal system, and may well cause severe social and psychological damage in high-crime, low-income communities of color. It therefore is time to reevaluate the justice system's overreliance on the double-edged sword of the snitch. With better public disclosure, judicial and legislative oversight, limitations on rewards, and careful attention to community needs, the informant institution can be better regulated in order to mitigate the collateral damage that it now inflicts.

Mr. CONYERS. Thank you.

Mr. SCOTT. Thank you.

I had one other question.

Mr. Brooks, we have heard that the benefit that could be obtained if we eliminate these ghost informants if the confidential informant would just show up in court before the magistrate for the warrant. Are there practical, real life problems with having the confidential informant show up downtown in front of the magistrate?

Mr. BROOKS. I think there is a couple of problems. First of all, the sheer volume of law enforcement work, I believe, would clog the State and local courts, perhaps not the Federal courts because the volume is different. And also there are many informants that are providing background information only never plan on appearing as a witness that certainly may be intimidated and dissuaded from cooperating with law enforcement.

I think the solution probably lies in good record keeping, solid identification of those informants. We identify our informants by photograph, by fingerprint, by a full bio. We keep records on every single case that they do. And those records are available for review by magistrates in every case.

In the case where the magistrate has a concern, we certainly make those informants available in camera for review by the magistrate having jurisdiction. But I think as a regular course, parading informants in and out—they are going to be concerned for their safety.

And by sheer volume, our courts are overloaded. They have trouble keeping up with the volume they currently deal with.

Mr. SCOTT. Professor Natapoff, is there a problem with requiring confidential informants to show up before the magistrate?

Ms. NATAPOFF. Well, it is certainly a logistical burden. But all due process is a logistical burden. I certainly think there are instances of certain kinds of crimes. There are certain kinds of allegations where it would make sense to have heightened requirements that law enforcement actually produce an informant, not only in the individual case, but it would also change the culture of the idea that ghost informants are a possible option.

Mr. SCOTT. Thank you.

Does the gentleman from Georgia, the gentleman from Michigan have any final questions?

The gentleman from Michigan?

Mr. CONYERS. I merely want to commend you, Chairman Scott, and Nadler as well and the witnesses. As was observed by Congressman Watt, this is the first time we have got into this matter in more than a dozen years. And as good as this hearing was—and I want to commend the law enforcement people that are here because outside of that one question that Mr. Murphy declined to answer posed by Mr. Nadler, there has been a lot of forthcoming here.

But this is only the tip of the iceberg. I mean, we have got to hold the most fair hearings in recent American history on the whole question of the criminal justice system, which goes way beyond informants. It has been picked up and articulated by many of the witnesses that we are talking about the culture of the law enforcement system and how it has got to be changed.

And one hearing starts us off. I am very, very proud of what we have accomplished here. I compliment all of those who have come forward.

Mr. SCOTT. Thank you. I am advised that we have to very quickly adjourn to allow another Subcommittee. But I will recognize the gentleman from Georgia.

Mr. JOHNSON. Well, I just simply wanted to commend first you, Chairman Scott, Chair of this Subcommittee, and also the Chair of the full Committee, Chairman Conyers, for the way that you have conducted our proceedings during my short 7 months here. I don't know what happened before then, but I do know we have made a tremendous amount of progress at bringing light to issues that have been held in the dark for so long. I just want to commend you both for your activities. I look forward to serving with you further.

Mr. SCOTT. Thank you very much.

I would like to thank the witnesses for their testimony today. Members may have additional written questions for the witnesses. If they are forwarded to you, we ask that you answer them as promptly as you can to be made part of the record. Without objection, the hearing record will remain open for 1 week for submission of additional materials.

I will ask all of the audience to vacate the room as quickly as possible. There is another Subcommittee meeting that is about to convene.

We want to thank the witnesses for their testimony.

Without objection, the Committee stands adjourned.

[Whereupon, at 12:47 p.m., the Subcommittees were adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Confidential informants play a unique role in law enforcement. With proper guidance and practices, they can provide valuable leads to help law enforcement officers better target their investigations and prosecute criminals. Without such guidance and practices, however, serious consequences may result.

Unfortunately, today's hearing is prompted by a series of incidences involving the abusive, unethical, and unlawful use of confidential informants by law enforcement officers.

In particular, there have been repeated reports where confidential informants were improperly incentivized to fabricate leads after being offered plea bargains, financial awards, and other inducements. There are also reports that law enforcement officers, in some instances, have misused confidential informants to increase and justify arrests and grant funding.

This problem was brought home to me in May, when I met with Reverend Markel Hutchins, one of today's witnesses, and former confidential informant, Alex White, regarding the case of Kathryn Johnston. The circumstances surrounding Ms. Johnston, particularly as it pertains to confidential informants, is extremely troubling. It is one of the reasons why we wrote to the Department of Justice, held a press conference, and holding this oversight hearing.

Ms. Johnston, a 92 year old woman, was shot and killed in her Atlanta home after police obtained a no-knock warrant based on a false affidavit allegedly from a confidential informant. When things went terribly wrong, the police tried to coerce the confidential informant, who was the apparent source of the false affidavit, to lie. Fortunately, the informant refused and the truth came to light.

Sadly, this incident in Atlanta is not an isolated case. Similar incidents have occurred in cities across the Nation. For example, an informant's uncorroborated statement led to the arrest in 2002 of 15 percent of the African American men, aged 18 to 34, in Hearne, Texas.

That same year, the Dallas "Sheet Rock Scandal" occurred in which an informant was payed $200,000 to provide a false story. The police used that informant and crushed gypsum made to look like cocaine to arrest 86 Mexican immigrants with limited English language skills.

In many of these cases, federal taxpayer money—including Byrne grants—was used. These funds should be used to fight crime, not to subsidize killing a 92 year old woman and arresting innocent people with false evidence obtained from improperly influenced confidential informants. Practices such as these severely undermine the integrity of law enforcement, results in invalid convictions, violates the rights of innocent civilians, and does nothing to make the public any safer.

We should know what, if any, standards exist with respect to how federal, state, and local law enforcement agencies use confidential informants to prevent abuse. If federal money and agencies are used in an investigation, we must insist that those investigations abide by reliable and credible guidelines on the use of confidential informants. These guidelines should apply at the state and local level.

I look forward to getting answers to these questions and others today. I thank Mr. Nadler and Mr. Scott for convening today's hearing on this matter, as well as the witnesses who will offer substantial insight through their testimony today.

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Mr. Chairman, I thank you for holding this very important hearing on the law enforcement confidential enforcement practices. As members of the Judiciary Committee, one of the most important roles we collectively serve is that of guardian of civil and constitutional rights of all individuals. In that respect, where there are questions of misuse or abuse of individual civil rights or other rights protected under the United States Constitution, it is our duty as Members of the Judiciary Committee to diligently and vigorously investigate to decipher whether the alleged abuses or concerns merit such scrutiny.

This Committee has the opportunity to gain insights into the allegations of the increasing number of civil rights abuses carried out through the law enforcement confidential informant practices. I would like to welcome and thank our witnesses: Mr. Wayne Murphy, Professor Alexander Natapoff, Commander Pat O'Burke, Ms. Dorothy Johnson Speight, Mr. Ronald E. Brook and Reverend Markel Hutchins. I hope that your testimony here today will prove fruitful in guiding this Committee in its findings with regard to whether law enforcement officers have engaged in confidential informant practices that intentionally violate the civil or constitutional rights of any individual.

Mr. Chairman, the purpose of this hearing is to examine law enforcement practices and their impact on civil and constitutional rights. Of particular concern is the continuing controversy of the use of confidential informants in drug enforcement. Despite its impact on the criminal justice system, the practice has been subject to minimal federal oversight. Through this hearing, we also hope to explore three pressing concerns with respect to how the use of confidential informants has (1) influenced the practice of plea bargaining, (2) increased the potential for abuse due to the inherent secrecy of the practice, and (3) has affected poor and minority communities. This Committee will also explore policies designed to limit the potential for abuse.

The use of confidential informants in the U.S. justice system has become an ever-growing, unchecked practice which has given rise to civil rights abuses. Every year, law enforcement officials create convenient alliances with criminal suspects who become informants, many of them drug offenders concentrated in inner-city neighborhoods. These criminal offenders informally negotiate information and undercover work for promises of leniency. In many cases, however, law enforcement hastily and carelessly rely on what is often self-serving information from criminal offenders.

As a result, the criminal offenders are wrongly granted leniency and other individuals are falsely implicated in criminal activity. Thus, the alliance between the law enforcement officer and the informant is fraught with peril, being nearly without judicial or public scrutiny as to the propriety, fairness, or impact the deals have on the community. What is even more disturbing is that law enforcement officers often fail to corroborate the veracity of informant information, the "get tough" policies of the "war on drugs" pressure police departments to increase arrests, and departmental informant policy and oversight is the exception not the norm. Not surprisingly the alliance between law enforcement and informants has resulted in tragic civil rights violations.

Mr. Chairman, there is also enormous potential for abuse due to the inherent secrecy of the practice. As law enforcement has increased its dependency on informants, the quality of investigations has declined and scrutiny of the informants has receded. Prosecutors have complained that there is no way of knowing whether the information that the informant provides is true and their concern is well founded. One study has shown that 45.9 % of documented wrongful capital convictions have been from false informant testimony.

There have been a number of truly disturbing cases where informants have intentionally wrongly implicated individuals in criminal activity for the soul reason of receiving leniency. Of the most notorious informants was Leslie Vernon White, an admitted "jail house snitch." White had made a career of creating false testimony to gain leniency for his own crimes by learning the details of his fellow inmates' crimes. In one 36-day period, he gave Los Angeles County prosecutors information about three murder cases, all from information he learned from fleeting encounters with inmates. In another case, Ron Williamson became one of 13 death row inmates who were ultimately freed because DNA proved his innocence—in Oklahoma alone. We must ask ourselves how many more defendants are on death row and in the prison population at large have who not been fortunate enough to have DNA evidence overcome an informant's lies.

