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The Paradoxical Role of Informers within the Criminal Justice System: A Unique Perspective

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THE PARADOXICAL ROLE OF INFORMERS WITHIN THE CRIMINAL JUSTICE SYSTEM: A UNIQUE PERSPECTIVE

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The primary function of the informer is to disclose information to law enforcement authorities which will result in a criminal investigation against a member of society.[1] The informer's role is a powerful one. Based on his knowledge, a person may be arrested, and possibly suffer loss of freedom, employment, or damage to reputation. Yet the use of informers is widespread,[2] and is often undertaken without safeguards sufficient to avoid abuse by the police.[3] Abuse of informant's information often arises in the context of pretrial warrant challenges and the entrapment defense.[4]

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1. For information concerning informants, *see generally* R. FERGUSON, THE NATURE OF VICE CONTROL IN THE ADMINISTRATION OF JUSTICE, 20-40 (1974) [hereinafter cited as VICE CONTROL]; M. HARNEY & J. CROSS, THE INFORMER IN LAW ENFORCEMENT (2d ed. 1968) [hereinafter cited as THE INFORMER]; V. LEONARD, THE POLICE, THE JUDICIARY AND THE THE CRIMINAL, 132-44 (2d ed. 1975) [hereinafter cited as THE POLICE]; D. SCHULTZ & L. NORTON, POLICE OPERATIONAL INTELLIGENCE, 108-17 (1968) [hereinafter cited as POLICE INTELLIGENCE]; J. SKOLNICK, JUSTICE WITHOUT TRIAL, 112-38 (1966); L. TIFFANY, D. MCINTYRE, JR. & D. ROTENBERG, DETECTION OF CRIME, 207-82 (1967) [hereinafter cited as DETECTION OF CRIME]; A. VOLLMER, THE POLICE & MODERN SOCIETY (1969); J. WILSON, THE INVESTIGATOR, 61-88 (1978) [hereinafter cited as THE INVESTIGATORS]. For an English view *see* Oscapella, *A Study of Informers in England*, 1980 CRIM. L.R. 136 [hereinafter cited as INFORMER IN ENGLAND].

It should be noted that some of the books cited above were written by police officers or officials and should be considered in that context.

2. *See* note 25 *infra*.

3. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1094 (1951) [hereinafter cited as *Judicial Control*]. The areas of greatest informer use are in victimless crimes. This phrase, "victimless crime," is used to include narcotics, gambling, and prostitution offenses where neither participant will generally report the crime. Informers are also valuable in the area of burgulary since the stolen items are usually sold. *Id.* at 1093. *See also* J. SKONICK, *supra* note 1, JUSTICE WITHOUT TRIAL where the author states, "[s]ince the vice control squad deals with crimes for which there are usually no complaining witnesses, vice control men must, as it were, drum up their own business." *Id.* at 116. *See also*, Note, *The Need for a Dual Approach to Entrapment*, 59 WASH. U.L.Q. 199 (1981).

"The need to use informers to investigate victimless crimes provides one further argument for a reconsideration of these offenses." INFORMERS IN ENGLAND, *supra* note 1, at 145. The use of informers may be a worse disease than the crimes which are being prevented. *Id.*

4. *See* text accompanying notes, 73-104 *infra*.

This article will explore some of the problems implicit in the use of informers. In order to do so, it will attempt to identify who are informers,[5] and examine how they are viewed by the police and the courts. Throughout the article, various proposed safeguards designed for the informer's protection will be examined. Also, the article will seek to develop a system which may ensure, to a greater degree, that the defendant accused of an unlawful act based on an informer's word be afforded a just and proper trial.[6]

I. THE INFORMER'S ROLE

Although informers may undertake their role for a variety of reasons, primarily they seek to avoid punishment for past conduct,[7]

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5. This article will focus on the relationship between police officers and informants and their related privilege. It should be noted that a similar privilege exists for reporters. As a result of the problems that can occur if the privilege is absolute, those states which recognize the privilege, extend it only to the news reporter and not to the informer. *See* ARIZ. REV. STAT. ANN. § 12-2237 (1980 Supp.). Alaska is exceptional in that the informer must consent to the disclosure. ALASKA STAT. § 09.25.190 (1977).

As with informant's privilege, opposing principles are involved. On one hand, the first amendment guarantees the freedom of the press. To achieve this freedom newspeople argue that any restraint on newsgathering will be contrary to the intent of the first amendment. If the press are forced to disclose their informants' identities, fewer informants will come forward, and the power of the press to spread ideas will be curtailed. On the other hand, opponents of reporter's privilege argue that the courts have the right to hear all the evidence and that the first amendment was never intended to extend the privilege to the press. *See generally Newsmen's Privilege Legislation*, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH (Second Printing 1975).

One example can serve to illustrate the importance of informant's privilege. In the Watergate scandal, without the informer known as "deep throat" the story may never have been revealed. *See* C. BERNSTEIN & B. WOODWARD, ALL THE PRESIDENT'S MEN (1975).

As of the mid-seventies, slightly less than one-half of the states had statutes which allowed for a newsman's privilege. It should be noted though, that the most populated states have them, such as California, New York, New Jersey, Pennsylvania, Ohio, Illinois and Michigan. *See Newsmen's Privilege Legislation*, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH (Second Printing 1975).

6. *See* text accompanying notes 69-72 *infra*.

7. THE INFORMER, *supra* note 1, set forth seven motives that induce people to inform: 1) fear of the law and its consequences; 2) revenge; 3) perverse use of the law for one's own purpose; 4) egotistical; 5) mercenary; 6) repentance or desire to reform; and 7) eccentric. *Id.* at 33-38. Harney and Cross state that "[t]he fear motive is not necessarily restricted to fear of the law or its consequences. Often we may acquire an informer who is a criminal in fear of his associates." *Id.* at 34. *See also* VICE CONTROL, *supra* note 1, at 22-23. In THE INVESTIGATORS, *supra* note 1, the author states that "[a] major motive—most investigators believe *the* major motive—of an informant is to obtain leniency on a criminal charge in exchange for information about accomplices involved in that charge or persons involved in other criminal offenses." *Id.*

gain revenge,[8] or obtain money.[9] Except for unusually public-minded citizens, most informers are former or active members of the criminal community.[10] While informers often provide evidence not otherwise available to investigators, caution by law enforcement authorities with regard to such information is imperative.[11] Justice would seem to demand that information obtained in this manner be unimpeachable, if it forms the essence of a criminal prosecution.[12] While this goal may be difficult to achieve in even the most favorable circumstances, current attitudes seem to indicate that safeguarding the rights of defendants with respect to informers is underemphasized by law enforcement authorities and courts.

