

# RE-DEFINING FRIENDSHIP: EMPLOYMENT OF INFORMANTS BY POLICE

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“There has always been one untidy phase of police work, a distasteful but vitally important ingredient in the chemistry of manhunting . . . informers.”<sup>1</sup>

## INTRODUCTION

The investigation of President Clinton for his affair with White House intern Monica Lewinsky illustrates, among other things, the public disapproval of friends working as government informants. When Linda Tripp recorded Lewinsky’s conversation about her relationship with President Clinton for independent counsel Kenneth Starr,<sup>2</sup> the public expressed disgust at Tripp’s disloyalty to her friend, Lewinsky. Tripp had “invad[ed] [Lewinsky’s] privacy in one of the basest and most basic ways—exposing intimate moments whispered, giggled and sobbed to a trusted friend.”<sup>3</sup> Tripp’s violation of her friendship with Lewinsky impelled criticism of Tripp and sympathy for Lewinsky, even from those who disapproved of Lewinsky’s involvement with the President.<sup>4</sup> Despite the sensitive nature of the investigation of the President and the necessity of collecting accurate evidence for the impeachment trial, “the message from the people [was] clear. Whatever the field of endeavor . . . you ignore the power of privacy at your own peril.”<sup>5</sup>

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1. GARY T. MARX, *UNDERCOVER: POLICE SURVEILLANCE IN AMERICA* 152 (1988) (quoting Melvin Purvis (1936)). Throughout this comment, the terms “informer” and “informant” are used interchangeably. This is due to the fact that the courts seem to use the word “informer” while police departments tend to employ the word “informant.”

2. See Steven Lubet, *Viewpoints*, *NEWSDAY*, Aug. 25, 1999, at A39.

3. Ellen Alderman, *Making Law Respond to the Right to Be Let Alone Series: The Private Domain*, *NEWSDAY*, Feb. 28, 1999, at B6.

4. See *id.*

5. *Id.*

Throughout the investigation of the President, the public not only maintained its general belief in the importance of privacy, but also showed particular disgust with a person's willingness to participate in an invasion of her friend's privacy.

While Tripp's recorded conversation with Lewinsky engendered public disapproval, Tripp's subsequent Maryland indictment under an anti-wire tapping statute also revealed a legislative disapproval of people who betray their friends.<sup>6</sup> The Maryland law that Tripp allegedly violated,<sup>7</sup> which is similar to laws in eleven other states,<sup>8</sup> prohibits the recording of conversations without the consent of all parties to the conversation. The rationale for such legislation is that these tactics are considered "socially corrosive."<sup>9</sup> As one commentator described, "[y]ou should not have to wonder whether someone is talking to you out of friendship or instead to make a clandestine record . . . of your candid thoughts."<sup>10</sup>

Admittedly, the notion that state and local governments may employ individuals' friends and family members as informants evinces public disapproval, legislative concern, and reminders of past and present informant abuses. However, the current system, which allows local law enforcement agencies to self-regulate the employment of informants,<sup>11</sup> is sufficient and does not need legislative intervention. In support of this contention, Part I of this article provides a brief overview of Su-

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6. See Lubet, *supra* note 2.

7. See MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (1999) (requiring that all parties consent to recording of wire, oral, or electronic communication). Violations are felonies punishable by imprisonment for not more than five years and a fine of not more than \$10,000. Civil liability may include \$100 per day of violation or \$1,000, whichever is greater, plus attorney fees and litigation costs. See *id.* § 10-410.

8. See CAL. PENAL CODE §§ 631-632 (Deering 1999); CONN. GEN. STAT. § 52-570d (1999); FLA. STAT. ch. 934.03 (1999); 720 ILL. COMP. STAT. ANN. 5/14-1 to 5/14-2 (West 1999); MASS. GEN. LAWS ch. 272, § 99 (1999); MICH. COMP. LAWS § 750.539c (1999); MONT. CODE ANN. § 45-8-213 (1999); NEV. REV. STAT. ANN. § 200.620 (Michie 1999); N.H. REV. STAT. ANN. § 570-A:2 (1999); 18 PA. CONS. STAT. § 5703 (1999); WASH. REV. CODE § 9.73.030 (1999).

9. See Lubet, *supra* note 2.

10. *Id.*

11. This article includes references to informants who have various relationships with suspects. These informant-types include any combination of "witnesses, . . . co-conspirators[,] minors[,] 'cooperating subjects' in trouble with the law[,] informers who cooperate for reasons of money, ideology, or other personal goals[,] or unwitting informers (also known as middlemen, bagmen, intermediaries, and corrupt influence peddlers)." MARX, *supra* note 1, at 85.

preme Court precedent dealing with government informants. The precedent reveals that the Supreme Court has steadfastly refused to draw a line that discourages or prohibits friends, family members, or colleagues from becoming informants,<sup>12</sup> despite apparent public disapproval of, and legislative concern about, friends working as government informants. Part II examines more recent state and federal cases that have involved informants who were personally related to those on whom they informed. Part III addresses local government self-regulation of informants and includes a discussion of the advantages and disadvantages of informants. Additionally, it presents various police department regulations and safeguards that serve to protect against informant misuse.

### I. BACKGROUND: SUPREME COURT CASES

Although not all Justices have agreed with the government's use of informants in particular cases,<sup>13</sup> the Supreme Court has generally upheld governmental use of informants, regardless of informant involvement in personal or intimate relationships with suspects.<sup>14</sup> Judicial approval of informants manifests itself in three ways. First, the Supreme Court has endorsed the use of acquaintances who become informants through the acceptance of a societal assumption of risk doctrine—that is, that individuals assume the risk of disloyal acquaintances when interacting in society. Second, the risk individuals assume that persons with whom they interact may be informants extends to include an assumption of the risk that those potential informants might record their interactions. Third, although the Supreme Court recognizes the Due Process clauses of the Fifth and Fourteenth Amendments to the Constitution as limitations on the government's use of informants,

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12. See generally *Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. White*, 401 U.S. 745 (1971); *United States v. Russell*, 411 U.S. 423 (1973).

13. See, e.g., *Hoffa*, 385 U.S. at 314–15 (Warren, C.J., dissenting); *White*, 401 U.S. at 787 (Harlan, J., dissenting).

14. See generally *Hoffa*, 385 U.S. 293; *White*, 401 U.S. 745; *Russell*, 411 U.S. 423.

the threshold necessary to violate these constitutional rights<sup>15</sup> appears impossible to meet.