One of the most egregious cases of civil rights abuse occurred in 2006 when 92-year-old Kathryn Johnson was shot to death in her Atlanta home when the Atlanta Police Department officers burst into her house to execute a search warrant obtained through a false affidavit. In the affidavit to obtain the warrant for Ms. Johnson's home, police officers Gregg Junnier and Jason Smith claimed that an informant had bought drugs inside the home while they waited outside. After the shooting, the informant in question, Alex White denied ever making a drug purchase in Ms. Johnson's home. The officers threatened White and gave him a fabricated story to tell investigator but White refused to lie for the officers. Instead, he went to federal authorities, exposing the officers. The officers pled guilty to manslaughter on April 27th of this year. In other examples, informants' fabricated evidence falsely accusing citizens of Hearne, Texas and Dallas, Texas. In 2002, in the town of Hearne, the uncorroborated word of an informant led to the arrest of 15% of the Hearne's African-American men ages 18–34; Hearne is a 5,000 person rural community in East Texas.

Mr. Chairman, the informant institution has a disproportionate negative impact on low-income, high-crime, urban communities in which many residents—as many as 50% of African American males in some cities—are in contact with the criminal justice system. They are therefore potentially under pressure to provide information to gain leniency.

In recent years, it has become clear that programs funded by the Edward Byrne Memorial Justice Assistance Grant program unintentionally have exacerbated racial disparities, led to corruption in law enforcement, and resulted in civil rights abuses across the country. This is especially the case when it comes to the program's funding of hundreds of regional narcotics task forces. These task forces, which have often lacked meaningful state or federal oversight and therefore are prone to corruption, are at the center of some of the most egregious law enforcement scandals.

One of the better known federally-funded drug task force scandals occurred in Tulia, Texas several years ago. In Tulia, 15% of the African American population was arrested, prosecuted, and sentenced to decades in prison based on the uncorroborated testimony of a federally-funded undercover officer who had a record of racial impropriety in enforcing the law. The Tulia defendants have since been pardoned, but similar scandals continue to plague the Byrne grant program.

These scandals are not the result of a few "bad apples" in law enforcement; they are the result of a fundamentally flawed bureaucracy that is prone to corruption by its very structure. Byrne-funded regional anti-drug task forces are federally-funded, state managed, and locally staffed, which means they do not really answer to anyone. In fact, their ability to perpetuate themselves through asset forfeiture and federal funding makes them unaccountable to local taxpayers and governing bodies.

That is why I introduced H.R. 253, (the "No More Tulias: Drug Law Enforcement Evidentiary Standards Improvement Act") to address the issue of confidential informant abuse. The bill prohibits a state from receiving for a fiscal year any drug control and system improvement (Byrne) grant funds under the Omnibus Crime Control and Safe Streets Act of 1968, or any amount from any other law enforcement assistance program of the Department of Justice, unless the state does not fund any anti-drug task forces for that fiscal year or the state has in effect laws that ensure that: (1) a person is not convicted of a drug offense unless the facts that a drug offense was committed and that the person committed that offense are supported by evidence other than the eyewitness testimony of a law enforcement officer (officer) or individuals acting on an officer's behalf; and (2) an officer does not participate in a anti-drug task force unless that officer's honesty and integrity is evaluated and found to be at an appropriately high level. The bill also requires states receiving federal funds under this Act to collect data on the racial distribution of drug charges, the nature of the criminal law specified in the charges, and the jurisdictions in which such charges are made.

We need to continue to seek solutions that will put in place effective guidelines for using confidential Informants in order to avoid civil rights abuses. I look forward to hearing from our witnesses today in our attempt to gain some guidance on this very serious matter.

Thank you. I yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE BETTY SUTTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO, AND MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you very much, Chairman Scott and Chairman Nadler for holding this hearing to call attention to an issue of vital importance.

And I would like to thank you, Congressman Forbes, Congressman Franks and all of my colleagues for the very warm welcome I've received as a new Member of the Committee and of the Crime Subcommittee. I'm deeply honored by the chance to serve with all of you.

It's my hope that today's hearing will shed some shed some light on a part of our criminal justice system that has not received the kind of Congressional scrutiny it deserves.

The relationship between confidential informants and law enforcement resides in a bit of a grey area. The very nature of those relationships precludes total transparency, but the lack of oversight and accountability may be inviting abuse.

There is no doubt that the use of confidential informants is critical to law enforcement. There is also no doubt that the practice contains a substantial risk of error.

Striking the right balance, and applying the right standards is critical.

It's critical because, when that balance is not struck, innocent third parties sometimes pay the price.

At the state and local levels, we lack uniform standards to deal with confidential informants, and, as such, there is little evidence that speaks to the reliability of informants, the propriety of deals that are made, and other important considerations.

What's missing from our current system is a way to ensure all parties involved remain accountable. This hearing is a first important step in exploring the best way to accomplish this.

The Department of Justice has formulated a set of guidelines for the use of confidential informants that have been successfully employed at the federal level; the state of Texas has reevaluated their system of task forces in order to provide better oversight.

By learning from the successes of these and other systems, I hope we will be able to find a way to implement appropriate federal guidelines on confidential informants that will strengthen the integrity of our criminal justice system.

I look forward to the testimony of today's panelists as we explore this issue, and I would like to thank all of them for taking the time to join us today.

Thank you, Mr. Chairman. I yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE TRENT FRANKS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA, AND RANKING MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Thank you, Chairman Scott and Chairman Nadler for holding this joint oversight hearing on law enforcement confidential informant practices.

Human sources play an important role in criminal investigations. On July 17th, police in California arrested a Mexican immigrant one year to the day after a hit-and-run in Oregon that killed a young jogger. A confidential source informed police that the suspect had fled back to Mexico. Luckily, a subsequent tip from a second confidential source led police to Lodi, California, where the suspect was arrested.

In Port Richey, Florida, a tip from a confidential informant led police to the house of a man who had been holding a 19-year-old mentally ill woman as a sex slave for himself and eight other men.

A confidential source also tipped off police in Waynesboro, Pennsylvania, that a man charged with threatening to kill three police officers was plotting to shoot courthouse employees and blow up the courthouse.

These are but three examples of the numerous criminal cases that are aided or even solved with the help of confidential sources. I welcome the opportunity today to review the use of confidential informants and to discuss ways that law enforcement can improve their procedures for human sources.

The nation's law enforcement agencies have the tremendous responsibility of balancing the use of human sources with the protection of civil liberties and due process rights. Any law enforcement tool that is misused to the detriment of these rights does a disservice to our criminal justice system.

We will hear today about the 1999 drug arrests in Tulia, Texas. In one day, ten percent of the African American population of Tulia was arrested on drug charges stemming from an undercover drug operation. The court later threw out the thirty-

eight convictions from this sting finding that they were based solely on the unreliable testimony of one person.

Although the convictions were tossed and the remaining arrestees were released, the damage had been done. Damage to the reputations and civil rights of those who were wrongly accused and damage to the community's trust in law enforcement.

My hope today is to learn what steps can be taken by state and local law enforcement agencies to prevent these tragedies and ensure accurate, comprehensive investigating of criminal offenses.

I look forward to hearing from our witnesses and I yield back the balance of my time.

THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES

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I. GENERAL PROVISIONS

A. PURPOSE AND SCOPE

1. The purpose of these Guidelines is to set policy for all Department of Justice (DOJ) personnel regarding the use of all Confidential Human Sources, as further defined below, that are operated by the Federal Bureau of Investigation (FBI) in any of the FBI's investigative programs or other authorized information collection activities.

2. These Guidelines are issued under the authority of the Attorney General as provided in Title 28, United States Code, Sections 509, 510, and 533.

3. These Guidelines are mandatory and supersede: the Attorney General's Guidelines Regarding the Use of Confidential Informants (May 30, 2002), to the extent that they apply to the FBI; the Attorney General Procedure for Reporting and Use of Information Concerning Violations of Law and Authorization for Participation in Otherwise Illegal Activity in FBI Foreign Intelligence, Counterintelligence or International Terrorism Intelligence Investigations (August 8, 1988), to the extent that it applies to assets; and the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (October 31, 2003) ("NSIG"), to the extent that they are inconsistent with these Guidelines.[1] These

[1]However, techniques whose use is authorized for validating assets, as outlined in the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection, to identify potential assets, to collect information to maintain the cover or credibility of assets, or to validate assets (including determining suitability or credibility) may continue to be utilized in relation to Confidential Human Sources in connection with activities related to threats to the national security.

Guidelines do not supersede otherwise applicable ethical and legal obligations of Department of Justice attorneys, which can, in certain circumstances (for example, with respect to contacts with represented persons), have an impact on FBI conduct.

4. These Guidelines apply to the use of a Confidential Human Source in a foreign country only to the extent that the Confidential Human Source is reasonably likely to testify in a domestic case.

5. These Guidelines do not limit the ability of the FBI to impose additional restrictions on the use of Confidential Human Sources.

6. All DOJ personnel have a duty of candor in the discharge of their responsibilities pursuant to these Guidelines.

7. These Guidelines shall be effective 180 days after they are approved by the Attorney General. However, to the extent provided in FBI policy: (i) activities commenced under pre-existing guidelines may be continued and completed in conformity with such pre-existing guidelines, notwithstanding the approval by the Attorney General and effectiveness of these Guidelines, and (ii) restrictions on the use of human sources under pre-existing guidelines which are not perpetuated by these Guidelines need not be observed following the Attorney General's approval of these Guidelines, even in relation to activities commenced under pre-existing guidelines, if the requirements of these Guidelines for such activities are satisfied. To the extent that paragraph III(A)(3)(f) cannot be fully implemented within 180 days, the FBI and the National Security Division will establish a protocol to

govern the review of sources who would otherwise be subject to that paragraph. The FBI shall adopt such measures as may be needed to effect an orderly and expeditious transition to the new Guidelines, without disruption or impediment to ongoing activities within their scope. The FBI shall keep the Deputy Attorney General, the Assistant Attorney General of the Criminal Division, and the Assistant Attorney General for National Security informed of such measures as directed by the Deputy Attorney General.

B. DEFINITIONS

1. "Special Agent in Charge" or "SAC" – the FBI Special Agent in Charge of an FBI Field Office (including an Acting Special Agent in Charge), except that the functions authorized for Special Agents in Charge by these Guidelines may also be exercised by the Assistant Director in Charge in an FBI Field Office headed by an Assistant Director, and by FBI Headquarters officials designated by the Director of the FBI.

2. "Federal Prosecuting Office" or "FPO" – any of the following Department of Justice components:

   a. The United States Attorneys' Offices;

   b. The Criminal Division;

   c. The National Security Division ("NSD");

   d. Any other litigating component of the Department of Justice with authority to prosecute federal criminal offenses, including the relevant sections of

the Antitrust Division, Civil Division, Civil Rights Division, Environmental and Natural Resources Division, and the Tax Division.