In partial response to the potential prejudice resulting from unwarranted reliance on informers, police often develop their own verification system. Typically, the officer initially strives for an atmosphere of trust in order to gain the informer's confidence.[13] In so doing, derogatory terms such as "snitch" are removed from the vocabulary, and inoffensive words such as "operator"[14] or "special employee"[15] are substituted. Thus, a somewhat more favorable environment is created in which free communication can take place.

Despite attempts to construct this environment of mutual trust, however, such trust seldom exists in fact. The police seldom give the informant more information that is necessary.[16] Records as to the

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at 65 (emphasis original). *See also* JUSTICE WITHOUT TRIAL, *supra* note 1, at 125.

The motive which causes an informer to act has a relationship to the quality of the information which he produces. *See* VICE CONTROL, *supra* note 1, at 23.

For example, the informer who is motivated by revenge is usually very reliable. *Id.* at 22.

8. *See* note 7 *supra*.

9. *See* note 7 *supra*. Money is not the most common motive for informers. JUSTICE WITHOUT TRIAL, *supra* note 1, at 125. Generally, fear or avoidance of punishment are the most common factors which influence informers. POLICE INTELLIGENCE, *supra* note 1, at 110.

10. W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965). *See also* note 1, *supra*.

11. Informants are very useful in areas of the law where there is no complaining witness. *See* note 3 *surpa*. Because of the informant's various motives, though, caution is necessary. *See* note 7 *supra*.

12. *See* United States v. Reynolds, 345 U.S. 1, 12 (1953).

13. In THE INFORMER, *supra* note 1, the authors state that "[t]he officer who hopes to continue in the useful employment of informers must never misrepresent to them in matters affecting the informer personally." *Id.* at 52.

14. Katz, *Narcotics Investigations: Developing and Using Informants*, 7 POLICE L.Q. 5, 7 (Spring 1978) [hereinafter cited as Katz].

15. JUSTICE WITHOUT TRIAL, *supra* note 1, at 130.

16. To maintain complete control over the situation the police officer should not

"operators" identity are maintained in the event that he is injured or killed.[17] The drug informer, for example may be "strip-searched" before and after each purchase or contact with a potential defendant.[18] Not only do such procedures provide supporting evidence for trial, but they also serve to verify the informant's candor and reliability.[19] Thus, solely to facilitate a workable relationship between the informer and the police, an atmosphere of mutual trust appears to exist. It is, in some ways, singularly ironic that police authorities, though will to accept readily the informer's information as substantial evidence, never fully trust that source.[20]

Those authorities are also aware of the concern that the informer's sense of moral value is typically questionable, and veracity is often weak.[21] For example, some informers may seek to abuse their position by selling police information to criminal elements.[22] To the extent that the informant is in this sense somewhat unreliable, the cautious and tenuous trust relationship is justified. The irony and source of possible abuse in this system is, however, the frequency with which the informer is the source of information which leads to an arrest.[23] In-

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give the informant any responsibilities for a successful outcome of the matter under investigation. VICE CONTROL, *supra* note 1, at 25. *See also* Katz, *supra* note 14, at 7.

17. *Id.* at 8.

18. *Id.* at 11.

19. "Police observation is a necessary check on the reliability of agents." DETECTION OF CRIME, *supra* note 1, at 257.

20. *See* note 16 *supra*. Another example of the police distrust of informers can be found in that it is recommended that the police first book a possible informant before striking some sort of deal. "Many investigators make the mistake of trusting this type [one whose motive is the desire to avoid punishment] *prior* to booking him into the system on the charge against him. When this occurs, the informant really has no obligation to fulfill his promises." VICE CONTROL, *supra* note 1, at 23 (emphasis original).

There is some conflict over the type of relationship that should be established between the informant and the police officer. Ferguson in VICE CONTROL observes that "[t]he investigator should maintain a formal relationship with his informer. He must avoid personal involvement but still be familiar with the informant's activities and maintain control." *Id.* at 24-25. Other authors believe that "[a] genuine friendship based upon some degree of mutual respect will produce a far greater and more available product than all other things." POLICE INTELLIGENCE, *supra* note 1, at 110.

21. "Overwhelmingly, informants are recruited from among persons who are themselves criminals or closely connected with criminals." THE INVESTIGATORS, *supra* note 1, at 64. Ferguson in VICE CONTROL states that although an undercover police agent may have to conform to the living standards of the informer, "he does not have to adopt the informant's moral standards." VICE CONTROL, *supra* note 1, at 25.

22. Kooken, *Ethics in Police Service*, 38 J. CRIM. L.C.P.S. 172, 174-75 (1947).

23. The type of case will be a decisive factor in the use of informants. *See* note 3, *supra*. In the narcotics cases the use of informants is indispensable. THE INVESTIGATORS, *supra* note 1, at 61.

asmuch as the motivations of the informant are often questionable, and his information and operation requires extensive verification, it would seem logical that his role should be a diminished one. Instead, many arrests are made as a direct result of the informant's word.[24]

Informers are widely employed in criminal investigations.[25] In one year alone, the Federal Bureau of Investigation engaged 2,800 "operators."[26] During the previous year, this same agency paid nearly 1.5 million dollars to informants[27] for information resulting in 2,600

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24. For example, Smith v. Illinois, 390 U.S. 129 (1968), where the only true witness to the crime was the informer. *See also* Fletcher v. United States, 158 F.2d 321 (D.C. Cir. 1946).

25. Since informers are closely protected, statistics about their use is difficult to obtain. Their importance, however, is often stated by police authorities. Oscapella, *A Study of Informers in England*, 1980 CRIM. L.R. 136, 137; *supra* note 1.