### A. *Societal Assumption of Risk*

A 1966 Warren Court decision authored by Justice Stewart<sup>16</sup> approved the government's continued use of acquaintances-turned-informants by acknowledging that individuals assume a risk of disloyal acquaintances when interacting in society. In *Hoffa v. United States*,<sup>17</sup> a majority of the Supreme Court refused to invalidate police action taken during the trial of James Hoffa. The police had encouraged Hoffa's friend to interact with, and report the activities of, Hoffa and his colleagues while they were on trial for other crimes.<sup>18</sup> The friend, acting as an informer, implicated Hoffa by participating in conversations that exposed Hoffa's attempt to bribe jury members. Using evidence that Hoffa had invited the informer into his hotel suite, the Court found the informer's testimony admissible,<sup>19</sup> and emphasized that Hoffa *chose* to have incriminating conversations in the presence of the informer—a choice no one had forced him to make.<sup>20</sup> The Court also found that the police officers' employment of the informant complied with the Fourth Amendment and that Hoffa's mistaken trust in a friend who had become an informer amounted to an assumption of risk "inherent in the conditions of human society."<sup>21</sup>

Chief Justice Warren dissented in *Hoffa*, finding "the nature of the official practices . . . offensive to the fair administration of justice in federal courts."<sup>22</sup> He disapproved of the decision for two main reasons. First, he felt the use of this informer invaded "basic rights made possible by prevailing

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15. The Court employs the shocks-the-conscience standard to determine whether a Due Process violation has occurred. For a brief description of this standard, see *infra* note 46.

16. See *Hoffa*, 385 U.S. 293.

17. See *id.*

18. See *id.* at 302.

19. See *id.*

20. See *id.*

21. *Id.* at 303 (quoting *Lopez v. United States*) (Brennan, J., dissenting) ("The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is . . . the kind of risk we necessarily assume whenever we speak.")

22. *Hoffa*, 385 U.S. at 315 (Warren, C.J., dissenting).

upon friendship . . . [an invasion] no less proscribed than an invasion accomplished by force."<sup>23</sup> Second, despite the government's reliance on the reports given to the federal authorities of the informer's observations of Hoffa, the informer lacked credibility.<sup>24</sup> The informer "became the equivalent of a bugging device which moved with Hoffa wherever he went,"<sup>25</sup> yet the informer faced indictments for crimes that Chief Justice Warren considered worse than Hoffa's.<sup>26</sup> Despite this, however, the government compensated this informer whose information lacked credibility.<sup>27</sup> Though dissatisfied with the employment of this particular informant, Chief Justice Warren did concede that generally "the Government must take the witnesses as it finds them."<sup>28</sup> However, by using the informer in *Hoffa*, Chief Justice Warren noted that the government did more than find the informer, it "reach[ed] into the jailhouse"<sup>29</sup> to employ him. Despite Chief Justice Warren's dissent, the Supreme Court has continued to approve of the employment of informants.

### *B. Expanded Assumption of Risk*

Five years after *Hoffa*, a plurality of the Supreme Court extended its assumption of risk doctrine with respect to informants.<sup>30</sup> In *United States v. White*,<sup>31</sup> the defendant, James White, invited a colleague into his home. Unbeknownst to the defendant, his colleague, acting as a government informer, carried a concealed radio transmitter and engaged White in conversations that were electronically overheard by federal narcotics agents.<sup>32</sup> The testimony of the eavesdropping agents was admitted and led to White's conviction for narcotics violations.<sup>33</sup>

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23. *Id.* at 314.

24. *See id.* at 320.

25. *Id.* at 319.

26. *See id.* at 321. The informer faced indictments for state and federal crimes of embezzlement, kidnapping, and manslaughter when he contacted the authorities and voiced his willingness to act as an informer against Hoffa. *See id.* at 317.

27. *See id.* at 319.

28. *Id.* at 320.

29. *See id.* at 321.

30. *See United States v. White*, 401 U.S. 745 (1971).

31. *Id.* at 760.

32. *See id.* at 747.

33. *See id.* at 746.

By approving of the informer's behavior in *White*, the Supreme Court acknowledged an additional assumption of the risk that acquaintances, even those invited into one's home, might record or electronically transmit conversations. The plurality cited past decisions like *Hoffa* and noted that, "[i]f the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence . . . ."<sup>34</sup> Noting the past acceptance of the employment of trusted acquaintances as government informers, the Court recognized "no persuasive evidence that the difference . . . between the electronically equipped and the unequipped agent is substantial enough to require discrete constitutional recognition, particularly under the Fourth Amendment which is ruled by fluid concepts of 'reasonableness.'"<sup>35</sup>

In justifying the use of electronic surveillance by informers, the plurality in *White* cited several advantages. First, electronic recordings are more reliable than the unaided memories of police agents in relaying the information that suspects actually communicate.<sup>36</sup> Second, when an informer uses electronic surveillance, the informer is less likely to change his mind about testifying or about the content of his testimony.<sup>37</sup> Third, recordings make it less likely that an informer will conceal unfavorable evidence based on a threat or injury.<sup>38</sup> Fourth, with electronic surveillance, there is a decreased chance that cross-examination will confuse the testimony.<sup>39</sup> Given the advantages of electronic surveillance in scenarios involving informers, the Court warned against being "too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable."<sup>40</sup>

Despite the plurality's approval of acquaintances becoming informants and utilizing electronic surveillance equipment, Justice Harlan's dissent questioned the hesitance to erect constitutional barriers to evidence obtained by government in-

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34. *Id.* at 752.

35. *Id.* at 752-53.

36. *See id.* at 753.

37. *See id.*

38. *See id.*

39. *See id.*

40. *Id.*

formers through transmitters or recorders.<sup>41</sup> Justice Harlan found that such behavior could “undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society.”<sup>42</sup> Justice Douglas expressed similar concerns, noting in his dissent that “[m]onitoring, if prevalent, certainly kills free discourse and spontaneous utterances.”<sup>43</sup>

### C. *The Due Process Door*

While the majority and plurality opinions of *Hoffa* and *White* respectively created rules that not only permit acquaintances to become government informers, but allow those informers to use electronic surveillance equipment, *United States v. Russell*<sup>44</sup> opened a door which could seemingly lead the surveilled to a Due Process remedy that provides protection from the informer. Although *Russell* did not involve an acquaintance who became an informer, it did involve an informer who posed as a representative of an organization that sought to control the manufacture and distribution of methamphetamine.<sup>45</sup> In seeking to gather incriminating evidence against the defendants, the informer supplied the defendants with a chemical necessary for the manufacture of methamphetamine.<sup>46</sup> Although the Court acknowledged the informer’s participation in the manufacture of the drugs, the Court found that the informer’s behavior stopped “far short of violating that ‘fundamental fairness, shocking to the universal sense of justice,’ mandated by the Due Process Clause . . . .”<sup>47</sup>

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41. *See id.* at 787 (Harlan, J., dissenting).

42. *Id.*

43. *Id.* at 762 (Douglas, J., dissenting).

44. 411 U.S. 423 (1973).

45. *See id.* at 425.

46. *See id.*

47. *Id.* at 432 (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)). The Court first used the shocks-the-conscience test in evaluating whether police violated the Due Process Clause of the Fourteenth Amendment when police pumped a suspect’s stomach in order to obtain swallowed evidence. *See Rochin v. California*, 342 U.S. 165 (1952).

In each case “due process of law” requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of

Unlike the focus on the defendants' assumption of risk in *Hoffa* and *White*, *Russell* discussed whether the government's use of an informer violated the defendant's Due Process rights. Though the Court did not find a Due Process violation in *Russell*,<sup>48</sup> it acknowledged that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."<sup>49</sup> Though the *Russell* court reveals the potential for Due Process violations in informant cases, the Supreme Court has yet to find any such violation in cases that involve informant-suspect relationships.

