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COERCED INFORMANTS AND THIRTEENTH AMENDMENT LIMITATIONS ON THE POLICE-INFORMANT RELATIONSHIP

Michael L. Rich*

INTRODUCTION

On May 7, 2008, Rachel Morningstar Hoffman, a twenty-three-year-old Tallahassee resident and recent graduate of Florida State University, disappeared while trying to purchase 1500 pills of ecstasy, two-and-a-half ounces of cocaine, and a handgun for $13,000 from two suspected drug dealers.1 Two days later, the Tallahassee Police Department ("TPD") arrested the dealers, Andrea Green and Deneilo Bradshaw, who led police to Hoffman's body.2 Hoffman had been shot and her body dumped in a rural area outside of the city.3

The swift apprehension of Bradshaw and Green might, at first glance, appear to be an example of efficient police work. But in fact, the TPD were intimately involved in the events that led to her death, as Hoffman was a confidential

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2. Corbett, supra note 1.


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informant who set up the deal at the TPD's express direction and under threat of criminal prosecution. Three weeks before her death, the TPD searched Hoffman’s apartment and found approximately five ounces of marijuana, six ecstasy pills, and other drug paraphernalia. The next day, officers met with Hoffman and gave her a choice: she could help the TPD apprehend other drug dealers or face prosecution on multiple felony charges. The decision no doubt seemed simple to Hoffman. The TPD told her that she only had to provide “substantial assistance” or do “one big deal” to avoid charges and promised that they would keep her safe. But if she refused to cooperate, they threatened significant prison time on multiple felony charges, and these new charges would have made her ineligible for drug court disposition of earlier marijuana possession charges. Given her options, she agreed to cooperate with the TPD.

Hoffman’s situation is typical of those faced by an increasing number of civilians who assist police in exchange


7. Presentment, supra note 1, ¶¶ 1, 3; Portman, supra note 4.


10. Law Enforcement Confidential Informant Practices: Joint Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security and the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong. 2 (2007) (statement of Rep. Scott, Member, House Comm. on the Judiciary) (“However, we cannot ignore the fact over the past two decades law enforcement has made more drug arrests and turned more defendants into informants than ever before. The war on drugs has pressured law enforcement into using a great many informants with little internal control over their officers and over vetting informants and their information.”).
for leniency. She decided to cooperate alone, without an opportunity to consult her attorney. She lacked a meaningful understanding of the charges she could face as a result of the drugs found in her apartment, or what she had to do in order to receive leniency. Once recruited, she risked injury and death to cooperate with the government and did so with no training in conducting undercover police operations or protecting herself from harm.

Hoffman’s murder has become a flash point in the debate over the use of confidential informants. Local prosecutors and the ACLU have questioned why the TPD did not notify the State Attorney’s Office about the drugs found during the April search or Hoffman’s agreement to cooperate, arguing that the failure to do so vested too much unsupervised discretion with the police. Hoffman’s parents have filed suit against the TPD, asserting negligence in the use of Rachel Hoffman.

Specific statistics on informant recruitment or use are unavailable because prosecutors and police tightly guard the identity of their informants for reasons of safety and continued utility. See Stephen L. Mallory, Informants: Development and Management 73 (2000); Alexandra Natapoff, Snitching: The Institutional and Communal Consequences, 73 U. Cin. L. Rev. 645, 654–57 (2008); infra Part I.C (setting forth the current model for the use of informants like Rachel Hoffman).


It is unclear whether the police told Hoffman what specific charges she would face if she opted not to cooperate. Compare id. (quoting a press release issued by Hoffman’s family, which noted lack of public knowledge of “what charges [Hoffman] was told she was facing”), with Taylor & Corbett, supra note 6 (“Hoffman was facing charges of possession of ecstasy with intent to sell, possession of controlled substance with intent to sell, maintaining a drug house and possession of drug paraphernalia.”). Regardless, she received no legal advice about the viability of any threatened charges or what sentence she realistically might have faced if she had been prosecuted. See Attorneys Release Statement, supra note 12.

See Presentment, supra note 1, ¶ 1.


See Attorneys Release Statement, supra note 12.

The unprecedented media attention lavished on Hoffman’s case was no doubt inspired at least in part by the fact that Hoffman, unlike many other confidential informants in the drug arena, was a white, college-educated woman. See Clark, supra note 15.

Pecquet & Corbett, supra note 8.
Hoffman—a young woman with no experience in trafficking firearms or cocaine—to purchase cocaine and a handgun, and have criticized the TPD for not allowing her an opportunity to consult an attorney.\(^1\) A grand jury investigation of Hoffman's death concluded that "negligent conduct on the part of the Tallahassee Police Department and D.E.A. [contributed to Ms. Hoffman's death].\(^2\)" Meanwhile, Professor Alexandra Natapoff contends that the Hoffman case shows that police are not properly held accountable for their use of confidential informants and that their use is not sufficiently transparent.\(^3\)

These criticisms, however, miss the forest for the trees. They focus on symptomatic flaws in the TPD's handling of Hoffman while failing to appreciate a fundamental constitutional violation inherent in the relationship between the state and informants like Hoffman.\(^4\) By forcing Hoffman


\(^2\) Presentment, supra note 1, at Conclusion; see also Clark, supra note 15 (quoting spokesperson for International Union of Police Associations, who noted that "[o]ther officers around the country that see this story . . . are going to see what happened here and ask why").

\(^3\) Clark, supra note 15. Professor Natapoff's comments echoed those she has raised elsewhere in a more academic context. See infra Part VI.

\(^4\) The rationale for these criticisms is readily apparent when the Hoffman tragedy is viewed from the perspective of the constituency raising the issue. For instance, prosecutors are concerned that when police recruit informants without their input or supervision, the police usurp prosecutorial discretion and may interfere with ongoing prosecutions. See Pecquet & Corbett, supra note 8. Likewise, Hoffman's parents wish to be compensated for the loss of their daughter and to prevent similar tragedies in the future. See Complaint, supra note 19; Jennifer Portman, Hoffman Parents Call for Tougher Law, TALLAHASSEE DEMOCRAT, Apr. 8, 2009, http://www.tallahassee.com/article/20090408/NEWS01/904080310. Nonetheless, likely because of their limited perspectives, these stakeholders' critiques focus only on individual symptoms of
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to decide between working for the state and facing criminal prosecution, the TPD compelled her to make a choice that, in a practical and constitutional sense, was no choice at all. An informant who agrees to cooperate when faced with such a dilemma is subjected to a condition of involuntary servitude prohibited by the express terms of the Thirteenth Amendment.\textsuperscript{23}

Since as early as the 1970s, commentators have argued that the Thirteenth Amendment applies in the informant context.\textsuperscript{24} However, the application of the Thirteenth Amendment to the use of confidential informants should be revisited for a number of reasons. First, in the intervening decades, the Supreme Court has clarified the Amendment’s scope and Congress has passed broad enforcement legislation, thus strengthening the legal argument for using the Amendment to regulate the state-informant relationship.\textsuperscript{25} Second, scholars have begun to examine the use of informants in more depth, raising practical, structural, and normative concerns that the application of the Thirteenth Amendment would specifically address.\textsuperscript{26} Third, no one has adequately addressed the dissonance between the Thirteenth Amendment’s historical context and the modern use of confidential informants; earlier discussions have instead focused primarily on potential practical implications of applying the Thirteenth Amendment to the relationship between the state and confidential informants.\textsuperscript{27}