3. "Chief Federal Prosecutor" or "CFP" – the head of an FPO.

4. "FPO Attorney" – an attorney employed by, or working under the direction of, an FPO.

5. "Confidential Human Source Coordinator" – a supervisory FPO Attorney designated by the CFP to facilitate compliance with these Guidelines.

6. "FPO participating in the conduct of an investigation" – any FPO employing or directing an FPO Attorney assigned to a matter whose approval is necessary pursuant to these Guidelines, or whose approval was sought or obtained regarding any investigative or prosecutorial matter including the issuance of a search or arrest warrant, electronic surveillance order, subpoena, indictment or other related matter.

7. "Confidential Human Source" – any individual who is believed to be providing useful and credible information to the FBI for any authorized information collection activity, and from whom the FBI expects or intends to obtain additional useful and credible information in the future, and whose identity, information or relationship with the FBI warrants confidential handling.

8. "Senior Leadership Source" – a Confidential Human Source who is in a position to exercise significant decision-making authority over, or to otherwise manage and direct, the unlawful activities of the participants in a group or organization involved in unlawful activities that are:

a. nationwide or international in scope; or

b. deemed to be of high significance to the FBI's criminal investigative priorities, even if the unlawful activities are local or regional in scope.[2]

9. "High-Level Government or Union Source" – a Confidential Human Source who is either (a) in relation to the federal government or the government of a state, the chief executive, the official next in succession to the chief executive, or a member of the legislature, or (b) a president, secretary-treasurer or vice president of an international or national labor union or the principal officer or officers of a subordinate regional entity of an international or national labor union.[3]

10. "Tier 1 Otherwise Illegal Activity" — any activity that:

a. would constitute a misdemeanor or felony under federal, state, or local law if engaged in by a person acting without authorization; and

b. that involves -

(i) the commission, or the significant risk of the commission, of any act of violence by a person or persons other than the Confidential Human Source;[4]

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[2]Such organizations shall include, but are not limited to: any La Cosa Nostra Family, Eurasian Organized Crime Group, or Asian Criminal Enterprise which is recognized by FBI Headquarters; and any domestic or international Terrorist Organization, which is recognized by FBI Headquarters.

[3]The term "regional entity" shall not include a local union or a group of local unions, such as a district council, combined together for purposes of conducting collective bargaining with employers.

[4]Bookmaking that is significantly associated with, or substantially controlled by, organized crime ordinarily will be within the scope of this definition. Thus, for example, where bookmakers have a financial relationship with members or associates of organized crime, and/or

(ii) corrupt conduct, or the significant risk of corrupt conduct, by an elected public official or a public official in a high-level decision-making or sensitive position in federal, state, or local government;

(iii) the manufacturing, importing, exporting, possession, or trafficking of controlled substances in a quantity equal to or exceeding those quantities specified in United States Sentencing Guidelines § 2D1.1(c)(1);

(iv) financial loss, or the significant risk of financial loss, in an amount equal to or exceeding those amounts specified in United States Sentencing Guidelines § 2B1.1(b)(1)(I);[5]

(v) a Confidential Human Source providing to any person (other than an FBI agent) any item, service, or expertise that is necessary for the commission of a federal, state, or local offense, which the person otherwise would have difficulty obtaining; or

(vi) a Confidential Human Source providing to any person (other than an FBI agent) any quantity of a controlled substance, an explosive, firearm, or

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use members or associates of organized crime to collect their debts, the conduct of those bookmakers would create a significant risk of violence, and would therefore fall within the definition of Tier 1 Otherwise Illegal Activity.

[5]The citations to the United States Sentencing Guidelines (USSG) Manual are to the 2005 Edition. The references herein to particular USSG Sections are intended to remain applicable to the most closely corresponding USSG level in subsequent editions of the USSG Manual in the event that the cited USSG provisions are amended. Thus, it is intended that subsection (iii) of this paragraph will remain applicable to the highest offense level in the Drug Quantity Table in future editions of the USSG Manual, and that subsection (iv) of the paragraph will remain applicable to dollar amounts that, in future editions of the USSG Manual, trigger sentencing enhancements similar to that set forth in the current section 2B1.1(b)(1)(I). Any ambiguities in this regard should be resolved by the Assistant Attorney General for the Criminal Division.

other dangerous weapon, or other item that poses an immediate and significant threat to public safety, with little or no expectation of its recovery by the FBI.

11. "Tier 2 Otherwise Illegal Activity" - any other activity that would constitute a misdemeanor or felony under federal, state, or local law if engaged in by a person acting without authorization.

12. "Fugitive" – an individual:

    a. for whom a federal, state, or local law enforcement agency has placed a wanted record in the FBI's National Crime Information Center (other than for a traffic or petty offense); or

    b. for whom a federal warrant has been issued; and

    c. for whom the law enforcement agency is willing, if necessary, to seek his or her extradition to its jurisdiction.

13. "Human Source Review Committee" or "HSRC" – A committee convened pursuant to these Guidelines to review various matters under these Guidelines as set forth below in paragraph III (A).

14. "National Security Investigation" – A national security investigation as defined in Part VIII.Q of NSIG.

15. "International Terrorism Investigation" – An investigation relating to international terrorism, whether conducted under NSIG, under the Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise

Investigations (May 30, 2002), or under other guidelines issued by the Attorney General.

C. PROHIBITION ON COMMITMENTS OF IMMUNITY BY THE FBI

The FBI does not have any authority to make any promise or commitment that would prevent the government from prosecuting a Confidential Human Source for criminal activity that is not authorized pursuant to Section V below or that would limit the use of any evidence by the government, without the prior written approval of the FPO that has primary jurisdiction to prosecute the Confidential Human Source for such criminal activity. An FBI Agent must exercise due diligence to avoid giving any person the erroneous impression that he or she has any such authority.

D. MAINTAINING CONFIDENTIALITY

1. Obligation

DOJ Personnel have an obligation to maintain as confidential the identity of any Confidential Human Source. Consistent with that obligation, DOJ personnel shall not disclose the identity of a Confidential Human Source or information that Source has provided that would have a tendency to identify the Source unless disclosure is appropriate under one of the exceptions referenced below in paragraph D (4).

2. Security of Material

If the FBI provides DOJ personnel with any material containing:

a. the identity of a Confidential Human Source;

b. information that may possibly identify the Source; or

c. information that the Source has provided;

such material must be secured in a manner consistent with its security markings or classifications, when not in the direct care and custody of DOJ personnel.

3. **Continuing Obligation**

DOJ personnel have a continuing obligation after leaving employment with the Department of Justice to maintain as confidential the identity of any Confidential Human Source and the information that Source provided, unless disclosure is appropriate under one of the exceptions referenced below in paragraph D (4).

4. **Exceptions**

a. Notwithstanding paragraph I (D) (1), DOJ personnel may make appropriate disclosures:

i. to FBI Agents who need to know the identity of the Source in order to perform their official duties. However, an FPO must coordinate with the FBI Agent directing the Source to obtain the required approval of the FBI-SAC or his or her designee prior to such disclosure;

ii. to other law enforcement, intelligence, immigration, diplomatic, and military officials who need to know the identity to perform their official duties, subject to the prior approval of the FBI-SAC or his or her designee;

iii. when the Confidential Human Source has agreed to testify in a grand jury or judicial proceeding.

b. All DOJ personnel must disclose the identity of a Confidential Human Source, and the information that Source has provided, when required by court order, law, regulation, these Guidelines or other Department of Justice policies.

5. **Disclosures to Confidential Human Sources**

DOJ personnel must exercise due diligence to avoid disclosing any confidential investigative information to a Confidential Human Source (e.g., information relating to electronic surveillance, search warrants, indictments and other charging documents, or the identity of other actual or potential informants), other than what is necessary and appropriate for operational reasons.

E. EXCEPTIONS AND DISPUTE RESOLUTION

1. Whenever an FBI SAC, a CFP, or the designee of an FBI SAC or CFP, believes that extraordinary circumstances exist that warrant an exception to any provision of these Guidelines, or whenever there is a dispute between or among entities (other than a dispute with the Assistant Attorney General (AAG) of either the Criminal Division or National Security Division of the Department of Justice) regarding these Guidelines, an exception must be sought from, or the dispute shall be resolved by, the AAG for the Criminal Division or the National Security Division (whichever is appropriate) or his or her designee.

2. Whenever there is a dispute with the AAG for either the Criminal Division or National Security Division of the Department of Justice, such dispute shall be resolved by the Deputy Attorney General or his or her designee.

3. The Deputy Attorney General, or his or her designee, shall hear appeals, if any, from decisions of the Assistant Attorneys General of the Criminal Division and the National Security Division.

4. Any exception granted or dispute resolved pursuant to this paragraph shall be documented in the FBI's files.

F. RIGHTS OF THIRD PARTIES

Nothing in these Guidelines is intended to create or does create an enforceable legal right or private right of action by a Confidential Human Source or any other person.

G. COMPLIANCE

1. Within 60 days of the approval of these Guidelines by the Attorney General, the FBI shall submit an implementation plan to the respective Assistant Attorneys General for the Criminal Division and the National Security Division of the Department of Justice for review. The plan must address all the requirements imposed upon the FBI by these Guidelines.

2. Within 60 days of the approval of these Guidelines, the FBI in conjunction with the Criminal Division of the Department of Justice, shall establish a Human Source Review Committee to perform the functions set forth in Section III (A) below.

3. Within 60 days of the approval of these Guidelines, each FPO shall designate one or more supervisory FPO Attorneys to serve as "Confidential Human Source Coordinators," whose duties shall include:

   a. coordinating the responsibilities of the FPO under these Guidelines;

b. serving as a point of contact for the FBI for all matters pursuant to these Guidelines; and

c. approving matters pursuant to these Guidelines on behalf of the FPO when no other FPO Attorney has been assigned or when the assigned FPO Attorney is unavailable.

4. Each CFP and FBI-SAC shall implement comprehensive periodic training of its respective personnel regarding these Guidelines.

5. Each CFP shall coordinate with the appropriate FBI SAC to develop procedures to maximize the accessibility and availability of the FPO's Confidential Human Source Coordinators.