## II. FEDERAL COURT CASES

Despite *Russell's* "open door" to Due Process claims in cases involving government informants or agents, federal circuit courts have generally followed the Supreme Court's refusal to find Due Process violations. In fact, the federal courts have refused to find Due Process violations even in situations where the suspect and informant were family members or involved in intimate relationships.

### A. *Exploitation of Familial Relationships*

While *United States v. Penn*<sup>50</sup> does not involve the government's official employment of an informant, it does illustrate the judicial hesitancy to find a Due Process violation based on the nature of a relationship. In *Penn*, a Seattle police department investigation led officers to believe that Penn was distributing heroin from her home.<sup>51</sup> Though the police had se-

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reconciling the needs both of continuity and of change in a progressive society.

*Id.* at 172 (citation omitted). Despite the Court's articulation of evaluative factors, the shocks-the-conscience test has received criticism. Justice Scalia, for example, criticizes the Court's later use of this test, referring to it as the "*ne plus ultra*, the Napoleon Brandy, the Mahatma Ghandi, the Cellophane of subjectivity, th' ol' 'shocks-the-conscience' test." *Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., concurring) (footnote omitted).

48. *See Russell*, 411 U.S. at 432.

49. *Id.* at 431-32.

50. 647 F.2d 876 (9th Cir. 1980).

51. *See id.* at 878-79.

cured a search warrant to locate the heroin, one of the police officers questioned Penn's five-year-old child about the whereabouts of the heroin.<sup>52</sup> When the child hesitated to show the officer the location of the heroin, the officer offered the five-year-old child five dollars in exchange for the information.<sup>53</sup> With the child's assistance, the police uncovered 132.9 grams of heroin.<sup>54</sup>

Although the *Penn* court disapproved of the law enforcement tactics,<sup>55</sup> it did not find a Due Process violation.<sup>56</sup> In determining whether the police behavior shocked the conscience,<sup>57</sup> the Ninth Circuit used a totality of the circumstances approach<sup>58</sup> and evaluated three circumstances. First, the police bribed the child to provide information.<sup>59</sup> Second, the child was quite young.<sup>60</sup> Third, the child was closely related to the suspect.<sup>61</sup> Not one of these three circumstances, considered individually, violated Penn's Due Process rights.<sup>62</sup> However, because the court recognized the potential for a Due Process violation with the presence of all three circumstances, the court looked to other factors to determine whether a Due Process violation had indeed occurred.<sup>63</sup> Among the circumstances which the court considered were the legality of the search, the lack of police coercion applied to the child, the seriousness of the mother's crime, and the irregular nature of the police tactic.<sup>64</sup>

In addition to examining these circumstances, the court explained that in determining whether the police conduct shocked the conscience, it would have to consider the nature of the Penn family unit. In particular, the court noted that this family unit included a mother who involved her children in her

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52. *See id.*

53. *See id.* at 879.

54. *See id.*

55. *See id.* at 880.

56. *See id.*

57. *See* discussion *supra* note 47.

58. *See Penn*, 647 F.2d at 880 ("Due process arguments are to be 'tested by an appraisal of the totality of facts in a given case'" (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942))).

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.* at 881.

64. *See id.*

heroin-dealing business.<sup>65</sup> The court found this final factor essential because, along with the fact that the young child knew the location of the heroin, it "render[ed] quite hollow any presumption of innocence and any presumption of *normal* family roles and affairs."<sup>66</sup> The court's discussion of the Penn family's absence of innocence and normalcy contributed to its conclusion that the police behavior was not shocking to the conscience.<sup>67</sup>

The dissent in *Penn*, however, argued against the government employing a child-informant who has a familial relationship with a suspect.<sup>68</sup> Child-informants' "experience[s] could leave [them] with permanent scars . . . [that] might well cause irreparable psychological damage when the children one day realize . . . that they were instrumental in sending their parents to jail."<sup>69</sup> The majority opinion addresses this concern about potential psychological harm to child-informers and concludes that if one considers the alternative to using the child to inform on the parent,<sup>70</sup> then the police tactics do not seem shocking.<sup>71</sup>

Despite the disfavored police tactics and the potential psychological harm to the child-informer, the court did not find a Due Process violation. The court indicated, however, that it would not approve of a "systematic" government program aimed at impelling young children to inform against their parents.<sup>72</sup> Admittedly, such a program would prove destructive of

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65. *See id.* In characterizing the "manner of family unit," the court also considered that the mother had engrained hatred for Caucasians and the police into her children. *See id.* at n.6.

66. *Id.* at 882 (emphasis added). While some may find this reference to the "normal" family objectionable, the court is presumably trying to minimize the shock to the conscience resulting from the police conduct by emphasizing that "normal" families do not involve their children in drugs. In other words, the court finds that little can be more shocking to the conscience than an entire family's engagement in illegal behavior such as this.

67. *See id.*

68. *See id.* at 885-91 (Goodwin, J., dissenting).

69. *Id.* at 887-88 (Goodwin, J., dissenting).

70. The court contemplates the alternative to the child informing on the parent and determines that the child "might equally well suffer 'permanent scars and irreparable psychological damage' from the reflection that his mother led him to spend his childhood spreading heroin and misery throughout his community." *Id.* at 882.

71. *See id.*

72. *See id.* (referring to programs in societies such as those imagined by George Orwell and created by Adolf Hitler).

child-informants and their families. Therefore, even though the court found no Due Process violation, law enforcement should use child-informants sparingly.<sup>73</sup>

### *B. Intimate Suspect-Informant Relationships*

Like the Ninth Circuit's refusal to find a Due Process violation due to police conduct that exploits a close familial relationship, courts generally authorize the government's employment of informants involved in familial and intimate relationships with suspects. Not surprisingly, the aggressive campaign against drugs has frequently motivated the federal government to employ informants. Despite the frequent use of informants in drug cases, including informants who have intimate or familial relationships with suspects, the courts consistently refrain from finding Due Process violations. In *United States v. Simpson*,<sup>74</sup> the Federal Bureau of Investigation employed Helen Miller as an informant to investigate an individual suspected of dealing heroin. The FBI knew Miller as a prostitute, a heroin user, and a fugitive seeking to avoid Canadian drug charges.<sup>75</sup> Despite her background, the FBI asked Miller to initiate and sustain a friendship with defendant Simpson in order to facilitate an investigation.<sup>76</sup> During Miller's "friendship" with Simpson, Miller and Simpson regularly engaged in sexual intercourse.<sup>77</sup> Though the FBI had not instructed informant Miller to have sex with defendant Simpson, the FBI did know of Miller's sexual relationship with Simpson. The FBI nevertheless chose to maintain a "passive tolerance."<sup>78</sup> Rejecting defendant Simpson's request for a dismissal of the indictment on the basis of an outrageous conduct Due Process violation,<sup>79</sup> the Ninth Circuit Court of Appeals explained:

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73. See *infra* note 156 and accompanying text.