Finally, the last thirty years have seen renewed interest in exploring the Thirteenth Amendment’s potential reach.\textsuperscript{28} Scholars have argued that the Amendment can protect,
among others, children abused by their parents,\textsuperscript{29} battered women,\textsuperscript{30} prostitutes,\textsuperscript{31} bankruptcy debtors,\textsuperscript{32} women seeking an abortion,\textsuperscript{33} and victims of sexual harassment,\textsuperscript{34} among others.\textsuperscript{35} In response, critics have suggested that a careless expansion of the Thirteenth Amendment could have unintended and undesirable consequences,\textsuperscript{36} and that such expansion without consideration of the Amendment's history and context, weakens the moral force of its blanket prohibition on slavery and involuntary servitude.\textsuperscript{37}

In light of these concerns, this article asserts that the Thirteenth Amendment constrains the state-informant relationship, and provides legal, historical, and practical support for this argument. Part I lays out a brief history of informant use, defines the state-informant relationships relevant to the Thirteenth Amendment analysis, and


\textsuperscript{36} Alex Kozinski & Eugene Volokh, \textit{A Penumbra Too Far}, 106 HARV. L. REV. 1639, 1657 (1993) ("Following the lengthening shadows of constitutional provisions as they recede ever further from the source is something to be undertaken cautiously, with a constant regard to the consequences. No matter how tempting or righteous the desired result may be, one must always be ready to recognize when the reading has become too tenuous, the proposed doctrine too vague, the implications too risky.").

\textsuperscript{37} See, e.g., William M. Carter, Jr., \textit{Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery}, 40 U.C. DAVIS L. REV. 1311, 1356 n.160 (2007) ("Overly creative interpretations of the Amendment that pay little attention to its actual history and context can result in cases and scholarship diminishing the Amendment rather than strengthening it.").
describes the current model for handling informants like Rachel Hoffman. Part II discusses the original purposes of the Thirteenth Amendment and the Supreme Court’s application of the Amendment in the involuntary servitude context. Part III argues in favor of applying the Thirteenth Amendment to the state-informant relationship and addresses the most apparent legal and historical criticisms of that application. Part IV sets forth a new model for the use of informants that complies with the Thirteenth Amendment. Part V discusses the Thirteenth Amendment’s possible impact on criminal investigation and prosecution in light of this new model. Finally, Part VI explains how applying the Thirteenth Amendment to the state-informant relationship will address some of the societal concerns about confidential informant use that have been raised by other scholars.

I. OVERVIEW OF INFORMANT USE

A. A Brief History

Private individuals have played an important role in criminal law enforcement since Roman times, when citizens known as delatores infiltrated subversive organizations and prosecuted criminal offenses.38 Under English common law, civilians played two distinct roles in law enforcement as approvers and common informers.39 Approvers were admitted felons who provided testimony against their accomplices in exchange for a royal pardon; common informers were private citizens who reported minor regulatory violations in exchange for a portion of the assessed fine.40

Both the approver and common informer systems suffered from fundamental flaws. Because death was the fate of both the unsuccessful approver and the convicted felon,

40. Id. at 153, 157.
those charged with felonies had a strong incentive to become approvers and accuse others, regardless of their guilt, in hopes of obtaining a pardon. Moreover, law enforcement officials could compel prisoners to become approvers and accuse innocent civilians, whom the officials could then extort for ransom. Meanwhile, a common informer could profit by agreeing not to prosecute an offender in exchange for a fee smaller than the potential fine, but larger than the informer’s share of that fine. These and other abuses caused both systems to eventually fall into disfavor in England. Nonetheless, both carried on in some form during the early days of the Union. Following the tradition of paying common informers, the first Congress rewarded informants who reported violations by customs officers. The approver system continued into the nineteenth century through the “general rule” that an accomplice who discloses his own guilt and that of his accomplices would not be prosecuted.

During the last century, these American remnants of the common informer and approver systems have met vastly different fates. Despite its early popularity, the common informer system atrophied, and the rewarding of private citizens for reporting civil regulatory violations has become largely anachronistic. By contrast, the tradition of rewarding those who turn in their accomplices has blossomed into the modern informant system. Informants are now involved in at least a significant minority of criminal prosecutions and are a valuable tool in almost every area of law enforcement. Specifically, they are viewed as

41. BLOOM, supra note 38, at 5.
42. Zimmerman, supra note 39, at 156.
43. Id. at 159–60.
44. See BLOOM, supra note 38, at 5–6; Zimmerman, supra note 39, at 155–66.
45. Zimmerman, supra note 39, at 166.
46. See Whiskey Cases, 99 U.S. 594, 595 (1878).
47. The one exception is the civil False Claims Act, which continues to flourish. See generally Michael Rich, Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation under the Civil False Claims Act, 76 U. Cin. L. Rev. 1233 (2008) (discussing the False Claims Act and the limited number of other federal qui tam statutes).
48. MALACHI L. HARNEY & JOHN C. CROSS, THE INFORMER IN LAW ENFORCEMENT 14 (2d ed. 1968) (“The fact is that the informer is valuable to the police in practically every spectrum of crime.”); Natapoff, supra note 11, at 654–57 (providing some rough estimates of informant use).
irreplaceable in two particular contexts: (1) the investigation of organized criminal enterprises, which are generally resistant to police infiltration; and (2) the investigation of narcotics, prostitution, and other vice crimes, because inside information is often necessary for police to learn about their occurrence. Nonetheless, it is impossible to ascertain the frequency or efficacy of police reliance on informants, because their identities are closely guarded and their use is essentially unregulated.

B. Defining Classes of Informants

In its broadest sense, the term “informant” includes any civilian who provides information to police, and encompasses a number of familiar cultural tropes, including jailhouse snitches, criminal accomplices, concerned citizens, jailhouse snitches, criminals.

49. See Harney & Cross, supra note 48, at 12 (“The short summary of the stated value of the informer from the prosecution point of view is that he is almost indispensable in narcotics cases. With this we agree . . . .”); James Q. Wilson, The Investigators: Managing FBI and Narcotics Agents 76 (1978) (“Without an informant, few cases can be made at all, and thus the DEA can monitor its agents’ performance by examining case output or undercover buys . . . .”); Susan S. Kuo, Official Indiscretions: Considering Sex Bargains with Government Informants, 38 U.C. Davis L. Rev. 1643, 1649–50 (2005); Erik Luna, Drug Exceptionalism, 47 Vill. L. Rev. 753, 768–69 (2002); Note, Informers in Federal Narcotics Prosecutions, 2 Colum. J.L. & Soc. Probs. 47, 49–51 (1966) [hereinafter Informers].


51. Police interest in confidentiality stems from the desire to ensure the informant’s safety and continued utility and to protect the ability of the police to continue to recruit informants, who are generally afraid of getting “burned,” or exposed, by the police. See Harney & Cross, supra note 48, at 70–72; Charles E. O’Hara & Gregory L. O’Hara, Fundamentals of Criminal Investigation 191 (7th ed. 2003) (emphasizing that the identity of a confidential informant “should not be disclosed unless absolutely necessary and then only to the proper authorities”).