Oscapella's article indicates that the English share the same problems and concerns faced by the American criminal justice system. For example, "[b]elief in the importance of informers is strong, as is the belief that an informer whose identity is revealed may suffer at the hands of disgruntled criminal colleagues." *Id.* at 137.

Oscapella states that the courts "have attempted to maintain a balance between permitting secrecy in police-informer dealings in order that necessary sources of information do not dry up, and withholding from the defendant information which might be used to secure an acquittal." *Id.* For the American version of this balancing test, *see* text accompanying notes 46-52 *infra*. By using an informant, the police obtain the conviction and avoid causing the informant to testify. *Id.* at 139. As in the United States, "[t]he judge determines whether or not to order disclosure, but the problem lies in providing to the judge the information necessary to make the decision without exposing the informer to the defendant in the process." *Id.* at 140. *See* text accompanying notes 57-72, *infra*.

Since English "courts have flatly refused, without cogent reason, to accept a defense of entrapment," the possibility of abuse through the use of informants is greater than the American system where entrapment is recognized. *Id.* at 142. However, the English courts may exclude evidence obtained through entrapment or mitigate a sentence because of it. *Id.* If informers do entrap defendants, the English solution is to sanction the police officers. *Id.* "As a result, an accused enticed by an agent provocateur can expect sympathy and little else." *Id.* at 143.

Finally the problem of motivating the informant is raised. Oscapella states that "[i]ncentives are necessary, for the informer works primarily out of self-interest. At the same time inducements to inform must not be too attractive, as this increases the likelihood that the informer will manufacture information or incite crimes." *Id.*; *See* note 45 *infra*, dealing with the contingent fee arrangement with informers. As in the U.S., the granting of immunity or the mitigation of the informer's sentence are used as incentives. *Id.* at 144.

Oscappella notes that the situation can be improved if informer-police relations are more structured. Complete absence of discretion would be impossible to achieve, but movement in that direction would curb informer abuses. *Id.* at 145-46. Overall, the English face the same problems that are present in the American system.

26. *F.B.I. Director and Congressmen Clash Over Freedom of Information Act*, 13:13 CRIME CONTROL DIGEST 10 (1979).

27. Chicago Tribune, May 4, 1978, at 8, Sec. 1.

arrests.[28] Guidelines exist with the FBI concerning the relationship of that agency as to informants.[29] The language of those guidelines clearly sets forth that informers are not, nor are they to be regarded by anyone within the Bureau, as agents or employees of the FBI;[30] a statement which acknowledges the tenuous relationship between the agency and the informer.

Perhaps more significantly, the guidelines also bluntly concede that informants assist the Bureau by using "an element of deception and intrusion into the privacy of individuals," but continue to provide that this "element" shall not include acts of violence, unlawful techniques, or criminal activities, unless authorized for purposes of a federal prosecution.[31] This last provision is particularly significant in its contain-

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28. *Id.*

29. *Attorney General Levi Announces Guidelines for F.B.I. Use of Informants*, 20 CRIM. L. REP. 2336 (1977).

30. Regardless of this distance between the informer and the F.B.I., the Bureau is cautious of maintaining the informer's anonymity. Only in the most unusual cases will the F.B.I. "burn," that is, release the name or otherwise identify, the informer, and even then only with the informer's permission. THE INVESTIGATORS, *supra* note 1, at 68.

31. *Attorney General Levi Announces Guidelines for F.B.I. Use of Informants*, 20 CRIM. L. REP. 2336 (1977).

In 1975 a Senate Select Committee held hearings on Intelligence Activities. *U.S. Congress, Senate Select Committee to Study Government Operations with Respect to Intelligence Activities, Hearings: F.B.I.*, 94th Cong., 1st Sess. 1975 [hereinafter cited as *Hearings*].

Two informers of the F.B.I., Mary Cook and Gary Rowe, testified. Although dealing with intelligence rather than criminal informers, their testimony is illuminating about informers and their roles. This exchange between Mr. Schwarz, attorney for the committee, and Gary Rowe, Klan member and F.B.I. informant, illustrates the abuses which can occur.

Mr. Schwarz: Turning to the subject of violence, what instructions, if any, were you given at the outset of your employment by the F.B.I. with respect to participation in violent activity?

Mr. Rowe: Sir, I was instructed under no conditions should I participate in any violence whatsoever.

Mr. Schwarz: Now did those instructions subsequently change?

Mr. Rowe: Yes, they did.

Mr. Schwarz: Describe the change will you, please?

Mr. Rowe: . . . The agent stated that I should try to get closer to members of this certain group and find out who they were and to get closer to them.

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Mr. Schwarz: And did you tell the F.B.I. that you would participate in violent acts?

Mr. Rowe: Before I participated in the acts, yes, I did.

* * *

Mr. Schwarz: Did the F.B.I. ever tell you when you went to these violent events that you should stand back and not participate, or did they say you were on your own and do whatever you think is necessary?

Mr. Rowe: Sir, they said, "We have to by law instruct you that you are not to

participate in any violence. However, I know you have to do this. We know it's something that you have to do and we understand it, and we need the information."

Id. at 116-17.

James B. Adams, Deputy Associate Director of the F.B.I. also testified as to the F.B.I. requirements concerning informers.

Mr. Adams: . . . our policy has been to discourage any activities which in any way might involve an informant doing something that an agent cannot do, . . . which basically is entrapment. . . .

Senator Huddleston: In the gathering of information do you have any safeguard at all, any rule as to how the informant proceeds in order to gather the information you are looking for?

Mr. Adams: Only that he proceed through legal means.

Id. at 85.

The testimony also touched on the dangers to informants, and ways to protect them.

Senator Tower: What protections are afforded to informants?

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Mr. Adams: The greatest protection in the world we can afford them is to maintain the confidential relationship which they have adopted with the F.B.I. . . . We have had informants murdered through disclosure. We have had them subjected to other violence and criminal activities, and the only protection beyond maintaining the confidentiality is once we have used them or had to expose them for some purpose we do have procedures for relocation and maintenance of them.