74. 813 F.2d 1462 (9th Cir. 1987).

75. See *id.* at 1464.

76. See *id.* at 1465.

77. See *id.* at 1465 n.3 (noting the dispute as to whether Miller and Simpson actually had sex or just engaged in foreplay). Regardless of the specifics of their relationship, such intimacy reflects the personal nature of their relationship.

78. See *id.* at 1468.

79. See *id.* at 1465.

[W]e refuse to draw fine lines based on the level of emotional intimacy inhering in a particular informant-suspect relationship. . . . [W]e note that law enforcement agents may recruit family members as informants to help investigate their relatives without violating the due process clause . . . . Exploiting an emotionally intimate relationship between lovers seems no more egregious than exploiting an emotionally intimate relationship between family members.<sup>80</sup>

Noting the acceptance of the government's employment of informants involved in familial relationships with suspects, the *Simpson* court did not find an intimate relationship between an informant and a suspect outrageous enough to constitute a Due Process violation. However, the court noted that the public would probably find such behavior "morally offensive" and deferred the regulation of such behavior to the other branches of government.<sup>81</sup>

Of course, the employment of informants is not limited to the FBI or drug cases. Several months after the Ninth Circuit decided *Simpson*, for example, the Seventh Circuit decided *United States v. Shoffner*,<sup>82</sup> a case that involved an informer monitoring a stolen-vehicle ring for an Indiana police department.<sup>83</sup> The government's informer, Mary Ann Wright, had familial relationships with several of the defendants. She was the daughter of one defendant, the mother of another defendant's child, and the niece of a third defendant. Furthermore, she had a sexual relationship with a fourth defendant.<sup>84</sup> The sexual relationship between Wright and the fourth defendant resulted in an unwanted pregnancy. Consequently, the local police department employing Wright gave her financial assistance so that she could obtain an abortion.<sup>85</sup>

Despite the intimate nature of these relationships, Wright became the government's most important witness.<sup>86</sup> In deciding whether the government's use of the informant violated the

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80. *Id.* at 1467 (citing *United States v. Penn*, 647 F.2d 876, 880-84 (9th Cir. 1980)).

81. *See id.* at 1468.

82. 826 F.2d 619 (7th Cir. 1987).

83. *See id.* at 624.

84. *See id.*

85. *See id.*

86. *See id.*

defendants' Due Process rights, the court noted that it had never before found conduct outrageous enough to find a Due Process violation<sup>87</sup> and that it would not find a violation in this case either. The court had three reasons for not finding a Due Process violation. First, the informant's misconduct of engaging in an intimate relationship with one of the defendants could not be attributed to the government.<sup>88</sup> Second, "the fact that Wright was willing to inform on her family, while it may seem morally offensive to some, raise[d] no constitutional issue."<sup>89</sup> Third, although the court questioned the appropriateness of the police department funding Wright's abortion, it refused to find a Due Process violation. "[O]ur job is not to censure police officers for every act of questionable conduct in which they engage—we leave that to those with direct responsibility for supervision of the officers involved. Our job is to interpret the Constitution."<sup>90</sup> As in *Simpson*, the *Shoffner* court deferred the regulation of government informants to other levels of government.<sup>91</sup> Although none of the previously discussed cases were found to violate Due Process, the *Russell* door remains open as a potential safeguard against egregious misuse of informants.

### III. GOVERNMENT SELF-REGULATION OF INFORMANTS

The review of case law in Part I shows that the Supreme Court implicitly supports the government's use of informants by subscribing to the notion that society assumes a risk that the government may employ individuals' friends, family members, or colleagues as informants. Additionally, the judicial system, including the Supreme Court and federal courts, hesitates to limit the government's use of informants and refuses to find Due Process violations based on the intimate, personal, or familial nature of suspect-informant relationships.

In light of the judicial system's recognition of a societal assumption of risk and its hesitance to limit the use of informants, this section first discusses the advantages and disadvantages of local police departments' employment of

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87. *See id.* at 626.

88. *See id.*

89. *Id.*

90. *Id.*

91. *See id.*

informants. Next, it examines police department self-regulation of informants. Specifically, this section presents various provisions from police department regulations and argues against the necessity for, or effectiveness of, legislative or judicial regulation. Finally, this section examines additional social and systemic safeguards that decrease the disadvantages of employing informants, and concludes that these safeguards, along with police department self-regulation, increase the efficacy of police employment of informants.

#### A. *Advantages and Disadvantages of Informants*

Due to the distasteful yet vital nature of employing informants,<sup>92</sup> a discussion of informants is not complete without an examination of the advantages, as well as the disadvantages, of police employment of informants. For this reason, the first half of this section discusses the positive aspects of utilizing informants, while the second half presents some of the disadvantages.

Perhaps the greatest advantage of the employment of informants is that it provides law enforcement officers with another tool for fighting and solving crimes. This tool may prove particularly necessary and important in areas where other law enforcement tools have repeatedly failed, leaving a police department at an impasse with regard to fighting or solving a crime. Another, less obvious, advantage of employing informants centers on the willingness of individuals to inform on others in a variety of situations. In turn, this willingness to inform simplifies the use of the informant tool and may transform it into an attractive mechanism for dealing with crime.

Despite these advantages, the disadvantages of the employment of informants certainly do not permit it to escape criticism. The well-documented past misuse and present abuse of informants in the United States<sup>93</sup> presents the first criticism of law enforcement employment of informants. Another criticism focuses on the consequences to individuals who are sub-

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92. See MARX, *supra* note 1, at 152.

93. Part III.A.3 provides a brief discussion of the misuse of informants by the federal government. See *infra* notes 113-116 and accompanying text. Although this article focuses on local government use of informants, discussion of federal use of informants provides insight into that which generally relates to local government use of informants.

jects of criminal investigations and subsequent prosecutions that involve informants. Although there are apparent disadvantages to the employment of informants, this comment contends that the advantages of utilizing informants, subject to self-regulation by local police departments, outweigh the disadvantages.

### 1. The Importance of Informants

Although police must handle them discreetly, confidential informants<sup>94</sup> provide law enforcement officers with an important tool for fighting and solving crime. In fact, confidential informants often provide a crucial link to information that solves a seemingly unsolvable crime, such as an unwitnessed murder that resulted from a gang-related drive-by shooting.<sup>95</sup> Fortunately, informants afford police “access to varying groups or elements of society engaged in criminal activity,”<sup>96</sup> and “[t]hese associations enable the informant to furnish details on a continuing basis regarding crimes being planned or already committed.”<sup>97</sup> Since they provide police with information, which the police may not otherwise uncover, informants are an invaluable resource for law enforcement in combating crime.

Admittedly, police association with informants presents a considerable challenge to law enforcement agencies. “Effectively handling informants while obeying all applicable laws and department policy is complex and time consuming.”<sup>98</sup> In particular, when an informant contacts a law enforcement offi-

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94. According to one definition, “[a] confidential informant is a person who, under the direction of a specific investigator, furnishes information or performs other lawful services for the Department, generally with the expectation of compensation or favor.” SAN DIEGO POLICE DEPARTMENT, INVESTIGATIVE PROCEDURES MANUAL 21 (1997) [hereinafter INVESTIGATIVE PROCEDURES].