52. See Harney & Cross, supra note 48, at 31 (“All people who are sources of information, generically, and in the broad sense of the term, could be referred to as informers.”); Steven Greer, Towards a Sociological Model of the Police Informant, 46 Brit. J. Soc. 509, 510 (1995) (“Police informants include everyone who provides the police information about any matter whatsoever, however useful or useless this may be for crime prevention and detection.”); see also Black’s Law Dictionary 794 (8th ed. 2004) (defining informant as “[o]ne who informs against another; esp. one who confidentially supplies information to the police about a crime, sometimes in exchange for a reward or special treatment”); cf. Mallory, supra note 11, at 7 (defining an informant as “[a] person, directed by law enforcement, usually compensated, who furnishes information regarding unlawful activity or performs tasks as specified by law enforcement investigators”).
and innocent eyewitnesses. Informants assist the police for a variety of reasons. Some are promised leniency in their punishment in a contemporaneous or future prosecution. Others, like Rachel Hoffman, are told that the government will forgo a potential future prosecution entirely, in exchange for their cooperation. Still others, typically those against whom the police do not have evidence of other crimes to use as leverage, are paid for their cooperation. Finally, some informants are driven by less tangible motives such as feelings of civic duty, enjoyment of the positive attention from police, a desire for revenge, jealousy, or the hope of using the police to eliminate criminal competitors.

The heterogeneity of informants makes it difficult, if not impossible, to discuss them in a meaningful way without making distinctions within the class. Setting forth a

53. See Mallory, supra note 11, at 6–7.
54. See Harney & Cross, supra note 48, at 41–50; O'Hara & O'Hara, supra note 51, at 190–91.
55. United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) ("No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence."); see, e.g., United States v. White, 549 F.3d 946, 947–48 (4th Cir. 2008) (discussing individual arrested for possession of cocaine undertakes controlled drug buy in exchange for reduced punishment); United States v. Mason, 293 F.3d 826, 828–30 (5th Cir. 2002) (addressing an informant who was granted immunity for narcotics charges in exchange for cooperation with police).
57. See, e.g., United States v. Williams, 954 F.2d 668, 672 (11th Cir. 1992) (discussing the relevance of the fact that the informant was paid nearly $450,000); United States v. Diaz, 876 F.2d 1344, 1348 (7th Cir. 1989) (noting that a DEA informant paid $138,000 from 1982 to 1987); State v. Murchison, 541 N.W.2d 435, 441 (N.D. 1995) (noting that the informant was paid $1200 monthly, $200 weekly for expenses, seventy-five dollars for each person from whom he bought drugs, $200 extra for each conviction, and given a motorcycle and $1000 for a down-payment on a car); Kevin Coyne, Informer Appears at Trial, but His Recordings Talk, N.Y. TIMES, Oct. 31, 2008, at NJ1 (describing terrorism case where FBI paid informant $238,000 for his cooperation).
58. O'Hara & O'Hara, supra note 51, at 190–91.
59. See, e.g., Steven Greer, Supergrass: A Study in Anti-Terrorist Law Enforcement in Northern Ireland 2–27 (1995) (describing informants based on their relationships with the activities on which they inform and with the police); Wilson, supra note 49, at 62 (attempting to distinguish among informants based on their occupation, their motive for informing, and the length of their relationship with law enforcement). Of course, certain issues, such as credibility, arise with respect to any informants, but the analysis of even these common issues will vary widely depending on the informant. For instance, the
comprehensive taxonomy of informants is well beyond the scope of this article, but defining two classes of informants will be useful for the discussion herein.

The majority of the discussion will be limited to "active informants," a group defined as those who not only share with police information that they already possess, but also seek out evidence at the behest of police or prosecutors.\textsuperscript{60} The assistance these informants provide can span from arranging and participating in controlled drug buys, often while wearing a wire,\textsuperscript{61} to joining subversive organizations,\textsuperscript{62} introducing undercover officers to narcotics dealers,\textsuperscript{63} or engaging in sexual relationships with potential targets.\textsuperscript{64} This article will focus on a sub-group of active informants, termed "coerced

credibility of a jailhouse informant who claims that his cellmate confessed to him is highly suspect because he has strong motivation to fabricate the confession out of whole cloth. \textit{See} Emily Jane Dodds, \textit{I'll Make You a Deal: How Repeat Informants Are Corrupting the Criminal Justice System and What to Do about It}, 50 WM. & MARY L. REV. 1063, 1084–85 (2008). On the other hand, the innocent resident of a crime-ridden neighborhood is likely to be quite credible, because she may face threats of physical danger simply for assisting the police. \textit{See} Jacob Honigman, \textit{Can't Stop Snitchin': Criminalizing the Threats Made in ‘Stop Snitching’ Media Under the True Threats Exception to the First Amendment}, 32 COLUM. J.L. & ARTS 207, 209–10 (2009).

60. \textit{See} JOHN MADINGER, CONFIDENTIAL INFORMANT: LAW ENFORCEMENT'S MOST VALUABLE TOOL 28–29 (2000). By way of example, Rachel Hoffman was an active informant, because she sought out other dealers for the purposes of setting up of a drug deal to satisfy her obligation of providing "substantial assistance" to the TPD. On the other hand, a drug user who, after being arrested, receives leniency in exchange for telling the police who provided him with his drugs is not an active informant.

61. HARNEY & CROSS, supra note 48, at 26, 63; \textit{see e.g.}, State v. Wilson, 128 P.3d 969 (Idaho Ct. App. 2006) (discussing testimony of confidential informant who purchased methamphetamines from defendant while wearing a wire); Brooks v. State, 858 So. 2d 930 (Miss. Ct. App. 2003) (detailing evidence in drug case obtained from a controlled drug buy by a confidential informant in exchange for leniency, including audio tape of the deal); McCollum v. State, 582 N.E.2d 804 (Ind. 1991) (discussing court's decision hinging on evidence, including an audiotape, of a controlled drug buy by a confidential informant working in exchange for leniency).


64. \textit{See} Kuo, supra note 49, at 1653–59 (detailing claims that informants were required to perform sexual acts as part of their cooperation with police and prosecutors).
informants," against whom the government has, or claims to have, evidence of criminal activity sufficient to sustain a conviction, and who are motivated to assist the police by threats of criminal prosecution or punishment stemming from that evidence.

C. The Current Model for Interaction Between the State and Informants

Informants are an eclectic group, and thus it is unfeasible to attempt to describe herein every relationship between an informant and the state. Nonetheless, the model set forth in this part aggregates recommended practices from police handbooks and anecdotal evidence derived from news reports, scholarly publications, and other sources to provide a sense of both the consistent themes running through the interactions between state agents and informants, and the variety of those interactions. While considering active informants as a whole, the model focuses most specifically on the relationships between state agents and coerced informants. The model first discusses informant recruitment, then turns to issues that arise in the handling of informants. It concludes by considering how the relationship between an informant and the state ends and what legal avenues may be available to an informant who seeks redress for injuries suffered in the course of his service.

1. Recruitment

Given the importance of informants in many areas of law enforcement, police officers are encouraged to pursue all available avenues to grow their informant networks. At the state level, guidelines for determining whether a civilian is a

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65. The term "coerced" is not used lightly in identifying this class of informants and has been selected for want of a better label. No normative judgment is intended by it, but the label is apt. These informants are distinguished by the fact that they assist the state under the threat of state criminal sanctions, and such threats fit the definition of criminal coercion. See BLACK'S LAW DICTIONARY 275 (8th ed. 2004).