II. VALIDATION OF A CONFIDENTIAL HUMAN SOURCE

A. INITIAL VALIDATION

1. General

All FBI Confidential Human Sources must be subjected to the validation process as provided in these Guidelines and other FBI policies.

2. Time Limits

The FBI, in consultation with the Assistant Attorneys General of the Criminal Division and the National Security Division of the Department of Justice, shall establish reasonable time limits for subjecting a Source to the Initial Validation process that are compatible with these Guidelines and other FBI policies.

3. **Required Information**

In opening a Confidential Human Source, an FBI Agent shall document information pertaining to that Source and forward it to an appropriate FBI Supervisor for an Initial Validation. At a minimum, an FBI Agent shall provide the following information to facilitate the Initial Validation process:

a. basic identifying information that establishes the person's true identity, or the FBI's efforts to establish the individual's true identity;

b. a photograph of the person (when possible);

c. whether the person has a criminal history, is reasonably believed to be the subject or target of a pending criminal investigation, is under arrest, or has been charged in a pending prosecution;

d. the person's motivation for providing information or assistance, including any consideration sought from the government for this assistance;

e. any promises or benefits, and the terms of such promises or benefits, that are given a Confidential Human Source by the FBI, FPO or any other law enforcement agency (if known, after exercising reasonable efforts); and

f. any other information that is required to be documented in the Confidential Human Source's file pursuant to these Guidelines and FBI policies, including but not limited to, the instructions provided to the Confidential Human Source.

B. INSTRUCTIONS

1. In opening a Confidential Human Source, at least one FBI Agent, along with one additional Agent or other government official present as a witness, shall review with the Confidential Human Source instructions as required by these Guidelines and other FBI policies. At a minimum, these instructions must indicate that:

   a. information provided by the Confidential Human Source to the FBI must be truthful;

   b. the Confidential Human Source's assistance and the information provided are entirely voluntary;

   c. the United States Government will strive to protect the Confidential Human Source's identity but cannot guarantee that it will not be divulged;

   d. the Confidential Human Source must abide by the instructions of the FBI and must not take or seek to take any independent action on behalf of the United States Government.

2. The following additional instructions shall also be reviewed with a Confidential Human Source if applicable to the particular circumstances of the Confidential Human Source:

   a. The FBI on its own cannot promise or agree to any immunity from prosecution or other consideration by a FPO, a state or local prosecutor, or a Court in exchange for the Confidential Human Source's cooperation, because the decision to confer any such benefit lies within the exclusive discretion of the FPO and the Court. However, the FBI will consider (but

not necessarily act upon) a request by the Confidential Human Source to advise the appropriate FPO, the state or local prosecutor, or Court of the nature and extent of his or her assistance to the FBI;[6]

b. The Confidential Human Source has not been authorized to engage in any criminal activity and has no immunity from prosecution for any unauthorized criminal activity;[7]

c. The Confidential Human Source is not an employee of the United States Government and may not represent himself or herself as such;[8]

d. The Confidential Human Source may not enter into any contract or incur any obligation on behalf of the United States Government, except as specifically instructed and approved by the FBI;[9]

e. The FBI cannot guarantee any rewards, payments, or other compensation to the Confidential Human Source;

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[6] This instruction should be provided if there is any apparent issue of criminal liability or penalties that relates to the Confidential Human Source.

[7] This instruction should be provided to any Confidential Human Source who is not authorized to engage in otherwise illegal activity. See paragraph V (B)(3) for instructions that must be provided to a Confidential Human Source who is, in fact, authorized to engage in otherwise illegal conduct.

[8] This instruction should be provided to all Confidential Human Sources except under those circumstances where the Source has previously been, and continues to be, otherwise employed by the United States Government.

[9] This instruction should be provided to all Confidential Human sources except under those circumstances where the Source is otherwise authorized to enter a contract or incur an obligation on the behalf of the United States.

f. In the event that the Confidential Human Source receives any rewards, payments, or other compensation from the FBI, the Source is liable for any taxes that may be owed; and

g. No promises or commitments can be made, except by the United States Department of Homeland Security, regarding the alien status of any person or the right of any person to enter or remain in the United States.[10]

3. The content and meaning of each of the foregoing instructions must be clearly conveyed to the Confidential Human Source. Immediately after these instructions have been given, the FBI Agent shall require the Confidential Human Source to acknowledge his or her receipt and understanding of the instructions. The FBI Agent, and the additional Agent or other government official present as a witness, shall document that the instructions were reviewed with the Confidential Human Source and that the Source acknowledged the instructions and his or her understanding of them. As soon as practicable thereafter, an FBI Supervisor shall review and, if warranted, approve the documentation.

4. The instruction and documentation procedures shall be repeated to the Confidential Human Source whenever it appears necessary or prudent to do so, and, in any event, at least annually.

[10] This instruction should be provided if there is any apparent issue of immigration status that relates to the Confidential Human Source.

C. **ANNUAL VALIDATION REVIEW**

1. Each Confidential Human Source's file shall be reviewed at least annually consistent with these Guidelines and other FBI policies.

2. The FBI shall establish procedures to ensure that all available information that might materially alter a prior validation assessment, including, but not limited to, information pertaining to unauthorized illegal activity by the Confidential Human Source, is promptly reported to an FBI Supervisor and then recorded and maintained in the file of the Confidential Human Source.

III. SPECIAL APPROVAL REQUIREMENTS

A. **DEFINED CATEGORIES OF SOURCES**

1. **Required Early Approval**

Within 60 days of utilizing a Confidential Human Source who meets any of the following definitions, the FBI must seek written approval, in accordance with the relevant provisions set forth in paragraph III (A)(3) below, for the continued use of the Source unless an FPO Attorney has existing oversight of a Source because the Source has agreed to testify in a federal criminal prosecution:

a. "Senior Leadership Source" -- a Confidential Human Source as defined in paragraph I (B)(8), above;

b. "Privileged or Media Source" -- A Confidential Human Source who is under the obligation of a legal privilege of confidentiality or affiliated with the media;

c. "High-Level Government or Union Source" – A Confidential Human Source as defined in paragraph I (B)(9), above.

2. **Long-Term Sources**

When a Confidential Human Source has been registered for more than five consecutive years, and to the extent such a Source remains open, every five years thereafter, the FBI must seek written approval, in accordance with the relevant provisions set forth in paragraph III (A)(3) below, for the continued use of the Source.

3. **Approval Process**

All FBI requests seeking approval for the continued use of a Confidential Human Source who meets any of the definitions set forth in paragraphs III (A)(1) & (2) above, <u>except</u> those Sources providing information for use in an international terrorism investigation, national security investigation, or other activity under NSIG, shall be reviewed and determined by a Human Source Review Committee (HSRC).

a. Composition of the HSRC - - At least one HSRC shall be established by the FBI and the Criminal Division of the Department of Justice. The Chairperson of each HSRC shall be an FBI Agent at or above the level of Deputy Assistant Director (or its equivalent). The membership of each HSRC shall include: two FBI Agents, and two attorneys from the FBI's Office of General Counsel, as designated by the Chairperson; and five FPO Attorneys designated by the AAG for the Criminal Division. One of

the five FPO Attorneys shall be a Deputy AAG from the Criminal Division, and at least two of the remaining FPO Attorneys shall each be from a U.S. Attorney's Office and have relevant experience in organized crime matters. In addition, an FPO Attorney designated by the Assistant Attorney General for National Security shall be a member of the HSRC, but shall not be considered to be a voting member for purposes of determining whether continued use of a Source under review should be approved.

b. Access to FBI Information - - During the approval process, the HSRC shall have access to all relevant FBI information pertaining to the use of the Confidential Human Source under consideration, including any Annual Validation Reports. However, the identity of the Confidential Human Source will not be disclosed to the HSRC unless the Chairperson of the HSRC determines that compelling reasons exist to warrant such a disclosure.

c. Time Limit - - The HSRC approval process shall be completed no more than 45 days after the FBI has submitted a request seeking approval for the continued use of a Confidential Human Source. While the request is pending with the HSRC, the FBI shall be permitted to continue to utilize the Confidential Human Source.

d. Notice to FPO - - After a final decision has been made by the HSRC, the HSRC shall consider whether to provide notice of the decision to any appropriate FPO.

e. Disputes - - The HSRC shall recommend approval of the continued use of a Source only upon reaching a consensus, provided that whenever the FBI, an FPO, or a HSRC Member disagrees with the final decision of the HSRC, it may seek review and reconsideration of that decision pursuant to the Exceptions and Dispute Resolution section, paragraph I (E) above. While the dispute is pending resolution, the FBI shall be permitted to continue to utilize the Confidential Human Source.

f. Sources Providing Information for Use in International Terrorism Investigations, National Security Investigations, or Other Activities under NSIG - - No Confidential Human Source who is providing information for use in international terrorism investigations, national security investigations, or other activities under NSIG shall be referred to the HSRC for review. Instead, the FBI shall provide notice to the National Security Division within 60 days of FBI Headquarters' approval of the continued use of any such Confidential Human Source who is subject to the enhanced review provisions of the FBI's Confidential Human Source Validation Standards Manual. Confidential Human Sources who meet any of the definitions set forth in paragraphs III(A)(1) & (2) shall be subject to enhanced review. The Assistant Attorney General for National Security

shall designate FPO Attorneys to review the notices and associated information pursuant to the following process:

i. Upon request by the designated FPO Attorney, the FBI shall make available at FBI Headquarters to the designated FPO Attorney Validation Reports regarding the Confidential Human Source. If the Validation Reports do not permit the FPO Attorney to conduct a meaningful analysis of the propriety of continuing to use the Confidential Human Source, the FPO Attorney may ask for additional information regarding the Confidential Human Source. The identity of the Confidential Human Source shall not be disclosed to the designated FPO Attorney unless the Assistant Director or a Deputy Assistant Director of the Division that is utilizing the Confidential Human Source determines that compelling reasons exist to warrant such a disclosure. With the exception of a request for the identity of the Confidential Human Source, all requests by the FPO Attorney for further information pertaining to a Confidential Human Source shall be satisfied within a reasonable period of time. Failure to provide such information may be grounds for the National Security Division to recommend that the Deputy Attorney General disapprove continued use of the Confidential Human Source. If the Director of the FBI and the Assistant Attorney General for National Security do not agree

whether information sought is reasonably necessary in order for the FPO Attorney to conduct a meaningful analysis of the propriety of continuing to use the Confidential Human Source, any such dispute shall be resolved by the Deputy Attorney General.

ii. The designated FPO Attorney may consult with other designated FPO Attorneys and with the Assistant Attorney General for National Security concerning the continued use of the Confidential Human Source. If the Assistant Attorney General for National Security does not object to the FBI's continued use of the Confidential Human Source, no further action shall be taken. If the Assistant Attorney General for National Security objects to the FBI's continued use of the Confidential Human Source, the Assistant Attorney General shall forward a recommendation to the Deputy Attorney General that continued use of the Confidential Human Source be disapproved. While the dispute is pending resolution before the Deputy Attorney General, the FBI shall be permitted to continue to utilize the Confidential Human Source.