Id. at 96.

See note 36 *infra* dealing with the protection of witnesses under the Organized Crime Control Act of 1970. Later the problem of guidelines and control was discussed.

Mr. Adams: . . .[o]ur main concern is whether he [the informant] provided reliable information and that the information he collects is collected by legal means. We don't permit an informant to engage in any activity that an agent couldn't legally himself . . . you recruit informants in areas where they do have knowledge of criminal activities. But we even had to open investigations and prosecute some of our informants. . . .

Id. at 97.

Testimony was also elicited concerning the development of informers with the F.B.I.

Mr. Adams: We secure background information on informants. We do this to insure, as best as possible, we are dealing with a reliable, stable individual even though he may be engaged in a unstable activity. We go through this period and consider them more or less, in different terminology, probationary, potential, verifying information that he furnishes us, and everytime they [field agents] report on the status of an informant, they have to tell us what percentage of his information has been verified by other means.

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Senator Tower: . . . Sometimes, then you might recruit people that you know have committed criminal acts.

Mr. Adams: That's true.

Senator Tower: Do you promise him immunity from future prosecution in many instances to secure their cooperation.

Mr. Adams: No.

[question was rephrased and clarified]

We do have situations where during an investigation we target on one individual,

ing the potential for use and abuse by agents during their actions with informants. On the one hand, it would prohibit purely disruptive activity having no clear prosecutorial purpose; on the other hand, however, when FBI activities are undertaken for purposes of a federal prosecution, actual or tenative, illegal acts seem to be permitted.[32] In this manner, the FBI's own guidelines may provide members of the Bureau with the means by which to circumvent explicit Supreme Court rulings which serve to suppress illegally obtained evidence,[33] as these unlawful actions of the informant may never be discovered.[34] These

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the lower rung, and the U.S. attorney and the Department offer immunity. We don't.

Id.

Later in his testimony Mr. Adams explained the role of informers and how the entrapment problem arises.

Mr. Adams: The difficulty . . . is retaining the confidentiality of the individual, and trying, through use of the informant, to obtain evidence which could be used independently of the testimony of the informant so that he can continue operating as a criminal informant.

Senator Tower: Are these informers ever authorized to function as provocateurs?

Mr. Adams: No, sir, they're not. We have strict regulations against using informants as provocateurs. This gets into the delicate area of entrapment, ... That providing an individual has a willingness to engage in an activity, the Government has the right to provide him the opportunity. This does not mean, of course, that mistakes don't occur in this area, but we take whatever steps we can to avoid this. Even the law has recognized that informants can engage in criminal activity. . . . If we have a situation where we felt that an informant has become involved in some activity in order to protect or conceal his use as an informant, we go right to the U.S. Attorney or to the Attorney General to try to make sure we are not stepping out of bounds insofar as the use of our informants.

Id. at 133-34.

Further, Mr. Adams stresses the importance of informers in criminal law.

Mr. Adams: When I look at informants and see that each year informants locate 5,000 figutives, they locate subjects in 2,000 more cases, they recover $86 million in stolen property and contraband, . . . we have almost reached a point in the criminal law where we don't have much left. . . . They [informants] are absolutely essential to law enforcement.

Id. at 155.

32. *See* note 31 *supra.*

33. Mapp v. Ohio, 367 U.S. 643 (1961); *see also*, Weeks v. United States, 232 U.S. 383 (1914).

34. For example, the police may suspect that X has drugs hidden in his apartment, but do not have the necessary probable cause which would allow a search warrant to be issued. They call in their informant, tell him what they suspect and ask him if he can get into the apartment to check out the information. This is not suggesting that the police order or intend the informer to illegally enter X's apartment; the police may believe that the informer can legitimately gain entrance. If, however, the informer does break into X's apartment and discovers the location of the drugs, he may report back to the police that X invited him in, and while there learned the location where the drugs were kept. The police then may be able to obtain a search warrant and legally

actions often remain undetected because of efforts by law enforcement officers to protect the identity of their "operators."

II. HIDING THE INFORMER

A. *Safety and Credibility*

Police do have well-grounded fears concerning the safety of informers.[35] A Presidential Commission has recognized that intimidation can and often does occur once an informant is exposed.[36] Also recognizing this danger, various levels of law enforcement agencies have developed several techniques which serve to deceive the accused as to the informant's existence, thereby eliminating any need for the latter's presence during trial while at the same time retaining all

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search X's apartment. In this hypothetical, the illegal nature of the informer's behavior may never be exposed, and the police have circumvented the exclusionary rule.

35. "The ultimate cost to the informant is, of course, being killed in reprisal for his cooperation." THE INVESTIGATORS, *supra* note 1, at 70. However, the author of THE INVESTIGATORS conducted a random sample of 43 informants in drug enforcement cases. None had been killed after two years and only two had quit because of threats. *Id.* The author gives a reason for the seeming disparity between the potential threat to informers and the actual consequences. "[I]n fact, the world of street dealing is so localistic and the number of groups and organizations active on the street so large that a dealer can defect in one place and, by moving a few blocks away, resume business in another." *Id.* at 71.

36. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 462 (1968).

Congress recognized the dangers to informants when passing the Organized Crime Control Act of 1970, 84 Stat. 923 (1970). Title V of that Act is entitled Protected Facilities for Housing Government Witnesses. Sections 501 and 502 provide:

> Sec. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.
>
> Sec. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.

Id. at 84 Stat. 933.