66. See CARMINE J. MOTTO & DALE L. JUNE, UNDERCOVER 13–14 (2d ed. 2000) ("Every contact an agent makes in the course of his regular duties, or may learn about from others in his non-police-related activities, should be considered as a candidate to be a source of information."). For a time, the Federal Bureau of Investigation even established a quota of informants that each street agent was required to meet. WILSON, supra note 49, at 75.
good informant candidate are at best scattershot, and generally involve little oversight. At the federal level, the Department of Justice has established guidelines requiring that a case agent consider seventeen factors to determine a potential informant's suitability, including her age, motivation, relationship with the target of the investigation, reliability, and history of drug abuse. Though the guidelines provide no direction as to how these factors should be weighed or applied in making the ultimate suitability determination, they do require a supervisor's approval of the decision to recruit an informant. Nonetheless, even when guidelines do exist, they often give way to the government's constant need for more informants.

While informants can come from any walk of life, officers are encouraged to target those civilians who are engaged in criminal activity, live or work in close proximity to criminals or crime, or associate with criminals, because they are most likely to possess useful information and connections. Among law-abiding citizens, professions that place individuals in a position to interact with criminals and surreptitiously obtain information, such as barbers, bartenders, hotel clerks, postal workers, doormen, and waiters, are considered to be excellent sources of useful informants.

Non-criminals can be useful informants, but the most productive, long-term informants tend to be criminals themselves. Criminals rarely volunteer to become

67. See Zimmerman, supra note 39, at 134–36 n.321. Indeed, the unsuitability of Rachel Hoffman to be an active informant was a focus of some of the criticism of the TPD's handling of her case. Presentment, supra note 1, ¶ 1.

68. See Department of Justice Guidelines Regarding the Use of Confidential Informants, January 8, 2001, http://www.usdoj.gov/ag/readingroom/ciguidelines.htm; see also MALLORY, supra note 11, at 24–25 (suggesting information that should be obtained prior to including informant in investigation).

69. Department of Justice Guidelines, supra note 68.

70. Dan Eggen, FBI Agents Often Break Informant Rules; Study Finds Confidentiality Breaches, WASH. POST, Sept. 13, 2005, at A15 (reporting on internal investigation of compliance with DOJ rules for handling confidential informants that found violations in eighty-seven percent of cases); Informers, supra note 49, at 55.

71. HARNEY & CROSS, supra note 48, at 40.

72. Id. at 31, 33–40; O'HARA & O'HARA, supra note 51, at 194.

informants without any police encouragement, so efforts to
"flip" a suspected criminal typically begin immediately
following her arrest.74 A civilian's uncertainty about her
future is highest in the hours after being arrested, thus
making her most likely to agree to cooperate at that time.75
One former officer who trains police in informant recruit-
ment recommends that “[a]ll individuals arrested should be
interviewed for becoming potential informants,” because
“[i]nformants who have initiated significant cases or provided
information for an investigation have been known to be
developed following an arrest for a minor offense.”76

In attempting to recruit a civilian as an informant, an
officer's immediate task is to determine what might motivate
her to assist the police and whether she is willing to take the
extra step of becoming an active informant.77 Sometimes the
potential informant's motivation is clear; before providing any
assistance, she will explicitly demand some consideration
such as a specific sum of money, a portion of any recovered
goods, or leniency on a pending or potential criminal charge.78
But when an individual does not make explicit demands, the
most powerful motivational tool available to the police or
prosecutor is the fear of criminal charges and a long prison
sentence.79 Potential informants are often reluctant to assist
the police for a variety of reasons, including societal pressures
against informing, a continuing sense of loyalty to criminal

74. Id. at 73 ("Efforts to flip a suspect begin almost with the moment of his
arrest."); MALLORY, supra note 11, at 21; see also SKOLNICK, supra note 56, at
121 (noting the value of arresting an individual in the development of that
person as an informant).

75. WILSON, supra note 49, at 73–74.

76. MALLORY, supra note 11, at 21; see also HARNEY & CROSS, supra note
48, at 80 ("Every person arrested or who comes to the attention of an officer in
connection with a criminal investigation should be considered a potential source
of information.").

77. MOTTO & JUNE, supra note 66, at 14 ("Always remember that an
informant has his own reason or motive for informing and it is imperative for
the agent to deduce exactly what that motive is."). "In working with the
informant before beginning a case, it must be learned how far the informant is
willing to go." Id. at 53.

78. See id. at 14–15; see also HARNEY & CROSS, supra note 48, at 41;

79. See HARNEY & CROSS, supra note 48, at 41–42; see also SKOLNICK, supra
note 56, at 121–22; WILSON, supra note 49, at 65–66 ("A major motive—most
investigators believe the major motive—of an informant is to obtain leniency on
a criminal charge . . . ").
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associates, and fear of physical harm if the individual’s cooperation is discovered. Particularly in cases where the individual’s testimony at trial may be necessary, the fear of a long prison sentence is often the only leverage sufficient to outweigh these concerns. Thus, while active informants cooperate for a variety of reasons, most are coerced informants who assist the police in exchange for promises of leniency.

While the agreement to cooperate is superficially similar to a plea agreement, it lacks the safeguards that attach to a formal plea, including specificity, judicial review, and, in most cases, the participation of defense counsel. When promising leniency, police are instructed to avoid making specific promises about what amount of assistance will be sufficient to earn leniency or exactly what form that leniency will take. As a result, the police frequently tell an informant only that “substantial assistance” is expected of her, and promise nothing more than to share the fact of the informant’s cooperation with the prosecutor or the court. Additionally, while a court must ensure that a defendant’s waiver of his constitutional rights is knowing, voluntary, and intelligent before a plea is valid, the active informant agrees to cooperate without judicial oversight of, acquiescence in, or even awareness of the deal. Finally, the negotiation of the

80. See Harney & Cross, supra note 48, at 40; Wilson, supra note 49, at 68-72.
81. Wilson, supra note 49, at 72.
82. Skolnick, supra note 56, at 112 (“To maintain an informant network, police must pay off each informer, usually by arranging for a reduction of charge or sentence or by not acting as a complainant . . . .”); see also Informers, supra note 49, at 54 (“[I]n the vast majority of cases, a person under arrest for a narcotics violation agrees to become an informer to reduce his punishment . . . .”).
83. Natapoff, supra note 11, at 664-68. Professor Natapoff also discusses other protections inherent in a plea agreement that are not available to the active informant, including completeness, finality, and enforceability. Id. See infra Part V.B for a discussion of these issues.
84. Natapoff, supra note 11, at 652; Informers, supra note 49, at 56 n.49. Vagueness is preferred because police typically do not have the power to keep specific promises of leniency, and an officer must maintain a reputation for honesty and fair dealing in order to continue to recruit informants successfully. Harney & Cross, supra note 48, at 62; Wilson, supra note 49, at 68.
85. See Presentment, supra note 1, ¶1.
86. See Harney & Cross, supra note 48, at 62; Motto & June, supra note 66, at 42.
cooperation agreement often occurs outside the presence and without the knowledge of the informant’s attorney.\textsuperscript{88}