B. FEDERAL PRISONERS, PROBATIONERS, PAROLEES, AND SUPERVISED RELEASEES

1. Consistent with extant Department of Justice requirements, the FBI must receive the approval of the Criminal Division's Office of Enforcement Operations ("OEO") prior to utilizing as a Confidential Human Source an individual who is in the custody of the United States Marshals Service or the Bureau of Prisons, or who is under Bureau of Prisons supervision. See U.S.A.M. § 9-21.050.

2. Prior to utilizing a federal probationer, parolee, or supervised releasee as a Confidential Human Source, an FBI Supervisor shall determine whether the use of that person in such a capacity would violate the terms and conditions of the person's probation, parole, or supervised release. If the FBI Supervisor has reason to believe that it would violate such terms and conditions, prior to using the person as a Confidential Human Source, the FBI Supervisor or his or her designee must obtain the permission of a federal probation, parole, or supervised release official with authority to grant such permission, which permission shall be documented in the Confidential Human Source's files. If such permission is denied or it is inappropriate for operational reasons to contact the appropriate federal official, the FBI may seek to obtain authorization for the use of such individual as a Confidential Human Source from the Court then responsible for the individual's probation, parole, or supervised release, provided that the FBI first consults with the FPO for that District.

3. If an FPO is participating in the conduct of an investigation by the FBI in which a federal probationer, parolee, or supervised releasee would be utilized as a

Confidential Human Source or would be working with a federal probationer, parolee, or supervised releasee in connection with a prosecution, the FBI shall notify the FPO Attorney assigned to the current matter prior to using the person as a Confidential Human Source.

C. CURRENT OR FORMER PARTICIPANTS IN THE WITNESS SECURITY PROGRAM

1. Consistent with extant Department of Justice requirements, the FBI must receive the approval of OEO and the sponsoring FPO Attorney (or his or her successor) prior to utilizing as a Confidential Human Source a current or former participant in the Federal Witness Security Program, provided further that the OEO will coordinate such matters with the United States Marshals Service. See U.S.A.M. § 9-21.800.

2. If an FPO is participating in the conduct of an investigation by the FBI in which a current or former participant in the Witness Security Program would be utilized as a Confidential Human Source or would be working with a current or former participant in the Witness Security Program in connection with a prosecution, the FBI shall notify the FPO Attorney assigned to the matter prior to using the person as a Confidential Human Source.

D. STATE OR LOCAL PRISONERS, PROBATIONERS, PAROLEES, OR SUPERVISED RELEASEES

1. Prior to utilizing a state or local prisoner, probationer, parolee, or supervised releasee as a Confidential Human Source, an FBI Supervisor shall determine whether the use of that person in such a capacity would violate the terms and

conditions of the person's incarceration, probation, parole, or supervised release. If the FBI Supervisor has reason to believe that it would violate such terms and conditions, prior to using the person as a Confidential Human Source, an FBI Supervisor or his or her designee must obtain the permission of a state or local prison, probation, parole, or supervised release official with authority to grant such permission, which permission shall be documented in the Confidential Human Source's files. If such permission is denied or it is inappropriate for operational reasons to contact the appropriate state or local official, the FBI may seek to obtain authorization for the use of such person as a Source from the state or local court then responsible for the person's incarceration, probation, parole, or supervised release.

2. If an FPO is participating in the conduct of an investigation by the FBI in which a state or local prisoner, probationer, parolee, or supervised releasee would be utilized as a Confidential Human Source or would be working with a state or local prisoner, probationer, parolee, or supervised releasee in connection with a prosecution, the FBI shall notify the FPO Attorney assigned to the matter prior to using the person as a Confidential Human Source.

E. **FUGITIVES**

1. Except as provided below, an FBI Agent shall not initiate communication with a current or former Confidential Human Source who is a fugitive.

2. An FBI Agent is permitted to communicate with a current or former Confidential Human Source who is a fugitive:

a. if the fugitive Source initiates the communication;

b. if the communication is part of a legitimate effort by the FBI to arrest the fugitive; or

c. if approved, in advance whenever possible, by a Supervisor of any federal, state, or local law enforcement agency that has a wanted record for the individual in the NCIC and, in the case of a federal warrant, by the FPO for the issuing District.

3. An FBI Agent who communicates with a Confidential Human Source who is a fugitive must promptly report such communication to the appropriate federal, state or local law enforcement agency, and any other law enforcement agency having a wanted record for the individual in the NCIC, and must document those communications in the Confidential Human Source's files.

IV. RESPONSIBILITIES REGARDING CONFIDENTIAL HUMAN SOURCES

A. NO INTERFERENCE WITH AN INVESTIGATION OF A CONFIDENTIAL HUMAN SOURCE

DOJ personnel shall not interfere with or impede any criminal investigation or arrest of a Confidential Human Source. DOJ personnel shall not reveal to a Confidential Human Source any information relating to an investigation of the Source, including confirming or denying the existence of such an investigation, unless authorized to do so by the Chief Federal Prosecutor or his or her designee, after consultation with the appropriate FBI SAC or his or her designee.

B. PROHIBITED TRANSACTIONS AND RELATIONSHIPS

1. DOJ personnel directing or overseeing the direction of a Confidential Human Source shall not:

   a. exchange gifts with a Confidential Human Source;

   b. provide the Confidential Human Source with anything of more than nominal value;

   c. receive anything of more than nominal value from a Confidential Human Source; or

   d. engage in any business or financial transactions with a Confidential Human Source.

2. Unless authorized pursuant to paragraph IV (B)(3) below, any exception to this provision requires the written approval of an FBI Supervisor, in advance whenever possible, based on a finding by the FBI Supervisor that the event or transaction in question is necessary and appropriate for operational reasons. This written finding shall be maintained in the Confidential Human Source's files.

3. DOJ personnel directing or overseeing the direction of a Confidential Human Source shall not socialize with that Source, except to the extent necessary and appropriate for operational reasons.

4. If an FPO is participating in the conduct of an investigation that is utilizing an FBI Confidential Human Source or working with a Confidential Human Source in connection with a prosecution, the FBI shall provide written notification to the FPO Attorney assigned to the matter, in advance whenever possible, if the FBI

approves an exception under paragraph IV (B) or if an FBI Agent socializes with a Confidential Human Source in a manner not permitted under paragraph IV(B)(2) & (3).

C. MONETARY PAYMENTS

1. General

Monies that the FBI pays to a Confidential Human Source in the form of fees and rewards shall be commensurate with the value, as determined by the FBI, of the information or assistance the Source provided to the FBI. The FBI's reimbursement of expenses incurred by a Confidential Human Source shall be based upon actual expenses incurred, except that relocation expenses may be made based on an estimate of the expenses.

2. Prohibition Against Contingent Payments

Under no circumstances shall any payments to a Confidential Human Source be contingent upon the conviction or punishment of any individual.

3. Approval for Payments

The FBI shall establish a written delegation of authority for approval of payments to Confidential Human Sources. The delegation of authority shall establish the level of approval required when single payments, aggregate annual payments, and total aggregate payments meet or exceed specific threshold amounts. The threshold amounts and approval authority are subject to periodic review and amendment as deemed appropriate by the FBI Director.

4. **Documentation of Payment**

The payment of any FBI funds to a Confidential Human Source shall be witnessed by at least one FBI Agent and another government official. In the event of extraordinary circumstances that must be documented in the Source's file, only one witness shall be required. Immediately after receiving a payment, the Confidential Human Source shall be required to sign or initial, and date, a written receipt.[11] At the time of the payment, the FBI Agent or other government official shall advise the Confidential Human Source that the monies may be taxable income that must be reported to appropriate tax authorities. Thereafter, the FBI shall document the payment and the advice of taxability in the FBI's files. The documentation of payment shall specify whether the payment is for services or expenses.

5. **Accounting and Reconciliation Procedures**

The FBI shall establish accounting and reconciliation procedures to comply with these Guidelines. The FBI procedures shall ensure that the FBI accounts for all funds paid to a Confidential Human Source subsequent to the issuance of these Guidelines.

6. **Coordination with Prosecution**

If an FPO Attorney is participating in the conduct of an investigation or prosecution that is utilizing an FBI Confidential Human Source who is expected

[11] The Confidential Human Source may sign or initial the written receipt by using a pseudonym which has been previously approved and documented in the Source's files and designated for use by only one Confidential Human Source.

to testify, the FBI shall coordinate with the FPO attorney, in advance if practicable, any payment of monies to the Confidential Human Source pursuant to paragraph IV(C)(3) above. If the payment is to be made for services and if the FPO Attorney objects to the payment, no payment will be made until the dispute has been resolved in accordance with Section I. E. above.

V. AUTHORIZATION OF OTHERWISE ILLEGAL ACTIVITY

A. GENERAL PROVISIONS

1. The FBI shall not authorize a Confidential Human Source to engage in any activity that otherwise would constitute a criminal violation under federal, state, or local law if engaged in by a person acting without authorization, except as provided in the authorization provisions in paragraph V(B) below.

2. The FBI is never permitted to authorize a Confidential Human Source to:

   a. participate in any act of violence except in self-defense;[12] or

   b. participate in an act designed to obtain information for the FBI that would be unlawful if conducted by a law enforcement agent (e.g., breaking and entering, illegal wiretapping, illegal opening or tampering with the mail, or trespass amounting to an illegal search).