For further information concerning the effectiveness of these sections, *see* Newsweek, March 8, 1976 at 90; and Newsweek, Jan. 5; 1981 at 42.

benefits derived from the informant's knowledge and activity.[37] The overall objective of many of these techniques is to protect the informant, and not the accused or his rights, by removing the need for having the informant actually testify at trial.[38]

In cases involving the alleged use of narcotics, for instance, this objective of minimizing the risk of informant identification is accomplished if the informant only introduces the undercover agent to the target, without purchasing any narcotics.[39] The informant's purpose is a limited one. The agent then actually pursues the transaction with the target, thereby eliminating any necessity for having the informant directly involved.[40] This techinque may often be employed in conjunction with a second device of deception designed to protect the informant. The police may delay making any actual arrest in order that the target will be less likely to remember who introduced him to the undercover agent. The delay period serves to minimize any possible association between the undercover agent and the informer, and to protect the latter's anonymity.[41] The defendant thus remains singularly unaware of the informant's role in bringing about his arrest and possible conviction.[42]

Keeping the informant out of court and his identity secret helps guarantee his safety. Safety is not the only reason an informer's identity may be hidden. Law enforcement authorities often have a more practical and less altruistic concern in mind. Criminals have little credibility before juries.[43] Again, as pointed out above, most informers are either criminals or at least associate with criminals.[44] This problem of creditibility, therefore, would be of great concern if informants were forced to testify as witnesses. Credibility may be diminished even further if the informant is working for money, and gaining

37. Basically, "the police attempt to use the informant as a *tipster* about the location of criminal activities rather than as a *witness* or as a *participant* in the crime." JUSTICE WITHOUT TRIAL, *supra* note 1, at 133 [emphasis original].

38. THE INVESTIGATORS, *supra* note 1, at 71.

39. This introduction is called "duking in." *Id.*

40. *Id.*

41. Refraining from the "buy and bust" is one way the police avoid burning the informant's identity. DETECTION OF CRIME, *supra* note 1, at 258. Another way the police can protect their informant is to "double-duke" in another agent, thereby giving the informant an opportunity to disavow any knowledge of the agent who made the arrest. THE INVESTIGATORS, *supra* note 1, at 71. Finally, if confronted the informant can always lie and state that he did not know that the person was an agent. *Id.*

42. *See* note 37 *supra*.

43. Since conviction of a crime has such as influence on juries the Federal Rules of Evidence limit the admissibility of it. *See* FED. R. EVID. 609.

44. *See* note 10 *supra*.

more income with a correspondingly greater number of arrests that are made as a result of his information.[45] This practical concern for the witness's credibility is obviated if the undercover agent testifies at trial. The informant is neither in personal danger nor in a position potentially to undermine the prosecution's case.

B. A Balancing of Interests

The same two reasons that lead police to hide informers may also serve to provide some rationalization for certain abuses of the informer. Law enforcement officials can frequently urge that they are seeking only to protect the informer. On the other hand, the accused may argue, with some degree of validity, that his constitutional right to a fair trial and to confront all accusers is limited in cases in which all witnesses cannot be cross-examined.[46]

In *Roviaro v. United States*,[47] the Supreme Court recognized the informer's privilege. The Court stated that "[w]hat is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law."[48] The government's privilege to withhold disclosure of the informant's identity is not absolute[49] in criminal proceedings. Although strong considerations are given to a legitimate public policy interest in protecting effective law enforcement,[50] other limitations exist. The

45. *See generally* 13 A.L.R. FED. 905-15, which is entitled Admissibility in Federal Criminal Trial of Testimony of Informers Hired Under Contingent Fee Arrangement.

46. U.S. CONST. amend. VI.

In rare cases, it may be necessary for the informant to testify. In one such case the informant testified with a fictitious name and refused to state a home address. Smith v. Illinois, 390 U.S. 129 (1968). Obviously, the actions were for personal safety. Despite such concerns, the Supreme Court held that this procedure denies the defendant a right to effective cross-examination in contradiction of the sixth amendment and the right to confront accusers. To forbid inquiry as to name and address is to circumvent effectively the ability to impeach the credibility of the witness.

There have been a few instances where an informer has successfully testified without divulging a name or address. United States v. Crockett, 506 F.2d 759 (5th Cir. 1975); United States v. Palermo, 410 F.2d 468 (7th Cir. 1969). This was permitted because of a demonstrated safety problem to the witness. The burden of proving such a need is upon the prosecution. It cannot be conjecture, but must be a real necessity. 410 F.2d at 472. *See also* Shaw v. Varelli, 407 F.2d 735 (7th Cir. 1969); United States v. Illinois, 394 U.S. 214 (1969).

47. 353 U.S. 53 (1957).

48. *Id.* at 59.

49. There is no absolute rule requiring disclosure of the informant's identity. McCray v. Illinois, 386 U.S. 300, 311 (1966).

50. United States v. Kelly, 449 F.2d 329, 330 (9th Cir. 1971) (where mere speculation was insufficient to overcome the public policy).

right to disclosure of the informer's identity is most compelling in those cases in which his identity is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause."[51] Thus there develops a balancing of interests where the defendant's need for disclosure is weighed against the public's interest in free flowing information to police authorities.[52]

C. *Establishing the Need for Disclosure*

The case law recognizes and "seeks to balance two competeting objectives— . . . guaranteeing a fair trial to persons accused as a result of evidence gathered with the aid of informants and ensuring that law enforcement can be effective."[53] The court must give due deference to these dual concerns based upon facts which are often unique to the given case before it. In so doing, the onus is upon the accused to exhibit a need for disclosure.[54] That need cannot be merely speculative,[55] but must be founded upon an actual prejudice to the defendant or to his ability to pursue a fair trial.[56] Courts may consider any number of factors. Most often weight will be given to the nature of the crime,[57] possible defenses available to the accused,[58] and the significance of the informer's role[59] in the overall scheme of law enforcement activity with respect to the accused. In essence, the degree to which disclosure is material to the accused's defense must be established by him.[60]

This burden of proof is significant. The defendant is placed in a frustrating situation of having to establish a genuine need to know the informer's identity,[61] yet such a need may become apparent to the defendant only after disclosure. As a result, the apparently even-handed balancing test may function in manner that is contradictory to its purpose.