The importance of fear in an active informant’s decision to cooperate, coupled with the lack of oversight of the recruitment process, permits and even encourages the police to engage in ethically questionable tactics. Shortly after an arrest, police maximize the arrestee’s fear of a long sentence by emphasizing the maximum penalties for the crimes with which she might be charged and suggesting that the only easy way out is for her to cooperate.\textsuperscript{89} And because many criminal defense attorneys will discourage their clients from becoming informants,\textsuperscript{90} police make arrests at night, when defense counsel are least likely to be available,\textsuperscript{91} or discourage arrestees from contacting their attorneys.\textsuperscript{92} At least one expert suggests that even when there is insufficient evidence to bring charges against an individual, police should claim that charges will soon be filed to encourage an arrestee to assist the police.\textsuperscript{93} Alternatively, he suggests filing

\begin{itemize}
  \item \textsuperscript{88} Natapoff, supra note 11, at 648 (“In its most extreme form, bare-knuckled negotiations between suspect and agent take place unsupervised and unrecorded, without judicial or public review or even the presence of counsel.”).
  \item \textsuperscript{89} WILSON, supra note 49, at 73; see also Andrea L. Dennis, Collateral Damage? Juvenile Snitches in America’s “Wars” on Drugs, Crime, and Gangs, 46 AM. CRIM. L. REV. 1145, 1155 (2009) (discussing the use of threats of adult criminal charges to compel cooperation from juvenile arrestees).
  \item \textsuperscript{90} See Corbett, supra note 1 (reporting that Hoffman’s defense attorney “advises clients not to become informants because of the risks”); Daniel C. Richman, Cooperating Clients, 56 OHIO ST. L. J. 69, 111–26 (1995) (discussing the pressures on defense attorneys to counsel against cooperation).
  \item \textsuperscript{91} WILSON, supra note 49, at 73–74 (“[The arrestees] were allowed to telephone a friend or attorney, but, as the arrest was made at night, there was little chance of seeing an attorney before morning. . . . [Their attorney] was cooperative, but after a day or so of negotiating . . . it became clear that no deal was going to be made. The agents were disappointed, since they wanted the source more than they wanted the importers, but not surprised: ‘You either flip ‘em right away, or you don’t flip ‘em at all.’”).
  \item \textsuperscript{92} See United States v. Morrison, 449 U.S. 361, 362 (1981) (addressing the propriety of DEA agents, aware that defendant had retained counsel, who spoke to defendant without counsel present, disparaging defense attorney and threatening stiff jail term if she did not cooperate); Alexander v. DeAngelo, 329 F.3d 912, 914–15 (7th Cir. 2003) (noting that plaintiff alleged that police discouraged her from consulting an attorney, “telling her that they were ‘the attorneys’”); People v. Mason, 97 Misc. 2d 706 (N.Y. Sup. Ct. 1978) (dismissing criminal charges in part because prosecutors and police repeatedly violated court order by speaking to defendant outside of presence of defense counsel and disparaging defense counsel’s abilities in order to recruit defendant as confidential informant).
  \item \textsuperscript{93} MALLORY, supra note 11, at 23.
\end{itemize}
criminal charges against uncooperative individuals for the sole purpose of encouraging them to become informants.\textsuperscript{94}

2. Handling

After an active informant is recruited, her handler instructs her on what is required to satisfy her obligations to the police, which may involve obtaining evidence against a specific target\textsuperscript{95} or simply “making cases” against others.\textsuperscript{96} Once the active informant has her instructions, her handler typically leaves her to her own devices so long as she continues to be productive.\textsuperscript{97} The police become more actively involved only when the informant undertakes a controlled buy or other planned operation, during which they typically will watch the informant as closely as possible and search her before and after the operation.\textsuperscript{98} These precautions allow the police to protect the informant, enhance the admissibility at trial of any evidence obtained, and confirm the informant’s candor and credibility.\textsuperscript{99}

In some cases, an informant’s handler will overlook additional crimes committed by the informant.\textsuperscript{100} The police

\begin{itemize}
\item 94. Id.
\item 95. See Alexander, 329 F.3d at 914–15 (alleging that police recruited informant based on her prior sexual relationship with specific target of corruption investigation).
\item 96. See Informers, supra note 49, at 48.
\item 97. See Harney & Cross, supra note 48, at 78 (noting an informant is “not under police discipline or control, but is essentially a free agent”); Motto & June, supra note 66, at 60; Informants, supra note 49, at 48 (“The informant is left on his own and, depending upon his success at making cases, he is allowed to stay out on the street. The agent with whom he works periodically checks up on him.”). But see Mallory, supra note 11, at 59–60 (“Control [of the informant] can be maximized if informants are aware of or believe that they are being observed by their control agents during period of inactivity.”).
\item 98. See Motto & June, supra note 66, at 53 (describing the process required to guarantee useful evidence).
\item 99. Katz, supra note 24, at 54.
\item 100. Police handbooks on informant use emphasize that informants should not be permitted to engage in other criminal activity without punishment. See Motto & June, supra note 66, at 55 (“Police officers should exert every effort to make it clear to the informant that he has no right to violate the law because he is working with the police, and violations will not be tolerated.”). For example, former narcotics investigators Malachi L. Harney and John C. Cross express horror at the notion that addict informants might be permitted to keep some of the drugs they purchase. Harney & Cross, supra note 48, at 9 (“Furnishing drugs to an addict as described would constitute a felony!”). Nonetheless, those same handbooks acknowledge that police do ignore informant criminal activity, see Motto & June, supra note 66, at 55 (“Allowing informants to violate the
are particularly likely to be lenient when an informant commits a crime outside of the handler's purview. For instance, burglary detectives are more likely to overlook an informant's commission of a drug-related offense, and vice versa.\footnote{101} In some cases, a prosecutor may help an informant avoid prosecution following an arrest by another agency.\footnote{102} An informant may find herself in a continuous cycle of service if, during the course of working off one charge, she is arrested anew, and the new arrest provides the police with additional leverage to require her continued assistance.\footnote{103}

The fact that the informant is helping the police puts her in danger of serious physical harm or death should her criminal cohorts discover her perceived betrayal.\footnote{104} In part because of this risk, the police or prosecutor will sometimes forego pursuing criminal charges against a third party in order to protect the informant's identity.\footnote{105} This concern for the informant, however, is not wholly altruistic. Police who

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\footnote{101}{SKOLNICK, supra note 56, at 124–26.}

\footnote{102}{Informers, supra note 49, at 58 ("Government officials admit that they make an effort to get valued informers released from prosecution for non-narcotics charges.").}

\footnote{103}{See SKOLNICK, supra note 56, at 121 (describing how additional arrests can "become[] an added value to the officer's bargaining position" and can be used as a commodity to exchange for an informant's service).}

\footnote{104}{HARNEY & CROSS, supra note 48, at 68; GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 146 (1988); WILSON, supra note 49, at 70; ("The ultimate cost to the informant is, of course, being killed in reprisal for his cooperation. DEA agents believe this is not a trivial possibility—one, in charge of informant records at a DEA office, said "three or four" informants in that region had been killed in the preceding six months."); see, e.g., Scott McCabe, Girlfriend of Accused Drug-Dealer Charged in Death of Informant, WASH. EXAMINER, June 23, 2009, http://www.washingtonexaminer.com/local/crime/Girlfriend-of-accused-drug-dealer-charged-in-death-of-informant-48813992.html (discussing how a woman enticed a DEA informant to location where her boyfriend murdered him to keep him from testifying).}