95. See Interview with Dan Hatfield, Detective, The City of San Diego Police Department Street Gang Unit, in San Diego, Cal. (Aug. 1, 2000)(on file with author)(hereinafter “Interview with Dan Hatfield”). Interestingly, it is often the case that the perpetrator of an unwitnessed crime, such as a drive-by shooting between rival gang members, brags about the crime to friends or significant others. Unfortunately for the gang member, these friends or significant others may then become confidential informants and report details about the crime to the police. See *id.*

96. Memorandum from Chief of Police, San Diego Police Department, to All Personnel 1 (Nov. 1, 1993) (on file with author) (quoting San Diego County Grand Jury)(hereinafter “Memorandum from Chief of Police”).

97. *Id.*

98. *Id.*

cer, the officer must immediately determine the informant's true motivation for initiating the contact.<sup>99</sup> Such a determination may decrease the potential physical danger to an officer or an informant or other negative consequences that could result when an informer acts on the basis of an improper motivation, such as revenge.<sup>100</sup> The handling of informants, in fact, presents such a challenge that uniformed field officers are substantially restricted in their associations with informants.<sup>101</sup> Despite the challenges inherent in handling informants, the information gathered from informants is so crucial to fighting crime that police departments are willing to cautiously overlook the difficulties.

## 2. Societal Acceptance of Informants

Despite the apparent dangers of relying on informants, there is no reason for law enforcement agencies to abandon the employment of informants. Like the judiciary, society seems to tolerate the use of informants as a law enforcement tool to assist in the search for justice, as long as the government effectively enforces the law while maintaining the individual's interest in privacy. After all, law enforcement association with informants is not technically instigated by police, since police do not generally solicit informants for information, nor do they seek out suspect-informant relationships.<sup>102</sup> Rather, the informants themselves contact the police.<sup>103</sup>

Individuals also confirm society's tolerance for the government's use of informants by frequently taking advantage of opportunities to inform on others.<sup>104</sup> Though not necessarily in an undercover capacity, individuals have expressed a willing-

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99. *See id.*

100. *See id.*

101. *See id.*

102. *See* Interview with Dan Hatfield, *supra* note 94.

103. *See id.* While police departments often employ gang members to inform on other gangs, the gang members approach the police with information, not vice-versa. *See id.*

104. In this context, the word "inform" is used broadly to encompass situations where the average member of the public may voluntarily furnish the police with information about a crime, without expectation of gain or reward. While police may not classify this public-spirited citizen as an informant, *see* Memorandum from Chief of Police, *supra* note 96, the citizen's actions are consistent with those of an informant, except that the public-spirited citizen is not expecting something in return.

ness to inform on others in order to reduce crime and secure personal safety.<sup>105</sup> This willingness is demonstrated by local community development of telephone hotline programs<sup>106</sup> and Internet web sites<sup>107</sup> that give individuals a direct connection to police departments from the comfort and safety of their homes. Additionally, this same acceptance of informing is demonstrated by drivers who have taken advantage of programs that encourage people with cellular telephones to report traffic violations.<sup>108</sup>

Prompted by the fear that crime has become rampant, communities have also developed programs that enlist citizen-volunteers to patrol the streets and report suspected crimes.<sup>109</sup> One police department, for example, offers a Citizen Police Academy program that provides citizens with twenty-two hours of police instruction.<sup>110</sup> Surprisingly, citizens have used some of these programs to report strangers and acquaintances alike.<sup>111</sup> Such eagerness by members of the public to embrace

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105. See MARX, *supra* note 1, at 199–200 (noting that increasing the amount of information sent to police through external sources could actually decrease police reliance on undercover operations).

106. See *id.* at 207 (noting two particular telephone hotline programs: “TIP (Turn In a Pusher)” and “Turn In a Poacher”).

107. See, e.g., Kansas City Metropolitan Crime Commission, *Crime Stoppers*, <http://www.kc-crime.org/> (last visited Mar. 14, 2001) (creating a modern method for citizens to provide the Kansas City, Missouri Police Department with crime information).

108. See MARX, *supra* note 1, at 207 (describing Seattle’s development of the 734-HERO hotline that allows people to report the unauthorized use of express lanes); Coleman Cornelius, *CSU Professor Hopes to Drive Down Road Rage*, DENV. POST, July 9, 1999, at B6 (demonstrating the success of Colorado’s state-wide “star-CSP” program that encourages drivers to report road rage on their cellular telephones).

109. See Jennifer Hanrahan, *Know Fear: With a Pervading Sense of Danger in Society, Americans Look to Fortify Their Personal Safety*, SAN DIEGO UNION-TRIBUNE, Oct. 26, 1999, at E1 (noting the existence of the Greater San Diego Citizens Patrols which employ “about 600 volunteers in [eighteen] communities . . . [to] drive around in pairs, unarmed, reporting suspected crimes”).

110. See The Northbridge Police Department, *Citizen Police Academy*, at <http://www.northbridgepolice.com/citizen%20police.htm> (last visited Mar. 1, 2001). In addition to familiarizing citizens with the Northbridge Massachusetts Police Station, citizen police cadets learn about constitutional and state law, laws of arrest, motor vehicle law, criminal investigation, patrol procedures, the Drug Abuse Resistance Education (DARE) Program, the judicial system, and firearms. See *id.* Upon graduation, the citizen police are invited to participate in a police Ride-Along program. See *id.*

111. See MARX, *supra* note 1, at 207 (describing one police sergeant’s experience of having spouses turn in one another and having mothers turn in their sons).

“informing”<sup>112</sup> supports the judicial system’s notion that, absent conduct that shocks the conscience, the ability to maintain effective law enforcement will outweigh the individual’s privacy interest.<sup>113</sup>

### 3. Overview of Past Misuse of Informants

Perhaps the greatest concern about using government informants in the United States relates to the American ideal of maintaining a free society.<sup>114</sup> One need not look far into American history in order to recall how the federal government’s employment of informants seemed to threaten the ideal of a free society. Although historically, informants sought to monitor dangerous organizations like the Ku Klux Klan, they also infiltrated groups like the Women’s Liberation Movement<sup>115</sup> and

112. In this context, “informing” is meant to encompass various types of informants, including those who are: anonymous, passive unpaid citizens, active unpaid citizens, unwitting, paid, jailhouse, and criminal informants, as well as public spirited citizens who volunteer information without expectation of compensation. See Interview with Dan Hatfield, *supra* note 95.

113. See generally *Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. White*, 401 U.S. 745 (1971); *United States v. Russell*, 411 U.S. 423 (1973); *United States v. Penn*, 647 F.2d 876, 882 (9th Cir. 1980); *United States v. Simpson*, 813 F.2d 1462 (9th Cir. 1987); *United States v. Shoffner*, 826 F.2d 619 (7th Cir. 1987).