For example, if an informant sold the defendant narcotics, evidence of such a sale may be valuable for the entrapment defense.[62] The informer, in such a case, could have been a dealer, an observer, or

51. 353 U.S. at 61.
52. *Id.* at 62.
53. THE INVESTIGATORS, *supra* note 1, at 63.
54. United States v. Estrada, 441 F.2d 873, 879 (9th Cir. 1971).
55. Lannon v. United States, 381 F.2d 858, 861 (9th Cir. 1967).
56. Wilson v. United States, 59 F.2d 390, 392 (3rd Cir. 1932). *See also* 353 U.S. at 61.
57. United States v. Conforti, 200 F.2d 365 (7th Cir. 1952).
58. *Id.*
59. *Id.*
60. 449 F.2d at 330-31.
61. *See* note 47 *supra*.
62. *See* text accompanying notes 79-104 *infra*.

a person reporting even the mere rumor of a sale. The value of such evidence was a consideration in *United States v. Kelly*.[63] Testimony in *Kelly* revealed that an individual was observed tying a package to the back of a toilet.[64] Subsequently, the package was picked up, and the defendant apprehended.[65] As a part of his defense, the accused asserted a necessity for disclosure based upon a belief that the informant had, in fact, placed the package of heroin on the toilet.[66] The defendant's request was denied, as the court found his assertion speculative, and insufficient to overcome the substantial public interest in protecting the informer.[67]

The defendant's situation is indeed ironic and perplexing. In spite of the possibility that the informer may have been a conspirator in the crime, or may have encouraged, deceived, or entrapped the defendant, the informer remains protected, and his testimony, arguably the *sine quo non* of the prosecution's case, remains unheard by the jury. As for the defendant, he may not, in cases such as *Kelly*, be able to prove who the informer was, much less establish such proof in a conclusive manner. The practical result of the balancing test is one which often poses an untenable situation for the defendant. Paradoxically, the accused cannot demonstrate a need for disclosure of the informer's identity so long as that identity remains unrevealed.[68]

Attempts at resolution of this paradox have taken the form of *in camera* disclosure.[69] Under this court procedure the informant is ques-

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63. 449 F.2d 329 (9th Cir. 1971).
64. *Id.* at 330.
65. *Id.*
66. *Id.*
67. *Id.*
68. Although the position in which the defendant is placed seems unfair, this fact alone does not necessitate a judicial remedy. For example, the "automatic standing" rule of the exclusionary rules puts the defendant in a similar position. *See* KAMISAR, LAFAVE, & ISRAEL, MODERN CRIMINAL PROCEDURE (1980) at 792.
69. United States v. Danesi, 342 F. Supp. 889, 894-95 (D. Conn. 1972); United States v. Lloyd 400 F.2d 414 (6th Cir. 1960). *See also* United States v. Jackson, 384 F.2d 825, 827 (3rd Cir. 1967) (*in camera* proceeding upheld).

California has addressed this issue by a statute which essentially codifies court-developed procedures in regard to *in camera* hearings. The statute reads, in part, as follows:

> (d) When, in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege provided for in Section 1041 is claimed by a person authorized to do so or if a person who is authorized to claim such privilege refuses to answer any question on the ground

tioned by the district attorney before the judge with the purpose of establishing the informer's reliability.[70] Theoretically, the judge could then determine if there existed a reasonable basis for insisting upon disclosure. Any advantages of *in camera* disclosure, however, are lost as a result of the procedure's failure to permit either the defendant or his counsel to be present during questioning of the informant.[71] No opportunity is afforded the defense to challenge the informant's veracity. Without cross-examination, no adequate opportunity exists for the court to examine thoroughly the informer's prejudices, perceptions, or possible undesirable motivations. The paradox remains unresolved.

Nevertheless, the protection afforded by *in camera* hearings may be improved. The defense attorney should be present during the questioning. Alternatively, a representative of the defendant's interest could be a court-appointed attorney charged with the limited duty of listening to and, if necessary, challenging the informant's testimony. This alternative is compelling, for the defendant would benefit by having at least a representative at the *in camera* proceeding, while the informant's identity could remain protected.[72]

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that the answer would tend to disclose the identity of the informant, the prosecuting attorney may request that the court hold an *in camera* hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the *in camera* hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. A reporter shall be present at the *in camera* hearing. Any transcription of the proceeding at the *in camera* hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to its contents. The court shall not order disclosure nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the identity of the informant, unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the *in camera* hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial.

CAL. EVID. CODE § 1042 (West 1981).

70. *Id.*

71. In People v. Darden, 34 N.Y.2d 177, 313 N.E.2d 49, 345 N.Y.S.2d 582 (1974), the court allowed the defense counsel to submit written questions to the informant during the *in camera* hearing. This acts as an additional safeguard to protect the rights of the defendant. However, the answer to one question may trigger previously unthought-of inquiries, and it may be unrealistic to contend that written questions by the defense counsel are an adequate substitute for cross-examination.

72. For general discussion of the *in camera* proceedings *see* Brenner, *In Camera Hearings on Informant Disclosure: A Criticism*, 15 SANTA CLARA L. 326 (1975); *Disclosure of an Informant's Identity—The Substantive and Procedural Balance Tests*, 39 ALBANY L. REV. 561 (1975).

III. AREAS OF POTENTIAL ABUSE OF THE INFORMER'S ROLE TO DENY CERTAIN DEFENSES

A. Warrant Challenges

Attempts to discover the informant's identity arise principally in two areas: pretrial warrant challenges, and the entrapment defense. Relying on the informant, authorities may investigate and file before a magistrate an affadavit to obtain a search or arrest warrant. These warrants can be justified by an informant's knowledge so long as he is perceived as being reliable and the underlying circumstances by which the informant obtained the knowledge were such as to make the information reasonably accurate.[73] Inadequate information with respect to either of these matters[74] will render the warrant invalid as lacking probable cause.[75] Basically, this procedure deems probable cause to be a question of warrant documentation. It does not seem to safeguard adequately against situations where the informer either lied to the police or obtained his information illegally.[76]

The Supreme Court has rejected, however, the position that an absolute right of disclosure arises within the context of issuance of the pretrial warrant.[77] Again, the defendant must prove the necessity for disclosure without having any means or information by which to do so.[78] The paradox remains unresolved.