\footnote{105}{See SKOLNICK, supra note 56, at 129 (noting two cases where prosecutor dropped charges to protect informants from harm); WILSON, supra note 49, at 68–69 (quoting supervisor of FBI organized crime squad, who stated that "we will guarantee an informant's anonymity—we'll even throw away good cases to protect him"); Alexandra Natapoff, Deregulating Guilt: The Information Culture of the Criminal System, 30 CARDOZO L. REV. 965, 1007 (2008).}
fail to protect the identity of their informants run the risk of developing a reputation among criminals for "burning" them, and thus becoming unable to recruit informants in the future.\textsuperscript{106} Despite the risks that informants face, most receive little or no training.\textsuperscript{107}

3. Termination and Redress of Injuries

An active informant's cooperation with the police often lasts for months or even years\textsuperscript{108} and typically comes to an end in one of four ways.\textsuperscript{109} First, the informant may change her mind and refuse to cooperate any further.\textsuperscript{110} Second, the state may terminate its relationship with an informant because of misconduct, such as providing false information, endangering officers, or repeated, unapproved lawbreaking.\textsuperscript{111} Third, the state may decide that the informant's cooperation is no longer needed or that she has fulfilled her obligation to assist the police.\textsuperscript{112} Finally, the relationship will end if the informant is severely injured or killed.\textsuperscript{113}

\begin{itemize}
\item \textsuperscript{106} SKOLNICK, \textit{supra} note 56, at 128–29; WILSON, \textit{supra} note 49, at 71–72.
\item \textsuperscript{107} Even the lengthy guidelines set forth by the Department of Justice for the use of confidential informants do not make any provisions for informant training. See Department of Justice Guidelines, \textit{supra} note 68. Pursuant to TPD policy, Rachel Hoffman received no training prior to the drug deal that led to her death. Brian Ross & Vic Walter, \textit{Botched Sting: Killed with Gun She Was Supposed to Buy}, ABC NEWS.COM, July 25, 2008, http://abcnews.go.com/Blotter/Story?id=5450550; see also HARNEY & CROSS, \textit{supra} note 48, at 80 (noting that an informant "is not a trained investigative officer").
\item \textsuperscript{108} See MALLORY, \textit{supra} note 11, at 59 (noting that informants should be evaluated by the police "at least quarterly"); WILSON, \textit{supra} note 49, at 65–66 (noting that out of thirty-nine informants who had been working for a local DEA office for more than two years, twenty were "working off a beef").
\item \textsuperscript{109} Despite extensive focus on the recruitment and handling of informants, most of the police handbooks on the use of informants cited herein provide no guidance on when an informant's service should be deemed complete.
\item \textsuperscript{110} MALLORY, \textit{supra} note 11, at 37–39; Informers, \textit{supra} note 49, at 48 ("[The informant'] usefulness to the Government ends when—for whatever reason—he stops making cases.").
\item \textsuperscript{111} MALLORY, \textit{supra} note 11, at 39; see, e.g., Bonnie Hayes, \textit{Chad MacDonald’s Short, Tragic Life}, L.A. TIMES, Apr. 5, 1998, at 1 (reporting that police terminated cooperation agreement with informant after he was apprehended engaging in an unapproved drug transaction).
\item \textsuperscript{112} See MALLORY, \textit{supra} note 11, at 39; Informers, \textit{supra} note 49, at 48 ("The system rewards only the informer who successfully makes a 'sufficient' number of cases.").
\item \textsuperscript{113} Rachel Hoffman's murder is but one example of an informant's assistance ending because of violence resulting from her status as an informant. \textit{See} United States v. Dublin, 189 F. App'x 151 (4th Cir. 2006) (upholding life
An informant who decides to stop cooperating may be put in jail to give her time to reconsider her decision. If the informant remains unwilling to cooperate, or if the informant is terminated for other misconduct, the state typically will withhold the promised benefit. Moreover, because the integrity of the police, with respect both to providing and to withholding benefits, is of the utmost importance, the state often will prosecute a reluctant informant to the fullest extent possible to discourage similar reticence by other informants.

Conversely, where the relationship between the state and the active informant ends acrimoniously, the informant may file suit to force the state to provide the promised benefit. While an informant may prevail in such a suit, the open-ended nature of state-informant agreements often makes success unlikely. Courts treat an agreement between an informant and the state like any other contract, and thus, in order to compel the state to provide the promised benefit, the informant must first establish the terms of her arrangement and show that she carried out her end of the bargain. Prosecutors, however, often retain full discretion to determine whether an informant's assistance has been sufficient to


114. MALLORY, supra note 11, at 37, 39 ("The informant may decide to not cooperate. . . . Informants will often rethink their exposure and decide to not cooperate if given too much time to contemplate their decision. However a night or two in jail can work for the investigator to help the informant decide to cooperate.").

115. Informers, supra note 49, at 56 ("Along with these promises, the Bureau of Narcotics acquaints the informer with one pressing fact of life: if he does not make sufficient cases, his own case will be pushed up on the trial court's calendar and he is unlikely to get the benefit of a [more lenient charge].").

116. Id.; see, e.g., Stuart Pfeifer, Informant's Kin Can Sue Police, Court Rules, L.A. TIMES, July 24, 2002, at B3 (reporting that after cooperation agreement was terminated for unapproved criminal activity, police told informant that he would be prosecuted on original charges).

117. See Bowers v. State, 500 N.E.2d 203 (Ind. 1986) (ordering dismissal of case against defendant as a result of breach of cooperation agreement by prosecutor on public policy grounds); People v. Jackson, 480 N.W.2d 283 (Mich. Ct. App. 1991) (upholding dismissal of charges against informant who complied with agreement to provide information relating to bank robbery in exchange for immunity).

118. See State v. Morocco, 393 S.E.2d 545, 550–51 (N.C. Ct. App. 1990) (rejecting defendant's evidence as insufficient to establish that he provided substantial assistance).
merit leniency, and courts generally are loath to impinge on that discretion absent evidence that the state acted in bad faith or with an unconstitutional motive.\textsuperscript{119} Furthermore, when the informant's testimony about the terms of the agreement or about her performance conflicts with that of the police, the relative social positions of the two witnesses usually cause any credibility determination to be decided against the informant.\textsuperscript{120}

Should harm befall the informant during the course of her service, her options for redress are limited. She may assert state-law tort claims against the individual officers or the political subdivision for which she worked.\textsuperscript{121} Depending on the jurisdiction, these claims may be successful,\textsuperscript{122} or they may be categorically barred by statutory limits on official liability.\textsuperscript{123} An injured informant may also file suit under 42 U.S.C. § 1983 asserting a violation of her Sixth Amendment

\textsuperscript{119} See Wade v. United States, 504 U.S. 181, 185–86 (1992) (recognizing that court could review prosecutor's decision not to file motion for downward departure for unconstitutional motives, but requiring "substantial threshold showing" before requiring evidentiary hearing); United States v. Villareal, 491 F.3d 605 (6th Cir. 2007) (requiring government to decide whether defendant provided substantial assistance, but noting that government's discretion in making that determination is limited only by prohibition of unconstitutional motives); United States v. Knights, 968 F.2d 1483, 1487 (2d Cir. 1992) (requiring some evidence of bad faith by government before ordering hearing on whether to compel government to move for downward departure).


\textsuperscript{121} See Complaint, supra note 19, ¶¶ 32–33 (alleging negligence by the City of Tallahassee).