B. AUTHORIZATION PROCEDURES

1. Written Authorization

[12]The Source may take reasonable measures of self-defense in an emergency to protect his or her own life or the lives of others against wrongful force.

a. Tier 1 Otherwise Illegal Activity must be authorized by an FBI SAC and the appropriate CFP, in advance and in writing for a specified period, not to exceed 90 days, except that, with respect to all international terrorism investigations, national security investigations, or other activities under NSIG, upon request of the FBI and at the discretion of the appropriate CFP, the Otherwise Illegal Activity may be authorized for a period of up to one year.

b. Tier 2 Otherwise Illegal Activity must be authorized by an FBI SAC in advance and in writing for a specified period, not to exceed 90 days.

c. The written authorization by the FBI SAC and/or CFP of Otherwise Illegal Activity shall be as narrow as reasonable under the circumstances as to the unlawful activity's scope, geographic area, duration and other related matters.

d. For purposes of this paragraph, <u>except</u> with respect to all international terrorism investigations, national security investigations, or other activities under NSIG, the "appropriate Chief Federal Prosecutor" is the CFP that:

   i. is participating in the conduct of an investigation by the FBI that is utilizing the Confidential Human Source or is working with the Confidential Human Source in connection with a prosecution;

   ii. would have primary jurisdiction to prosecute the Otherwise Illegal Activity that would constitute a violation of federal law; or

iii. is located where the Otherwise Illegal Activity is to occur, and it only constitutes a violation of state or local law.

e. With respect to all international terrorism investigations, national security investigations, or other activities under NSIG, the appropriate Chief Federal Prosecutor is the AAG of the NSD, or designee. Within 60 days after these Guidelines are approved by the Attorney General, the AAG of the NSD shall identify designees for purposes of this paragraph, which may include DOJ personnel outside the NSD.

2. Findings

a. The FBI SAC and the CFP who authorize the Otherwise Illegal Activity must make a finding, which shall be documented in the Confidential Human Source's files, that the illegal activity is:

i. necessary either to -

A. obtain information or evidence essential for the success of an investigation that is not reasonably available without such activity, including circumstances in which the Confidential Human Source must engage in the illegal activity in order to maintain his credibility and thereby obtain the information or evidence, or

B. prevent death, serious bodily injury, or significant damage to property; and

ii. that the benefits to be obtained from the Confidential Human Source's participation in the Otherwise Illegal Activity outweigh the risks.

b. In making these findings, the FBI SAC and the CFP shall consider, among other things:

i. the importance of the investigation;

ii. the likelihood that the information or evidence sought will be obtained;

iii. the risk that the Confidential Human Source might misunderstand or exceed the scope of his authorization;

iv. the extent of the Confidential Human Source's participation in the Otherwise Illegal Activity;

v. the risk that the FBI will not be able to closely monitor the Confidential Human Source's participation in the Otherwise Illegal Activity;

vi. the risk of violence, physical injury, property damage, or financial loss to the Confidential Human Source or others; and

vii. the risk that the FBI will not be able to ensure that the Confidential Human Source does not realize undue profits from his or her participation in the Otherwise Illegal Activity.

3. **Instructions**

a. If a Confidential Human Source is authorized to engage in Otherwise Illegal Activity, at least one FBI Agent, along with one additional government official present as a witness, shall review with the Confidential Human Source written instructions that:

i. the Confidential Human Source is authorized only to engage in the specific conduct set forth in the written authorization and not in any other illegal activity (the Chief Federal Prosecutor's written authorization should be read to the Confidential Human Source unless it is not feasible);

ii. the Confidential Human Source's authorization is limited to the time period specified in the written authorization;

iii. under no circumstance may the Confidential Human Source:

A. participate in an act of violence (except in self-defense);

B. participate in an act designed to obtain information for the FBI that would be unlawful if conducted by a law enforcement agent (e.g., breaking and entering, illegal wiretapping, illegal opening or tampering with the mail, or trespass amounting to an illegal search);

C. If applicable: participate in an act that constitutes obstruction of justice (e.g., perjury, witness tampering,

witness intimidation, entrapment, or the fabrication, alteration, or destruction of evidence);

D. If applicable: initiate or instigate a plan or strategy to commit a federal, state, or local offense;

iv. if the Confidential Human Source is asked by any person to participate in any illegal activity other than the specific conduct set forth in the written authorization, or learns of plans to engage in such illegal activity, the Source must immediately report the matter to the FBI Case Agent; and

v. participation in any illegal activity other than the specific conduct set forth in the written authorization could subject the Confidential Human Source to criminal prosecution.

b. Immediately after these instructions have been given, the Confidential Human Source shall be required to sign or initial, and date, a written acknowledgment of the instructions.[13] If the Confidential Human Source refuses to sign or initial the written acknowledgment, the FBI Agent, and the additional Agent or other government official present as a witness, shall document that the instructions were reviewed with the Confidential Human Source and that the Source acknowledged the instructions and his

[13] The Confidential Human Source may sign or initial the written acknowledgment by using a pseudonym which has been previously approved and documented in the Confidential Human Source's files and designated for use by only one Confidential Human Source.

or her understanding of them. As soon as practicable thereafter, an FBI Supervisor shall review and, if warranted, approve the documentation.

4. **Precautionary Measures**

Whenever the FBI has authorized a Confidential Human Source to engage in Otherwise Illegal Activity, the FBI must take all reasonable steps to:

a. monitor closely the activities of the Confidential Human Source;

b. minimize the adverse effect of the Otherwise Illegal Activity on innocent persons; and

c. ensure that the Confidential Human Source does not realize undue profits from his or her participation in the Otherwise Illegal Activity.

5. **Suspension of Authorization**

Whenever the FBI cannot, for legitimate reasons unrelated to the Confidential Human Source's conduct (e.g., unavailability of the Case Agent), comply with the precautionary measures described above, it shall immediately:

a. suspend the Confidential Human Source's authorization to engage in Otherwise Illegal Activity until such time as the precautionary measures can be complied with;

b. inform the Confidential Human Source that his or her authorization to engage in any Otherwise Illegal Activity has been suspended until that time; and

c. document these actions in the Confidential Human Source's files.

6. **Revocation of Authorization**

a. If an FBI Agent has reason to believe that a Confidential Human Source has failed to comply with the terms of the authorization of Otherwise Illegal Activity, the FBI Agent shall immediately:

i. revoke the Confidential Human Source's authorization to engage in Otherwise Illegal Activity;

ii. inform the Confidential Human Source that he or she is no longer authorized to engage in any Otherwise Illegal Activity;

iii. comply with the notification requirement of paragraph VI (B) below;

iv. determine whether the Confidential Human Source should be closed pursuant to Section VII; and

v. document these actions in the Confidential Human Source's files.

b. Immediately after the Confidential Human Source has been informed that he or she is no longer authorized to engage in any Otherwise Illegal Activity, the Confidential Human Source should sign or initial, and date, a written acknowledgment that he or she has been informed of this fact.[14] If the Confidential Human Source refuses to sign or initial the written acknowledgment, the FBI Agent who informed the Confidential Human Source of the revocation of authorization shall document the refusal, and the source's oral acknowledgment of the information if such oral

[14] The Confidential Human Source may sign or initial the written acknowledgment by using a pseudonym which has been previously approved and documented in the Confidential Human Source's files and designated for use by only one Confidential Human Source.

acknowledgment is provided. As soon as practicable thereafter, an FBI Supervisor shall review the written acknowledgment or documentation of refusal.

7. **Renewal and Expansion of Authorization**

a. If the FBI seeks to re-authorize any Confidential Human Source to engage in Otherwise Illegal Activity after the expiration of the authorized time period, or after revocation of authorization, the FBI must first comply with the procedures set forth above in paragraphs V(B)(1)-(3).

b. If the FBI seeks to expand in any material way a Confidential Human Source's authorization to engage in Otherwise Illegal Activity, the FBI must first comply with the procedures set forth above in paragraphs V (B)(1)-(3).

8. **Emergency Authorization**

a. In exceptional circumstances, an FBI SAC and the appropriate CFP may orally authorize a Confidential Human Source to engage in Tier 1 Otherwise Illegal Activity without complying with the documentation requirements of paragraphs V (B)(1)-(3) above, when they each determine that a highly significant and unanticipated investigative opportunity would be lost were the time taken to comply with these documentation requirements, and that the circumstances support a finding required pursuant to paragraph V (B)(2). In such an event, the documentation requirements, as well as a written justification for the oral authorization,

shall be completed within 72 hours or as soon as practicable following the oral approval and maintained in the Confidential Human Source's files.

b. In extraordinary circumstances, an FBI SAC may orally authorize a Confidential Human Source to engage in Tier 2 Otherwise Illegal Activity without complying with the documentation requirements of paragraphs V(B)(1)-(3) above when he or she determines that a highly significant and unanticipated investigative opportunity would be lost were the time taken to comply with these requirements. In such an event, the documentation requirements, as well as a written justification for the oral authorization, shall be completed within 72 hours or as soon as practicable following the oral approval and maintained in the Confidential Human Source's files.

9. Designees

The FBI SAC and the CFP may agree to designate particular individuals at the supervisory level in their respective offices to carry out the approval functions assigned to them in Section V.

10. Record Keeping Procedures

a. The FBI shall maintain a file for each Confidential Human Source containing all the written authorizations, findings and instructions regarding Tier 1 Otherwise Illegal Activity, as required under Section V(B) of these Guidelines.

b. At the end of each calendar year, the FBI shall report to the Assistant Attorneys General of the Criminal Division and the National Security

Division the total number of times each FBI Field Office authorized a Confidential Human Source to engage in Otherwise Illegal Activity, and the overall nationwide totals.

c. If requested, the FBI shall provide to the Assistant Attorneys General of the Criminal Division and the National Security Division a copy of any written authorization, finding or instruction issued pursuant to Section V(B) of these Guidelines.

VI. SPECIAL NOTIFICATION REQUIREMENTS

A. NOTIFICATION OF INVESTIGATION OR PROSECUTION

1. If an FBI Agent has reasonable grounds to believe that the alleged felonious activity of a current or former Confidential Human Source is, or is expected to become, the basis of a prosecution or investigation by an FPO or a state or local prosecutor's office, the FBI Agent must immediately notify a Confidential Human Source Coordinator or the assigned FPO Attorney of that individual's status as a current or former Confidential Human Source. However, with respect to a former Confidential Human Source whose alleged felonious activity is, or is expected to become, the basis of a prosecution or investigation by a state or local prosecutor's office, no notification obligation shall arise unless the FBI Agent has reasonable grounds to believe that the Confidential Human Source's prior relationship with the FBI is material to the prosecution or investigation.