B. Preparation of the Entrapment Defense

The second area in which disclosure of the informant's identity becomes significant is in the defendant's preparation of an entrapment defense. Entrapment has its modern origins in *Sorrells v. United States*.[79] In *Sorrells*, a federal agent visited the defendant at the latter's

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73. Aquilar v. Texas, 378 U.S. 108 (1964); *see also* Spinelli v. United States, 393 U.S. 410 (1969). This article will not undertake to treat in depth the problem of probable cause from informants. *See generally* Moylan, *Hearsay and Probable Cause: An Aquilar and Spinelli Primer*, 25 MERCER L. REV. 741 (1974); LaFave, *Probable Cause From Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L.F. 1; Livermore, *The Draper-Spinelli Problem*, 21 ARIZ. L. REV. 945 (1979).

74. Aquilar v. Texas, 378 U.S. 108 (1964).

75. Spinelli v. United States, 393 U.S. 410 (1969).

76. *See* note 34 *supra*.

77. McCray v. Illinois, 386 U.S. 300 (1967).

78. *See* note 68 and accompanying text *supra*.

79. 287 U.S. 435 (1932). For the evolution and treatments of the entrapment defense, *see generally* Defeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U. SAN. FRAN L. REV. 243 (1967); Dix, *Undercover Investiations and Police Rulemaking*, 53 TEX. L. REV. 203 (1975); Groot, *The*

home. Both men had previously been members of the same military division during World War I. As they reminisced, the agent requested liquor.[80] Although the defendant initially refused, eventually he obtained some alcohol.[81] As a result, he was arrested and prosecuted.[82] The action was dismissed as the Court held that the defendant was not criminally liable; he was not "predisposed to commit the offense" which the government agent had induced.[83] Predisposition thus became the central issue with respect to the entrapment defense.

A subsequent case seemed to qualify the conclusion that predisposition was independently dispositive of the entrapment issue. In *Sherman v. United States*,[84] an informer met the defendant at a physician's office when the latter was being treated for narcotics addiction.[85] Following a substantial period of time, the informer attempted to solicit the defendant's assistance in obtaining narcotics illegally.[86] Similar to the defendant in *Sorrells*, the defendant initially refused and later agreed to secure the narcotics for the informer.[87] Pursuant to the requirement of *Sorrells*, the government maintained at trial that the defendant's prior history of narcotics sales demonstrated the requisite predisposition to commit the offense.[88]

Nevertheless, the Supreme Court held that, based upon the evidence presented, "entrapment was established as a matter of law."[89] Significantly, however, a majority of the Court refused to adopt the objective test for entrapment which had been urged by the concurring justices.[90] Simply stated, the objective test would shift the

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Serpent Bequiled Me and I (Without Scienter) Did Eat—Denial of Crime and the Entrapment Defense, 1973 U. ILL. L.F. 254; Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245 (1942); Murchison, *The Entrapment Defense in Federal Courts: Modern Developments*, 47 MISS. L.J. 573 (1976); Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 39; Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163 (1976); Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871 (1963); Note, *Entrapment*, 73 HARV. L. REV. 1332 (1960); Note, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63 (1967); and Note, *The Need for a Dual Approach to Entrapment*, 59 WASH. U.L.Q. 199 (1981).

80. 287 U.S. at 439.
81. *Id.*
82. *Id.*
83. *Id.* at 444.
84. 356 U.S. 369 (1958).
85. *Id.* at 371.
86. *Id.*
87. *Id.*
88. *Id.* at 375.
89. *Id.* at 373.
90. *See* Justice Frankfurter's concurrence at 378.

court's focus in examination of an entrapment defense. Instead of focusing on the defendant's alleged predisposition to commit an offense, the objective test would inspect police or law enforcement conduct.[91] If the police conduct was outrageous, entrapment would lie regardless of the defendant's alleged predisposition.

Notwithstanding the Court's hesitation to adopt the objective test, the majority did seem to accept the proposition that the defendant's predisposition was not necessarily dispositive with respect to the entrapment issue.[92] The Court, following *Sherman*, seemed to be willing at least to engage in some form of inquiry with respect to police conduct during apprehension of the accused.

This willingness, however, was short-lived. In *United States v. Russell*,[93] the Court again returned to focusing on the defendant's predisposition. The typical scenerio lead to the defendant's arrest in *Russell*. An official of a law enforcement agency solicited certain narcotics from the defendant. The latter was unable to manufacture such narcotics, however, without the essential ingredient of phenyl-2-propanone.[94] When the informant provided the ingredient, the defendant prepared the final product.[95] The Court upheld the conviction by studying the defendant's predisposition rather than the agent's conduct.[96] The Court, in so doing, seemed somewhat less willing to engage in any form of inquiry into police conduct.

The final and more decisive shift away from examing official participation occurred in *Hampton v. United States*.[97] Writing for a plurality of the Court, Justice Rehenquist concluded that "[i]f the

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91. In United States v. Russell, 411 U.S. 423 (1973), *infra* note 93-96, the objective test is described by the dissent as:

> when the agent's involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then—regardless of the character or propensities of the particular person induced—. . . entrapment has occurred.

411 U.S. at 445 (dissenting opinion, Justice Stewart).

92. 356 U.S. at 372. A major problem with the subjective or predisposition test is that it focuses on the accused and his past conduct. "The danger of prejudice in such a situation, particularly if the issue of entrapment must be submitted to the jury . . . is evident." *Id.* at 382 (Frankfurter, J., concurring). The defendant must then choose between foregoing the entrapment defense or taking the chance that the jury will be prejudiced after hearing of his criminal record or bad reputation. *Id.*

93. 411 U.S. 423 (1973); *supra* note 91.

94. *Id.* at 425.

95. *Id.* at 426.

96. *Id.* at 433.

97. 425 U.S. 498 (1976).

police engage in illegal activities in concert with a defendant beyond the scope of their duties, the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under applicable provisions of state or federal law."[98] *Hampton* seems to permit the conclusion that the informer, who is at least an "operative"[99] assisting the police, can actually participate in the crime and not fear entrapping the defendant.[100] Further, *Hampton* introduces yet another paradox into the area of the informer's role in law enforcement. That is, *Hampton*, at least by implication, may stand for the proposition that only the guilty can be entrapped, but only the innocent can use the entrapment defense.