\textsuperscript{123} See Vaughn v. City of Athens, 176 Fed. App'x 974, 978–79 (11th Cir. 2006) (affirming dismissal of wrongful death claims on grounds that police were shielded from liability while undertaking discretionary functions within scope of law enforcement duties); Phillips v. Grady County Bd. of County Comm'rs, 92 Fed. App'x 692, 698 (10th Cir. 2004) (finding individual defendant immune from suit under state tort claims act).
right to counsel\textsuperscript{124} or her Fifth and Fourteenth Amendment substantive due process rights.\textsuperscript{125} Under current precedent, these constitutional arguments are unlikely to succeed. Because the Sixth Amendment right to counsel does not attach until the initiation of adversary judicial criminal proceedings,\textsuperscript{126} active informants are not entitled to its protections if, as is typical, they are recruited prior to charges being filed.\textsuperscript{127} Moreover, even after the right to counsel attaches, no remedy is available for a Sixth Amendment violation unless the informant can prove that the violation prevented her from receiving a fair trial in the pending criminal case.\textsuperscript{128} Given that active informants typically only gather evidence against others of unrelated crimes, establishing such prejudice is a tall order.

An injured informant may have more success in claiming a substantive due process violation under the "special relationship" and "state-created danger" doctrines.\textsuperscript{129} Pursuant to the former, a plaintiff argues that the government had a duty to shield her from harm caused by third-parties, because her relationship with the government makes her less able to protect herself and the breach of that duty violated her due process rights.\textsuperscript{130} Alternately, a

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  \item \textsuperscript{124} See People v. Mason, 411 N.Y.S.2d 970 (Sup. Ct. 1978).
  \item \textsuperscript{127} See Natapoff, supra note 11, at 667.
  \item \textsuperscript{128} See United States v. Morrison, 449 U.S. 361, 364 (1981) (reversing dismissal of criminal charges). "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." Id.
  \item \textsuperscript{129} See Butera v. District of Columbia, 235 F.3d 637, 647–52 (D.C. Cir. 2001) (noting that substantive due process may have been violated where police failed to protect police informant, but right to protection was not clearly established and claims were dismissed on qualified immunity grounds); G-69 v. Degnan, 745 F. Supp. 254, 262–65 (D.N.J. 1990) (discussing infringement on the liberty interest where informant asserted viable due process claim based on state's failure to relocate and provide new identity pursuant to agreement).
  \item \textsuperscript{130} See Laura Oren, Safari into the Snake Pit: The State-Created Danger Doctrine, 13 WM. & MARY BILL RTS. J. 1165, 1169–71 (2005).
\end{itemize}
plaintiff may contend that the government is liable for injuries caused by a third-party because a culpable state actor created the danger that resulted in the harm.\textsuperscript{131} An informant's success with these arguments will vary depending on the jurisdiction, because some circuits have rejected substantive due process claims brought by informants on the ground that informants voluntarily assume any risks of cooperating with the police.\textsuperscript{132} Even when such claims are allowed to proceed, their viability is based on the highly variable jury determination of whether the state action "shocks the conscience."\textsuperscript{133}

\textsuperscript{131} See id. at 1171–75.
\textsuperscript{132} See Vaughn v. City of Athens, 176 Fed. App'x 974, 977–78 (11th Cir. 2006) (rejecting due process claims on grounds that police did not have duty to protect informant while not in custody, despite knowledge of threats on informant's life); Gatlin ex rel. Estate of Gatlin v. Green, 362 F.3d 1089, 1093–94 (8th Cir. 2004) ("By cooperating with police in exchange for a reduced sentence and a chance to relocate, Gatlin knowingly assumed a considerable risk that MC gang members would eventually discover his cooperation and seek to avenge him."); Dykema v. Skoumal, 261 F.3d 701, 706–07 (7th Cir. 2001) (rejecting substantive due process claim on grounds that decedent, a drug dealer, "assumed the drug dealing risks"); see also McIntyre v. United States, 336 F. Supp. 2d 87, 113 (D. Mass. 2004) ("To be sure, because McIntyre was suspected of criminal activity, his decision to cooperate might have been based on persuasive argument by the government that it was in his interest to assist the government's investigation and prosecution of the criminal activities of others. It is also safe to say that confidential informants are generally more at risk than persons who are not informants. But . . . McIntyre chose to be an informant."). But see Ramirez-Peyro v. Holder, 574 F.3d 893, 906 (8th Cir. 2009) (discussing deportation action against former narcotics informant, rejecting government's contention that informant assumed risk of death in home country by engaging in drug trade and noting that "the violence Ramirez-Peyro faces, if anything, is an occupational hazard of working on behalf of the U.S. government, and, surely, this is not the type of hazard that we would like to encourage would-be informants to avoid for fear of it being used against them when they seek protection").

\textsuperscript{133} For instance, in Matican v. City of New York, 524 F.3d 151 (2d Cir. 2008), the court found that the plaintiff satisfactorily established a "state-created danger" when the New York Police Department planned a sting that would disclose the plaintiff's status as a police informant. Id. at 157–58. The Second Circuit nevertheless affirmed the grant of summary judgment to the defendants, reasoning that the NYPD's actions did not shock the conscience, because the sting required them to exercise professional judgment and balance concerns about their own safety with that of the plaintiff. Id. at 158–59. The court concluded, "[w]e are loath to dictate to the police how best to protect themselves and the public, especially when our ruling could be taken to require officers to use riskier methods than their professional judgment demands." Id. at 159. Given this deferential standard and considering the discretion and judgment that must be exercised in every phase of informant management, it is difficult to imagine many situations where an informant could establish a
II. A HISTORY OF THE THIRTEENTH AMENDMENT AND ITS APPLICATION

A. The Origins of the Thirteenth Amendment

Section 1 of the Thirteenth Amendment is striking for its breadth and absolutism:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.\textsuperscript{134}

Though the issue of whether the Thirteenth Amendment's reach extends to prohibit the badges and incidents of slavery has produced conflict among the Supreme Court, Congress, and scholars,\textsuperscript{135} the Amendment's unequivocal ban on both the formal institution of slavery and broader practices of involuntary servitude is unquestioned. The Supreme Court has consistently and forcefully affirmed that the Amendment is "an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."\textsuperscript{136} Moreover, unlike other Amendments that restrain only the government, the Thirteenth Amendment forbids slavery and involuntary servitude regardless of whether it is state-mandated or the result of solely private action.\textsuperscript{137}

\textsuperscript{134} U.S. CONST. amend. XIII, § 1.
\textsuperscript{135} See generally Jacobus tenBroek, Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment, 39 CAL. L. REV. 171 (1951) (criticizing Supreme Court's narrow interpretation of Thirteenth Amendment in light of Congressional debates on its passage); Alexander Tsesis, Furthering American Freedom: Civil Rights & the Thirteenth Amendment, 45 B.C. L. REV. 307 (2004) (contending that the Thirteenth Amendment is a powerful tool for the enactment of civil rights reforms, and sometimes a more preferable avenue for such reforms than the Fourteenth Amendment).
\textsuperscript{137} See, e.g., tenBroek, supra note 135, at 172 (comparing the Thirteenth and Fourteenth Amendments and noting that the former "operat[es] upon the...
In his seminal examination of the ratification debates, Professor Jacobus tenBroek identified three goals that the Thirteenth Amendment's supporters sought to achieve.\textsuperscript{138} First, the Amendment abolished "[s]lavery in its narrowest and strictest sense—slavery as legally enforceable personal servitude."\textsuperscript{139} Second, Congress sought to free all blacks, both in the South and the North, from "the burdens, badges, and indicia of slavery," and to "confirm the principle that 'nature made all men free and entitled them to equal rights before the law.'"\textsuperscript{140} Finally, Congress intended to abolish "the incidents of [slavery] which impaired and destroyed the rights of the whites."\textsuperscript{141} These "incidents" included violence perpetrated against whites who opposed slavery, limits on the speech and assembly rights of abolitionists, and the extreme poverty and ignorance that were believed to be collateral effects of slavery on Southern whites.\textsuperscript{142}