2. Whenever such a notification occurs, the Confidential Human Source Coordinator or the assigned FPO Attorney shall notify the CFP. The CFP and FBI SAC, with the concurrence of each other, shall notify any other federal, state or local prosecutor's office or law enforcement agency that is participating in the investigation or prosecution of the Confidential Human Source.

B. NOTIFICATION OF UNAUTHORIZED ILLEGAL ACTIVITY

1. If an FBI Agent has reasonable grounds to believe that a Confidential Human Source has engaged in unauthorized criminal activity (other than minor traffic offenses), the FBI shall promptly notify a Confidential Human Source Coordinator or the assigned FPO Attorney. In turn, the Confidential Human Source Coordinator or assigned FPO Attorney shall notify the following FPOs of the Confidential Human Source's criminal activity and his or her status as a Confidential Human Source:

   a. the FPO in whose District the criminal activity primarily occurred, unless a state or local prosecuting office in that District has filed charges against the Confidential Human Source for the criminal activity and there is no basis for federal prosecution in that District;

   b. the FPO Attorney, if any, who is participating in the conduct of an investigation that is utilizing the Confidential Human Source or is working with the Confidential Human Source in connection with a prosecution; and

c. the FPO Attorney, if any, who authorized the Confidential Human Source to engage in Otherwise Illegal Activity pursuant to paragraph V(B) above.[15]

2. Whenever such notifications are provided, the Chief Federal Prosecutor(s) and the FBI SAC, with the concurrence of each other, shall notify any state or local prosecutor's office that has jurisdiction over the Confidential Human Source's criminal activity and that has not already filed charges against the Confidential Human Source for the criminal activity of the fact that the Confidential Human Source has engaged in such criminal activity. The CFP(s) and the FBI SAC(s) are not required, but may with the concurrence of each other, also notify the state and local prosecutor's office of the person's status as a Confidential Human Source.

C. NOTIFICATION REGARDING CERTAIN FEDERAL JUDICIAL PROCEEDINGS

The FBI shall immediately notify an appropriate Confidential Human Source Coordinator or the assigned FPO Attorney whenever an FBI Agent has reasonable grounds to believe that:

1. a current or former Confidential Human Source has been called to testify by the prosecution in any federal grand jury or judicial proceeding;
2. the statements of a current or former Confidential Human Source have been, or will be, utilized by the prosecution in any federal judicial proceeding; or

[15] Whenever such notifications to FPOs are provided, the FBI must also comply with the Annual Validation Review requirements described above in paragraph (II)(C)(2).

3. an FPO Attorney intends to represent to a Court or jury that a current or former Confidential Human Source is or was a co-conspirator or other criminally culpable participant in any criminal activity.

D. PRIVILEGED OR EXCULPATORY INFORMATION

1. If an FPO is participating in the conduct of an investigation by the FBI that is utilizing a Confidential Human Source or working with a Confidential Human Source in connection with a prosecution, the FBI shall notify the FPO Attorney assigned to the matter, in advance whenever possible, if the FBI has reasonable grounds to believe that a Confidential Human Source will obtain or provide information that is subject to, or arguably subject to, a legal privilege of confidentiality belonging to someone other than the Confidential Human Source.
2. Whenever an FBI Agent knows or reasonably believes that a current or former Confidential Human Source has information that is exculpatory as to a target of a federal, state or local investigation, or as to a defendant (including a convicted defendant) in a federal, state or local case, the FBI Agent shall disclose the exculpatory information either to the assigned FPO Attorney that is participating, or had participated, in the conduct of the investigation or to a Confidential Human Source Coordinator.
3. In turn, the assigned FPO Attorney or Confidential Human Source Coordinator shall disclose the exculpatory information to all affected federal, state and local authorities. In the event the disclosure would jeopardize the security of a Confidential Human Source or seriously compromise an investigation, the FPO

Attorney or Confidential Human Source Coordinator shall refer the matter to the HSRC for consideration, except such matters with respect to an international terrorism investigation, national security investigation, or other activity under NSIG shall be referred to the AAG of the NSD or designee.

E. LISTING A CONFIDENTIAL HUMAN SOURCE IN AN ELECTRONIC SURVEILLANCE APPLICATION

1. The FBI shall not name a Confidential Human Source as a named interceptee or a violator in an affidavit in support of an application made pursuant to 18 U.S.C. § 2516 for an electronic surveillance order unless the FBI believes that:

   a. omitting the name of the Confidential Human Source from the affidavit would endanger that person's life or otherwise jeopardize an ongoing investigation; or

   b. the Confidential Human Source is a bona fide subject of the investigation based on his or her suspected involvement in unauthorized criminal activity.

2. In the event that a Confidential Human Source is named in an electronic surveillance affidavit under paragraph VI (E)(1) above, the FBI must inform the FPO Attorney making the application and the Court to which the application is made of the actual status of the Confidential Human Source.

F. RESPONDING TO REQUESTS FROM FPO ATTORNEYS REGARDING A CONFIDENTIAL HUMAN SOURCE

1. In any criminal matter arising under, or related to, these Guidelines, upon request by an appropriate FPO Attorney, the FBI shall promptly provide the FPO Attorney

all relevant information concerning a Confidential Human Source, including whether he or she is a current or former Confidential Human Source for the FBI.

2. If the FBI SAC has an objection to providing such information based on specific circumstances of the case, he or she shall explain the objection to the FPO making the request and any remaining disagreement as to whether the information should be provided shall be resolved pursuant to the Exceptions and Dispute Resolution section, paragraph I (E).

G. EXCEPTIONS TO THE SPECIAL NOTIFICATIONS REQUIREMENTS

The Director of the FBI, with the written concurrence of the Deputy Attorney General, may withhold any notification required pursuant to paragraphs VI (A)-(F) if it is determined that the identity, position, or information provided by the Confidential Human Source warrants extraordinary protection for sensitive national security reasons. Any such determination shall be documented and maintained in the Confidential Human Source file, along with the concurrence of the Deputy Attorney General.

H. FILE REVIEWS

If the FBI discloses any information about a Confidential Human Source to a FPO pursuant to paragraphs VI (A)-(F), the FBI SAC and the CFP shall consult to facilitate any review and copying of the Confidential Human Source's files by the FPO that might be necessary for an FPO Attorney to fulfill his or her disclosure obligations.

I. DESIGNEES

An FBI SAC and a CFP may, with the concurrence of each other, designate particular individuals in their respective offices to carry out the functions assigned to them in paragraphs VI (A)-(H).

VII. CLOSING A CONFIDENTIAL HUMAN SOURCE

A. GENERAL PROVISIONS

If the FBI determines that a Confidential Human Source should be closed for cause or for any other reason the FBI shall promptly:

1. close the individual;
2. document the reasons for the decision to close the individual as a Confidential Human Source in the Confidential Human Source's files;
3. if the Confidential Human Source can be located, notify the Confidential Human Source that he or she has been closed as a Confidential Human Source and document that such notification has been provided in the same manner as set forth in paragraph (II)(B)(3), except that, if the Confidential Human Source refuses to acknowledge his receipt and understanding of the notification, the FBI shall document the refusal; and
4. if the Confidential Human Source was authorized to engage in Otherwise Illegal Activity pursuant to paragraph V(B), immediately revoke that authorization under the provisions of paragraph V (B)(6).

B. DELAYED NOTIFICATION TO A CONFIDENTIAL HUMAN SOURCE

The FBI may delay providing the notification to the Confidential Human Source described above in paragraph of VII (A)(3) during the time such notification might jeopardize an ongoing investigation or prosecution or might cause the flight from prosecution of any person. If the decision is made to delay providing a notification, that

decision and the reasons supporting it must be documented in the Confidential Human Source's files.

C. CONTACTS WITH FORMER CONFIDENTIAL HUMAN SOURCES CLOSED FOR CAUSE

Absent exceptional circumstances that are approved by an FBI Supervisor, in advance whenever possible, an FBI Agent shall not initiate contact with or respond to contacts from a former Confidential Human Source who has been closed for cause. When granted, such approval shall be documented in the Confidential Human Source's files.

D. COORDINATION WITH FPO ATTORNEYS

If an FPO is participating in the conduct of an investigation that is utilizing an FBI Confidential Human Source or the FPO is working with a Confidential Human Source in connection with a prosecution, the FBI shall coordinate with the FPO Attorney assigned to the matter, in advance whenever possible, regarding any of the decisions described in paragraphs VII (A)-(C).

Date: 12-13-06

ALBERTO R. GONZALES
ATTORNEY GENERAL

THE CONFIDENTIAL INFORMANT ACCOUNTABILITY ACT
Proposals

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I. INTRODUCTION

The following proposals are offered as part of a comprehensive approach to improving the monitoring, quality control, and accountability of the government's use of confidential informants. Specifically, these proposals would: (1) require prosecutors to provide defendants with exculpatory impeachment material prior to plea negotiations regarding the criminal history of and benefits provided to informants used in the case; (2) require pre-trial "reliability hearings" to permit courts to test the reliability of compensated criminal informants outside the presence of the jury; and (3) require states to collect aggregate data on law enforcement use of criminal informants and their productivity.

II. DISCOVERY

A. Proposal

Prosecutors should be required to provide defendants with exculpatory material, including impeachment material regarding informants, prior to the entry of a guilty plea. Such impeachment information would include such information as: the informant's identity, criminal record, the benefits obtained or promised in connection with the case, and prior instances where the informant lied, recanted, committed perjury, or otherwise provided false information.

B. Rationale

Exculpatory impeachment information is discoverable under Brady v. Maryland, 373 U.S. 83 (1963). The government is already required to provide such information to defendants prior to trial, pursuant to United States v. Giglio, 405 U.S. 150 (1972). In 2002, however, the Supreme Court held that the government can withhold such information from a defendant if the defendant pleads guilty rather than going to trial. United States v. Ruiz, 536 U.S. 626 (2002). Ruiz's reasoning could arguably also be extended to apply to core Brady factually exculpatory material, although that was not at issue in the case. Since approximately 95 percent of federal cases are resolved by plea, the effect of Ruiz is to exempt otherwise discoverable material by postponing its production. This is unfair to defendants, who often cannot meaningfully evaluate their case without impeachment information about the confidential informants who incriminated them. It promotes gamesmanship by permitting the government to withhold otherwise discoverable material in the hopes of obtaining a plea. It conceals the policies governing the use of informants from public scrutiny because it makes it easier for the

government to hide problematic informant information by offering beneficial plea agreements. Finally, many U.S. Attorneys offices already recognize that late disclosure of Giglio material can impede plea negotiations and have the informal policy to provide it earlier than constitutionally required. Accordingly, a rule establishing that such material must be provided prior to the entry of a plea accords both with practice, accurate convictions, and fairness.