Additionally, while Justice Rehenquist noted that police can be prosecuted for illegal acts, his reasoning neglected to consider the practical unlikelihood of an informer ever being likewise prosecuted for equally illegal acts. If such prosecutions were to take place, damage to the informant system may result.[101] Accordingly, the informer is well-protected against official or legal responsibility for his improper or illegal acts.

Thus, entrapment presents the defense with two difficulties: (1) learning that an entrapment in fact took place and of the informer's role, and (2) employing this knowledge in a defense. Curiously, the defendant may not even realize that an entrapment has occurred, because the informant's identity and role remain undisclosed. There is constructed, in effect, an apparatus legally designed to deceive the accused and deny him a complete right to a fair trial and adequate defense.

Without any duty recongized by the law to disclose the infomer's identity, he is free to solicit and assist otherwise lawabiding citizens to commit a crime. Additionally, once accused of the crime, the defendant must accept the burden of proving the need for disclosure of an "operator" he has no reason to believe even exists.[102] It is indeed anomalous that the legal system protects,[103] and may even reward,[104] informers often at the expense of the accused's rights.

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98. *Id.* at 490.
99. *Id.*
100. *Id.* at 486-87.
101. Potential informants would not agree to participate in police investigations, if, upon conclusion, they would face prosecution. The avoidance of prosecution is the incentive for them to inform. *See* note 7 *supra*.
102. 441 F.2d 873 (9th Cir. 1971).
103. 425 U.S. at 490.
104. *See* note 45 *supra*. Though in many cases the informer may be rewarded, an

IV. CONCLUSION

The use of informants by law enforcement authorities, though clearly necessary, is prolific and problematic. Solutions to the problem have been sporatic and often without significant effect. For example, California protects the identity of informants by statute.[105] Section

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argument can be advanced which theorizes that the informer is actually operating against his will.

As a result of police coercion in the recruitment of informers *see* note 7 *supra*, a challenge to such police procedures may occur based upon the thirteenth amendment. The thirteenth amendment proscribes slavery and involuntary servitude. U.S. CONST. amend, XIII. Certainly such police action is not slavery as it is very limited and does not deny total freedom. However, the concept of involuntary servitude may be sufficiently flexible to support the challenge.

Based on the thirteenth amendment, Congress has prohibited the ". . . holding of any person to service or labor under the system known as peonage . . . in liquidation of any debt." 42 U.S.C. § 1994 (1974). This certainly outlaws debtors' prisons and forced labor to satisfy *economic* obligations. In fact, statutory authority imposes criminal sanctions against anyone using a peonage system. 18 U.S.C. § 1581 (1966).

In order to violate these anti-peonage statutes, one must demonstrate compulsion, United States v. Shackney, 333 F.2d 475, 486 (2d Cir. 1964), and debt. 42 U.S.C. § 1994 (1974). Compulsion does not arise where one has a choice between continued service and freedom. 333 F.2d at 486. Thus, this challenge was unsuccessful in attacking the professional baseball reserve clause, Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971), since a person can always quit baseball without fear of incarceration. The only threat is loss of baseball employment. In contrast, where a state statute permitted employers to pay a convict's fine and force the criminal to work until the fine was repaid, the Court found involuntary servitude. United States v. Reynolds, 235 U.S. 133 (1914). These two cases sharpen the focus on compulsion. In *Reynolds*, there is a real threat of incarceration, and thus sufficient coercion since one has no choice but to accept the superior and overwhelming force. In *Flood*, however, the threat is something other than incarceration. While the force may be powerful, there remains freedom to choose otherwise.

Debt must also be demonstrated. This term has been broadly defined and includes work contracts. Ex parte Drayton, 153 F. 986 (D.S.C. 1907). As such, debts appear to be obligations to perform work. Arguably, the involuntary informant is under both compulsion and debt. If the informer refuses to perform, incarceration will occur. He must agree to a work program to pay the system back for not prosecuting. In short, the informer is paying a debt. Arguably, therefore, the use of informants is unconstitutional as violative of the thirteenth amendment.

105. CAL. EVID. CODE §§ 1041, 1042 (West 1981), which read as follows:

Privilege for identity of informer. (a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that

1041 seems to develop a balancing test quite similar to that outlined by the Court in *Rovario*.[106] The California Supreme Court, however, subsequently appeared to adopt "an absolute view requiring disclosure whenever the informer is a material witness to issues which could establish the accused's innocence."[107] In 1969, the legislature added section 1042(d) providing for *in camera* hearings on the question of privilege. That change would permit the presiding judge to balance the defendant's need for disclosure with the government's interest in pro-

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outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(b) This section applies only if the information is furnished in confidence by the informer to:

(1) A law enforcement officer;

(2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or

(3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2).

(c) There is no privilege under this section to prevent the informer from disclosing his identity. (Stats. 1965, c. 299, § 1041).

§1042. Adverse order or finding in certain cases

(a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material.

(b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it.

(c) Notwithstanding subdivision (a), in any preliminary hearing, criminal trial, or other criminal proceeding * * * any otherwise admissible evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the offense charged, * * * is admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure.

106. *See* text accompanying notes 47-52 *supra*.

107. Note, *Disclosure of Informers Who Might Establish the Accused's Innocence*, 12 STAN. L. REV. 256, 258 (1959); *see also* Shatz, *California Criminal Discovery: Eliminating Anachronistic Limitations Imposed on the Defendant*, 9 U. SAN FRAN. L. REV. 259 (1974).

tecting the informer. Thus, many of the advantages outlined in Part II above would follow.[108]

Nevertheless, according to at least one commentator, even the California scheme is inadequate. "Under the present statutory scheme, privilege does not become an issue until the defendant has made a sufficient showing to justify discovery."[109] The same paradox of the defendant being unable to discover the informer's role underlies the California solution. This shortcoming should not, however, obscure the fact that the California legislature has gone further than any other by at least recognizing the problem informers pose to the criminal justice system. Only through greater recognition of the informer's role and an understanding of the problems confronting the defendants accused of crimes in which informers have been used can more proper and responsive legislation result.

108. *See* text accompanying notes 69-72 *supra*.
109. Shatz, *supra* note 107, at 270.