114. See, e.g., S. REP. NO. 94-755, bk III, at 225–70 (1976) (discussing the FBI’s use of informants in surveillance upon citizens of the United States during domestic intelligence activities); Pnina Lahav, *The Chicago Conspiracy Trial: Character and Judicial Discretion*, 71 U. COLO. L. REV. 1327, 1329–32 (2000) (discussing the Department of Justice’s electronic surveillance and subsequent trial of leaders of protest organizations who became known as the Chicago Eight). See generally MARX, *supra* note 1, at 29–32 (discussing the history of federal police).

115. See S. REP. NO. 94-755, bk III, at 233–44, 250–52 (1976).

The women’s liberation movement in Baltimore, Md . . . started out as a group therapy session with young women who were either lonely or confined to the home with small children, getting together to talk out their problems. Along with this they wanted a purpose and that was to be free women . . . They wanted equal opportunities[,] . . . their husbands to share in the housework and in rearing their children[,] . . . to go out and work in whatever kind of jobs they wanted, and [to] not be discriminated against as women.

*Hearings Before the Select Comm. to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate*, 94th Cong. 99 (1976) (statement of Sen. Church) (describing the Women’s Liberation Movement in Baltimore, Md., and noting that it exemplifies the problem of generalized surveillance of Americans).

Vietnam Veterans Against the War. Such historical overuse of informants has taught Americans that maintaining a free society requires "eternal vigilance."<sup>116</sup> However, eternal vigilance does not require a complete prohibition on government use of informants, especially since it seems that society tolerates, and even encourages, the use of informants when they decrease the occurrence of crimes.<sup>117</sup>

#### 4. Potential Dangers Faced by Informed-On Defendants

Another concern about law enforcement employment of informants centers on the potential dangers that informants pose to defendants in criminal trials, particularly when a suspect-informant relationship is involved. Though the government's use of informants may have a minimal effect on society at large, an informant could pose a substantial threat to an individual criminal suspect. The consequences to the suspect when a law enforcement agency employs friends and family as informants are twofold. First, the agency subjects the suspect to an assumption of the risk that friends and family will act as informants. Second, the suspect, as a defendant, faces the possibility of a conviction based on an informant's misrepresentations in court.

While the Supreme Court established that individuals assume a risk that acquaintances may deceive or betray them when they communicate,<sup>118</sup> one could argue that this risk does not include an assumption that relatives or friends will become informants. The argument is that individuals merely assume a

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116. See *Hearings Before the Select Comm. to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate*, 94th Cong. 63 (statement of Sen. Mondale) (explaining that the maintenance of liberty in a democracy requires "eternal vigilance"). Eternal vigilance includes taking measures to ensure that law enforcement maintains its proper role in society. See *id.* Eternal vigilance, reached through revealing and investigating abuses of power, does not weaken law enforcement, rather it ensures the maintenance of liberty. See *id.* Part III.C of this article presents safeguards that contribute to the notion of eternal vigilance and assist state law enforcement institutions in maintaining their appropriate societal role. See *infra* notes 148-162 and accompanying text.

117. Part III.A.2 discusses the idea that citizens of the United States show their tolerance for informants by their own willingness to participate in programs that provide them with the opportunity to inform on others. See *supra* notes 49-72 and accompanying text.

118. See *Hoffa v. United States*, 385 U.S. 293, 303 (1966).

risk that colleagues, friends, and family members may betray confidences during the usual course of interaction with society.<sup>119</sup> Arguably, the nature of the risk changes with the government's involvement in individuals' personal relationships:

[T]he risk that the individual's confidant may be fickle or a gossip is of an entirely different order from the risk that he is in reality a [government] secret agent . . . commissioned in advance to report the individual's every utterance to the authorities. In the latter situation we are no longer dealing with a risk of misplaced confidence inherent in the nature of human relationships; rather, we are dealing with government action designed explicitly to end in deceit and betrayal . . . .<sup>120</sup>

One could argue that individuals do not assume a risk that the government will actively participate in securing a friend's or associate's betrayal.<sup>121</sup> Assumption of this type of risk could surpass those risks "inherent in the conditions of human society,"<sup>122</sup> which support a "model of law enforcement where people fear any other citizen they're talking to could be a government informant."<sup>123</sup> Certainly, risks of this magnitude unjustly burden society and criminal suspects.

Aside from the injustice of subjecting individuals to an unfair assumption of risk, friends and family members who inform have tremendous access to the suspect and the suspect's activities. Additionally, these informants, like any other informant, could also have incentives to see that the suspect breaks the law.<sup>124</sup> As one commentator notes, "[b]ecause of charges they are seeking to avoid, a desire to punish competitors or enemies, or the promise of drugs or money, they may

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119. See Geoffrey R. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 4 AM. B. FOUND. RES. J. 1193, 1240 (1976) (arguing that individuals assume a risk that friends and associates, acting in their private capacities, may betray confidences).

120. *Id.*

121. See *id.* (arguing that once individuals cooperate with the government, such betrayal has exceeded the scope of the Fourth Amendment's acceptance of misplaced confidences).

122. *Lopez v. United States*, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting).

123. James Blair, *Ethics of Using Juvenile Informants*, CHRISTIAN SCI. MONITOR, Apr. 14, 1998, at 3 (quoting Dave Kopel, Research Director for the Independence Institute of Golden, Colorado).

124. See MARX, *supra* note 1, at 152.

have little concern with equitable and principled law enforcement.”<sup>125</sup> Depending on the informant’s situation, incentives may lead the informant to lie about the suspect’s criminal activities in order to personally secure government-granted benefits. Though the government may threaten an untruthful informant with perjury, this threat could prove ineffective if the informant already faces a substantial prison sentence for involvement in a crime. “The threat of perjury in a federal drug case is almost as ridiculous as trying to threaten them with a traffic ticket. If you’re looking at fifty years, a hundred years in prison, five years for perjury means nothing.”<sup>126</sup>

Despite lessons from history and potential dangers to defendants during criminal trials, the advantages of employing informants and the apparent societal acceptance outweigh the potential disadvantages. While the judicial system and the American public tolerate the use of government informants, several safeguards serve to protect individuals from overuse of informants and capitalize on information offered by those individuals who are willing to become informants. In response to some of the previously discussed disadvantages of employing informants, Parts III.B and III.C suggest that safeguards exist which adequately counter the criticisms and protect against the dangers of utilizing informants.

### *B. Police Department Self-Regulation of Informants*

The employment of informants by police does not promote overuse of informants or exacerbate dangers that defendants may face during trials that involve informant testimony. To the contrary, self-regulation by local police departments tends to minimize these dangers for several reasons. First, police departments have extensive guidelines and procedures, which not only serve to protect the public, but the police as well. The severe nature of the consequences that stem from disobeying or failing to follow department regulations serves as an incentive to maintain rigid enforcement. Second, in addition to local po-

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125. *Id.*

126. PBS ONLINE, *Snitch: How Informants Have Become a Key Part of Prosecutorial Strategy in the Drug War*, FRONTLINE, at <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/etc/tony.html> (last visited Mar. 1, 2001) (quoting an informant’s opinion about the threat of perjury to an informant). See generally *supra* note 11 (noting the various types of informants).

lice departments having well-developed regulations and policies regarding the handling of informants and incentives not to depart from them, local law enforcement agencies are in the best position to draft and enforce such regulations. In fact, the obvious inaction with respect to regulating law enforcement employment of informants—despite the legislative ability to act—supports the notion that self-regulation by local police departments is most effective. Finally, while the judiciary does seem to approve of the employment of informants by police, the judiciary is not in a position to adequately regulate local police departments' actions.