Although the timely disclosure of Giglio material potentially affects all material witnesses, it will have little impact on civilian and non-criminal witnesses for whom there will be little if any impeachment material. The primary impact will be on criminal informant witnesses who have received government promises or who have prior histories of unreliability. This is precisely the sort of material that should be disclosed prior to the entry of a guilty plea because it affects the fairness and accuracy of the process.

C. Proposed Language

The government shall provide to defendants all exculpatory material, including impeachment evidence pertaining to any government witness or informant, as defined by Brady v. Maryland and Giglio v. United States, prior to the entry of any guilty plea.

III. Reliability Hearings

A. Proposal

Upon a defendant's request, courts should be required to hold pre-trial reliability hearings in which the government would be required to establish to the satisfaction of the court the reliability of any confidential compensated informant witness, or statements made by that informant, that the government intends to use at trial. If no hearing is held, the court should be required to make a reliability determination based on the submissions of the parties.

B. Rationale

Unreliable informant witnesses are one of the single largest sources of wrongful convictions in this country. The fact that prosecutors use lying informants as witnesses, and that juries believe their perjured testimony, indicates that our current adversarial process does not effectively protect against this source of wrongful conviction. Requiring courts to establish the reliability of informant witnesses by holding pre-trial reliability hearings would prevent wrongful convictions, increase fairness to defendants, and provide better oversight of the governmental use of unreliable compensated criminal witnesses.

There is substantial precedent for such a rule. Illinois has passed legislation that requires courts to hold reliability hearings before a jailhouse snitch witness can be used at a capital trial. The federal system already requires that expert witnesses – another type of

compensated witness that tends to have an undue effect on juries – be screened by courts in hearings prior to trial pursuant to Daubert v. Merrell Dow, 509 U.S. 579 (1993) and Rule 702, Fed. R. Evid. Federal courts already have the authority to conduct reliability hearings on informants under their general pre-trial authority to screen relevant and prejudicial evidence under Rule 104, Fed. R. Evid.

It will be important to define carefully the kinds of witnesses that will be subject to reliability hearings. The rule should not interfere with current expert witness procedures. Nor should it be used to screen civilian witnesses who received meals, lodging, or travel expenses from the government to facilitate their ability to testify. It also should not be used to burden or interfere with the testimony of crime victims. It should apply to witnesses who have been used by the government as undercover informants, who have or will receive, or who reasonably believe that they will receive any form of lenience for their own crimes, avoid the institution of new criminal charges in any jurisdiction, receive direct payment, sentencing concessions (including probation or parole modifications), immunity from prosecution, the initiation or continuance of government benefits such as food stamps or pensions, or any of these aforementioned benefits for a spouse, intimate partner, or family member in exchange for their testimony.

C. Proposed Language

1. No "confidential informant" or "CI" as defined in this section shall testify in any federal hearing or trial, nor shall statements made by that CI be introduced for any purpose, unless the CI has been certified as reliable.

2. In order to certify a confidential informant as reliable, the court shall consider the following factors: (1) the CI's compensation as defined in this section, (2) the CI's own potential liability for or connection to the offense(s) charged; (3) the CI's connection to or knowledge of the defendant; (4) the CI's criminal history; (5) the CI's previous provision of information and/or testimony to the government in any jurisdiction in connection with any case; (6) the CI's reliability in connection with the provision of information in previous cases; (7) the CI's history of substance abuse and/or addiction; (8) the availability of corroborating information; (9) any other information relevant to the CI's reliability or credibility. Unless the court concludes by a preponderance of the evidence that the CI's testimony will be factually accurate in all material respects regarding the defendant's role in the offense(s), the CI shall not testify and the CI's statements shall be excluded.

3. In any case where the government intends to use a CI as a witness, or to introduce statements from a CI into evidence, the court shall hold a hearing to determine the reliability of that CI, unless a hearing is waived by the defendant, in which case the court shall issue a reliability determination based on the submissions of parties.

4. Definitions. For the purposes of this section, the following definitions shall apply:

a) "compensation" shall mean any deal, promise, inducement or benefit conferred in any jurisdiction, federal, state or local, including but not limited to formal or informal immunity from prosecution; the declination of filing of any criminal charge that could or would have otherwise been filed; avoidance of civil or criminal forfeiture; avoidance of arrest; beneficial sentencing recommendations, concessions, modifications, or reductions, including those related to probation, parole, or conditions of confinement; benefits related to bail, release conditions, or conditions of pretrial detention; the institution or maintenance of any government-sponsored benefit including pensions, food stamps, health care, housing, transportation, child care, education, or cash payments; drugs; cash payment; or any of the foregoing conferred on or promised to a spouse, intimate partner, child, parent, or other family member.

b) "confidential informant" shall mean:

(1) any person who receives or reasonably expects to receive compensation from the government in exchange for their testimony, cooperation, information, or other contributions to the investigation or prosecution of any criminal case; or
(2) an individual acting on behalf of a law enforcement officer or a person who is not a government employee but who is acting covertly on behalf of a law enforcement agency or under the color of law enforcement; or
(3) any person who meets a law enforcement agency's own definition of "confidential informant" or "confidential human source" or other similar definition and who poses significant reliability concerns.

c) "Confidential informant" shall not include:
(1) expert witnesses;
(2) the victim(s) of the offense(s) charged;
(3) any witness whose compensation is limited to expenses for food, travel, lodging, and other similar expenses incurred in connection with their testimony in the case;
(4) any witness whose compensation is limited to the receipt of a public reward.

IV. Data Collection

A. Proposal

All states receiving federal monies in connection with law enforcement or criminal justice should be required to collect data on the use of criminal informants at all stages of the criminal process, from investigations to the obtaining of warrants, to arrest, prosecution, and sentencing. To the extent possible, the data should include: the neighborhood or zip code where the informant was used; the informant's gender and race/ethnicity; the crimes committed by the informant; for each such crime, whether he/she was or was not arrested, charged, and/or convicted; the number of arrests and/or prosecutions in which the informant's information was used; the importance or weight of that information in that arrest or prosecution; and the length of time the informant has been cooperating with the government. The data should be transmitted annually in aggregate form to the Department of Justice for public dissemination and analysis.

B. Rationale

While the use of criminal informants is pervasive throughout state and local law enforcement, most jurisdictions lack any mechanism for keeping track of the number of informants used by the government and their productivity. As a public policy, it is therefore impossible to evaluate whether informant use actually makes communities safer, how many crimes they help solve, and how many they commit themselves. Because drug informants are concentrated in poor, high crime urban communities of color, there is also the problem of racial focusing in which the harms of informant use are disproportionately levied on poor black neighborhoods. States should be required to keep data on their use of informants so that criminal justice policymakers and legislatures can make rational public policy decisions about informant use. Such data will also permit the public to see how law enforcement works in their communities and permit a more informed public dialogue about law enforcement tactics.

Such a requirement would build on existing laws and regulations. States and localities are already required to provide the FBI with crime statistics, including hate crimes, in order to obtain criminal justice funding. By making these reporting requirements more sophisticated, they can provide the kinds of data that would reveal informant costs and benefits.

The purpose of the data collection is to permit a better public and governmental understanding of the use of informants and its true costs and benefits. It is not the purpose to endanger individual informants, officers, or to impede law enforcement investigations. For that reason, the publicly data should be reported in the aggregate without including individual identifying information. Such individual identifying information should be created and retained by the law enforcement agency for its own monitoring and evaluative purposes.

C. Proposed Language

1. Officer Reporting Requirements. A police officer, investigating agent, or other law enforcement officer [hereinafter "officer"] who receives any information from a confidential informant, or who offers any compensation, promise, deal, inducement or benefit to a confidential informant in the expectation of receiving such information, shall report to the law enforcement agency employing the officer information relating to the confidential informant. All such information shall be determined and reported to the best of the officer's knowledge and ability. It shall include:

a) the name or informant identification code (if such a code exists) of the informant;
b) the informant's gender;
c) the informant's race or ethnicity;
d) the informant's residence and/or locus of activity by zip code or neighborhood;
e) the nature, amount, or extent of the compensation offered, promised, or received;
f) the nature of any crimes committed by the informant or that the officer reasonably believes the informant to have committed;
g) the nature of the information sought or received from the informant, including the importance on a measurement scale [to be determined] of the information to the offense being investigated;
h) whether a warrant was sought or obtained based on the informant's information;
i) whether an arrest or conviction of another person was obtained based in whole or in part on the informant's information;
j) the nature of any illegal activity the informant did or will engage in to obtain information;
k) whether the informant previously provided information to that or another officer;
l) whether the officer gave money or drugs to the informant, or received any money or drugs from the informant;
m) whether the informant was under the influence of any intoxicating substance at the time of the interaction, and/or whether the officer reasonably believes that the informant engages in ongoing substance abuse;
n) whether the officer arrested the informant at that time or previously;
o) whether the informant possessed a gun.

2. Data Compilation Requirements

a) Every law enforcement agency shall compile and analyze the data received by the agency under this section. Each state shall designate a central agency to receive reports from all local and other agencies in that state, and to compile a final report for public dissemination and transmission to the Department of Justice.
b) Each report and final report must include:

(1) the total number of individual informant reports submitted by law enforcement officers;
(2) the total number of informants contained in officer reports, broken down by gender, race or ethnicity, and residence/locus of activity.
(3) the total number of offenses investigated using information from informants, broken down by type of offense, arrests made, and prosecutions conducted;
(4) the total number of crimes committed by or believed to have been committed by informants, broken down by type of offense;
(5) an evaluation of the productivity of the use of informants by that agency, including the commission of new crimes by informants and the types of offenses investigated and/or prosecuted based on informant information;
(6) an evaluation of the reliability of informants used by that agency, including the number of investigations or prosecutions that failed due in part or in whole to an informant's misinformation.

c) A report or final report from a local or state law enforcement agency shall not contain identifying information associated with individual informants or officers.