### 1. Self-Regulation

Extensive police department self-regulation of informant recruitment and handling is likely to minimize misuse of informants, particularly with respect to employment of informants in the field and at trial.<sup>127</sup> Police department regulations often mandate the precise procedure for establishing confidential informants. For example, an investigator who seeks to establish an informant must create an informant file, which identifies and establishes the informant, and is subsequently used in managing and paying informants.<sup>128</sup> In identifying the informant, the detective must complete a personal history which documents the potential informant's criminal propensities, present criminal associations, past criminal associations that the investigator may use in making an arrest, and the potential informant's past experiences as an informant.<sup>129</sup> Additionally, the informant's file must contain the informant's motivation, such as compensation or favor, and a supervisor must ultimately review the informant's completed file and approve of the informant prior to the commencement of employment.<sup>130</sup>

In addition to regulations that guide the establishment of informants, police departments regulate how informants are

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127. This section merely introduces potential regulations which some police departments have implemented when dealing with informants. It is not meant to serve as an exhaustive or thorough discussion of police departments' attempts at self-regulation.

128. See INVESTIGATIVE PROCEDURES, *supra* note 93, at 21.

129. See *id.* at 21–22.

130. See *id.* at 22.

managed, monitored, and compensated. These regulations may include strict rules that seek to limit the potential for informant abuse, as well as rules that minimize the dangers to police departments and the judicial system. Such rules may include prohibitions against coercing an informant, implicitly or directly promising immunity from arrest or prosecution, reducing the informant's charges, modifying a sentence, or paying an informant to testify in court.<sup>131</sup> Other rules prohibit police department personnel from meeting an informant without a cover officer or paying an informant without a witness.<sup>132</sup> Additionally, with respect to payment of informants, some rules limit the amount of money that police department personnel may pay to informants. For example, in some police departments, an investigator must have authorization in order to spend more than twenty-five dollars.<sup>133</sup>

As a whole, the previously noted regulations serve to protect police departments, informants, the judicial system, and the public from informant abuse. These regulations illustrate police departments' awareness of the importance of strictly regulating the use of informants. Although this comment does not provide an in-depth discussion of specific police department regulations, it is apparent that police departments have regulations concerning informants and are capable of self-regulating.

## 2. Legislative Inaction Supports Self-Regulation by Police Departments

In addition to the previously discussed judicial approval of informants,<sup>134</sup> state legislatures have "indirectly supported" the use of informants by refusing to create guidelines for police.<sup>135</sup> "Legislatures, like the courts, generally prefer to leave such matters to police, thus enacting a kind of legitimacy by de-

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131. See, e.g., *id.* at 22.

132. See *id.* at 23, 27.

133. The amount of money determines who must authorize the investigator's expenditure. "c. Sergeants may approve single expenditures up to \$200.00. d. Lieutenants can approve single expenditures up to \$500.00. e. All expenditures over \$500.00 require the approval of a Captain." *Id.* at 26.

134. See Part I.A *supra*.

135. See MARX, *supra* note 1, at 50-54.

fault.<sup>136</sup> This legislative inaction with regard to informants proves particularly interesting, because legislatures have not maintained this silence when faced with the need to regulate electronic surveillance. State legislation of electronic surveillance, in fact, prompted the federal government to create legislation of its own.<sup>137</sup>

In the ABA Standards for Criminal Justice,<sup>138</sup> the ABA recognizes the need for legislative regulation of electronic surveillance because surveillance can “diminish privacy, freedom of speech, association and travel, and the openness of society.”<sup>139</sup> One could argue that these concerns about electronic recordings—coupled with the notion that an informant is essentially a human “bugging device”<sup>140</sup>—are identical to those concerns about the government’s use of informants. Further, in cases where informants have close relationships with suspects, their access to the suspect is more intimate than any access obtained by electronic surveillance.

Despite these concerns, however, state legislatures have left the regulation of informants largely to police departments. This could stem from the fact that, in order to effectively enforce the law, police must have the ability to exercise discretion. Given the varied circumstances surrounding police departments’ employment of informants, police discretion facilitates the necessary flexibility to employ informants when needed. This does not suggest that state legislatures expect local police departments to grant complete discretion to individual officers. However, this may suggest that as long as police departments regulate themselves, legislative regulation is not necessary in order to protect free society.<sup>141</sup>

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136. *See id.* at 50.

137. *See* ABA STANDARDS FOR CRIMINAL JUSTICE ELECTRONIC SURVEILLANCE, Section B: Technologically-Assisted Physical Surveillance at 1 (3d ed. 1999) (noting that “[w]ork on . . . [the original] standards . . . heavily influenced subsequent federal legislation on the subject”).

138. *See id.*

139. *Id.* at 11.

140. *See Hoffa v. United States*, 385 U.S. 293, 319 (1966).

141. This is not to suggest that the United States should dispose of its “eternal vigilance.” *See Hearings Before the Select Comm. to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate*, 94th Cong. 63 (statement of Sen. Mondale).

At best, in a democratic society, it will never be possible to be too enthusiastic about undercover operations. There is always the risk of becoming overconfident and insensitive to the dangers that literally and figu-

### 3. Lack of Judicial Competence

Unlike state legislatures who could regulate local law enforcement agencies' employment of informants if necessary, the Supreme Court is unqualified to remove police discretion in informant cases. First, the Supreme Court does not have the opportunity to regulate police discretion,<sup>142</sup> especially in informant cases, since cases challenging police discretion rarely result in litigation in the highest courts.<sup>143</sup> Also, the lack of statutes and published police department guidelines limit Supreme Court review to examination of behavior of the individual officers.<sup>144</sup> In other words, because so few, if any, published police department regulations exist, the Supreme Court must examine the reasonableness of the individual officer's behavior with respect to an informant, rather than evaluating the regulation itself. Finally, the remoteness of Supreme Court or high-level state court decisions to law enforcement agencies means that these decisions will likely have little impact on police practices.<sup>145</sup> This is particularly true of the employment of informants because such police practices vary from case to case.

#### *C. Informant Safeguards*

Several additional aspects of American society serve to protect individuals from the potential overuse of informant infiltration by law enforcement agencies. These protections from government overuse of informants include social supports, such as the American commitment to democracy and the constitutional protection of civil liberties,<sup>146</sup> and the challenges of going to trial.

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ratively lurk beneath the surface . . . . Once one ceases to doubt the difficulty of the challenge, becomes complacent, and loses any fear, problems are more likely.

MARX, *supra* note 1, at 206.

142. See GREGORY HOWARD WILLIAMS, *THE LAW AND POLITICS OF POLICE DISCRETION* 88 (1984).

143. See *id.*

144. See *id.*

145. See *id.*

146. See MARX, *supra* note 1, at 230. Marx also cites the "variety of independent channels of mass communication" as one of the social supports that protects against the overuse of informants in the United States. *Id.*

### 1. Social Supports: Democracy and Protection of Civil Liberties

Since the United States maintains a commitment to democracy and protecting civil liberties, state laws are designed to uphold this political ideology. Additionally, informants, acting as mere enforcers of state laws, maintain a commitment to these ideals. In other words, the nature of the laws in the United States limits the potential for misuse of informants. If the United States did not have a commitment to laws which uphold these American ideals, it would have a greater potential for informant misuse because informants would act as enforcers of laws that, themselves, violate democracy and civil liberties.

The People's Republic of China, for example, does not share the American commitment to democracy or civil liberties, as illustrated by the Chinese government's "one child per couple" law that seeks to control population.<sup>147</sup> It was alleged that in order to enforce this law and confront prohibited pregnancies, the Chinese government authorized tactics which included "nighttime raids, forced abortions, [and] destruction of offending women's houses."<sup>148</sup> In addition to these tactics, the Chinese government allegedly paid informants "to report unauthorized pregnancies of neighbors, relatives, and friends."<sup>149</sup> Since China's population control law itself violates democracy and civil liberties, the *enforcement* of this law by government-paid informants also violates democracy and civil liberties. The fact that the government allegedly employed neighbors, relatives, and friends as informants, however, does not, in itself, violate democracy and civil liberties by misusing informants. Rather, the nature of the population control law *itself* violated these ideals. Since the laws of the United States are designed to promote democracy and civil liberties, the employment of informants to assist in the enforcement of state laws—including those who are neighbors, friends and relatives—does not itself misuse informants.

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147. See The Associated Press, *China Pays Informants to Uphold One Child Rule, Ex-Official Testifies*, COM. APPEAL, June 11, 1998, at A5 (reporting congressional testimony by a former population-control administrator in China).

148. *Id.*

149. *Id.*

Another safeguard that inheres in a democratic society stems from the tendency to question government actions. In the informant context, this means that the American public neither has accepted, nor will blindly accept, the government's use of informants. There are several instances in which society has criticized the government for its use of informants, illustrating the point that a democratic public has the potential to serve as a safeguard on local law enforcement agencies' use of informants. First, when the federal government used Linda Tripp as an informant against her friend, Monica Lewinsky, society seemed outraged.<sup>150</sup> Whether the public reacted to the federal government's distasteful use of Tripp's recording, Tripp's disloyalty to her friend, or merely sought to engage in partisan squabble, the American public proved its ability to criticize the government's use of informants. Second, society has clearly criticized and reacted to the government's use of minors as informants.<sup>151</sup> Despite the infrequent need for minors to act as undercover informants, the death of a seventeen-year-old undercover drug informant prompted the proposal of a California bill that would prohibit the use of minors in most undercover police operations.<sup>152</sup> The proposal of this, and other bills, demonstrates that a society that is devoted to democracy has the potential to promote desired change.

## 2. Trial Safeguards

Despite the additional concern that police departments may misuse informants and unjustly harm defendants, two aspects of trial protect the defendant from potentially untruthful informants: the prosecutor and the jury. First, because prosecutors have discretion to accept or reject particular police tactics, and control the types of cases that investigators develop,<sup>153</sup> the necessity of developing an adequate case for the local prosecutor may limit police departments' use of informants. In

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150. See Alderman, *supra* note 3.

151. See Blair, *supra* note 123.

152. See *id.* (noting that although this incident has prompted discussion among lawyers and the law-enforcement community, California and New Jersey were the only two states with proposed statutes that would regulate the government's use of minors as informants). See CAL. PENAL CODE § 701.5 (Deering 2001).

153. See MARX, *supra* note 1, at 190.

particular, prosecutors require more than an informant's testimony to take a case to trial and will thus seek testimony that will corroborate the informant's testimony. For example, a prosecutor will probably not even issue an indictment if a case is entirely based on an informant's testimony and lacks corroborating evidence.<sup>154</sup>

Second, one of the best safeguards against untruthful informants rests with the fact that if a case does go to trial, the jury will determine the truthfulness of the testimony by judging the informant's credibility. To illustrate this point, recall *United States v. Shoffner*, a case where the informer had several relationships with the defendants.<sup>155</sup> In *Shoffner*, the jury considered the informer's credibility a major issue,<sup>156</sup> and ultimately did not reach a verdict with regard to one defendant<sup>157</sup> and acquitted another.<sup>158</sup> "The jury obviously chose not to believe all of [the informer's] testimony. If believed in toto, [her] testimony would have convicted the defendants who were acquitted and those with regard to whom the jury could not reach a verdict."<sup>159</sup> Also, inherent in the jury's decision making process is the opportunity for the jury to observe the informant on cross-examination. This cross-examination process should readily reveal when an informant is testifying untruthfully. Although an informer could potentially testify untruthfully against a suspect, a perceptive jury should detect untruths and protect the suspect from unjustified conviction.

## CONCLUSION

Despite recent outcry against friends and family working as government informants, the government's use of informants is an effective and acceptable tool in enforcing the law, even with the occasional employment of a suspect-informant relationship. Contrary to recent public sentiment, the Supreme Court has steadfastly accepted police use of suspect-informant

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154. See PBS ONLINE, *Snitch: How Informants Have Become a Key Part of Prosecutorial Strategy in the Drug War*, FRONTLINE, at <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/> (last visited Mar. 1, 2001).

155. See *United States v. Shoffner*, 826 F.2d 619, 624 (7th Cir. 1987).

156. See *id.*

157. See *id.* at 624 n.6.

158. See *id.* at 624 n.7.

159. *Id.* at 624 n.8.

relationships. Though the notion that people assume a risk by interacting in society generally appears distasteful, the open door to Due Process claims serves to protect against truly outrageous police conduct. While the Supreme Court has not yet found a Due Process violation based on the nature of a suspect-informant relationship, the Due Process door nevertheless remains open.

Furthermore, even if the Supreme Court never opens the Due Process door, society approves of the government's use of informants. Although the United States has experienced past informant misuse, this has merely provided society with reasons for proceeding cautiously and avoiding blind acceptance of the government's use of informants. Despite the past, society embraces the notion of informing.

While the utilization of suspect-informant relationships has potential negative effects on criminal suspects, several safeguards serve to protect society and the suspect from the government's use of informants. These safeguards include effective self-regulation by police, American social supports such as a commitment to democracy and civil liberties, and protections inherent in a trial system that employs a prosecutor and a jury. Additionally, if the state legislatures disapprove of the employment of informants by local law enforcement agencies, state legislatures have proven their ability to impose legislation in similar contexts. However, given proper safeguards, police departments are in the best position to regulate themselves. Despite the distaste associated with suspect-informant relationships and informants in general, they serve a useful role in fighting crime.