The goals set forth by Congress echoed the "free labor" ethos propounded by many abolitionists and, most notably, Senator William H. Seward. To Seward and other free labor abolitionists, "the nobility of labor was an article of faith."\textsuperscript{143} Laborers who were able to pursue their calling and "to leave their jobs and take others" were the foundation of the Northern economy, which the abolitionists believed to be inherently superior to the stagnant Southern plantation economy.\textsuperscript{144} Slavery was of course the antithesis of free labor, and free labor abolitionists decried the institution itself, as

\begin{itemize}
\item \textsuperscript{138} Id. at 179.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id. at 179–80.
\item \textsuperscript{141} Id. at 180.
\item \textsuperscript{142} Id.; see CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (statement of Cong. Ebon C. Ingersoll) ("I am in favor of the adoption of this amendment to the Constitution for the sake of the seven millions of poor white people who live in the slave States but who have ever been deprived of the blessings of manhood by reason of this thrice-accursed institution of slavery. Slavery has kept them in ignorance, in poverty, and in degradation. Abolish slavery, and school-houses will rise upon the ruins of the slave mart, intelligence will take the place of ignorance, wealth of poverty, and honor of degradation; industry will go hand in hand with virtue, and prosperity with happiness, and a disenthralled and regenerated people will rise up and bless you and be an honor to the American Republic.").
\item \textsuperscript{143} ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 12 (2d ed. 1995).
\item \textsuperscript{144} Id. at 11–13, 26.
\end{itemize}
well as the cultural and economic foundation of the South generally as immoral, politically unsound, socially pernicious, and economically inferior.\textsuperscript{145} They believed that the South’s dependence on slaves was doomed to fail because slaves always would lack the desire for upward social mobility that inspired free laborers.\textsuperscript{146} Moreover, free labor abolitionists argued that the use of slaves denigrated labor generally and forced non-slaveholding Southern white laborers to endure disdain and social stagnation.\textsuperscript{147}

Free labor’s moral and social arguments found a voice among the Thirteenth Amendment’s Congressional supporters, who contended that involuntary servitude of any kind runs contrary to natural law principles that guarantee all men certain unalienable rights.\textsuperscript{148} These abolitionists specifically pointed to two of the Amendment’s philosophical underpinnings: “First, the Lockean presuppositions about natural rights and the protective functions of government; second, slavery’s denial of these rights and this protection not only to blacks, bond and free, but to whites as well.”\textsuperscript{149} Among other “God-given rights,”\textsuperscript{150} the Amendment sought to guarantee every man’s natural right “to till the soil, to earn his bread by the sweat of his brow, and to enjoy the rewards of his own labor.”\textsuperscript{151} By interfering with the natural right of

\begin{itemize}
\item \textsuperscript{145} Id. at 40–43.
\item \textsuperscript{146} Id. at 45–46.
\item \textsuperscript{147} Id. at 46–48, 50.
\item \textsuperscript{148} tenBroek, supra note 135, at 178 (quoting the statement of Cong. Godlove S. Orth, CONG. GLOBE, 38th Cong., 2d Sess. 13, 139 (1865)).
\item \textsuperscript{149} Id. at 176.
\item \textsuperscript{150} Supporters also wished to safeguard natural rights to life, education, legally-protected familial relations, and the acquisition and ownership of property. Id. at 180.
\item \textsuperscript{151} Id. (quoting CONG. GLOBE, 38th Cong., 1st Sess. 2990 (statement of Cong. Ebon C. Ingersoll)); see CONG. GLOBE, 38th Cong., 2d Sess. 200 (statement of Representative John F. Farnsworth) (“What vested rights so high or so sacred as a man’s right to himself, to his wife and children, to his liberty, and to the fruits of his own industry? Did not our fathers declare that those rights were inalienable? And if a man cannot himself alienate those rights, how can another man alienate them without being himself a robber of the vested rights of his brother-man?”). A desire to protect the natural rights of all citizens, including the right to possess and enjoy property, a necessary corollary to the right to benefit from one’s own labor, also animated the efforts of the principal drafters of the Thirteenth Amendment, Senator Lyman Trumbell and Representative James F. Wilson, in their support of the Civil Rights Act of 1866. See Randy E. Barnett, The Proper Scope of the Police Power, 79 NOTRE DAME L. REV. 429, 459–60 (2004).
\end{itemize}
slaves to reap the fruits of their labor, the institution of slavery devalued the work of all men.\textsuperscript{162}

\section*{B. Early Supreme Court Interpretation and the Peonage Cases}

Although the Supreme Court's interpretation of the Thirteenth Amendment has never realized the expansive scope that was contemplated by its original supporters,\textsuperscript{153} shortly after its ratification, the Court recognized that the Amendment at least prohibits any condition of involuntary servitude imposed on anyone anywhere in the United States.\textsuperscript{154} Nevertheless, the first direct applications of the Amendment by the lower federal courts came in response to the so-called "Black Codes," and subsequent attempts by Southern legislatures to recapture the inexpensive labor of freed slaves and other blacks for the benefit of white landowners.\textsuperscript{155} Under the Black Codes, black males who did not enter into employment contracts were charged as criminal vagrants, those who quit jobs were arrested and returned to their employers, and black children were "apprenticed" against their will by order of probate courts.\textsuperscript{156} Those

\begin{itemize}
\item \textsuperscript{152} See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1320 (statement of Sen. Wilson) ("Slavery, hating the cherished institutions that tend to secure the rights and enlarge the privileges of all mankind; despising the toiling masses as mudsills and white slaves; defying the Government, its Constitution and its laws, has openly pronounced itself the unappeasable enemy of the Republic.").
\item \textsuperscript{153} See tenBroek, supra note 135, at 171 ("[The Thirteenth Amendment's] history, subsequent to enactment, has never lived up to its historic promise as the 'grand yet simple declaration of the personal freedom of all of the human race within the jurisdiction of this government.'" (quoting Slaughter-House Cases, 83 U.S. 36, 69 (1872))).
\item \textsuperscript{154} Slaughter-House Cases, 83 U.S. at 72 ("Undoubtedly while negro slavery was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void."); see also Bailey v. Alabama, 219 U.S. 219, 240–41 (1911) ("While the immediate concern [of the Thirteenth Amendment] was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color, or estates, under the flag.").
\item \textsuperscript{156} See NOVAK, supra note 155, at 1–8 (describing in detail the vagrancy codes established throughout the south); Schmidt, supra note 155, at 649–51
\end{itemize}
indigents arrested under the Codes were forced to work under contract for landowners who paid their fines, sometimes after having been "hired out" at auction.\footnote{157} If a worker failed to complete the term of the new contract, he would be arrested, fined, and forced back into labor, thus creating an almost-unbreakable cycle of servitude.\footnote{158} The federal government failed to challenge these statutory constructs until the early twentieth century, and the first efforts in the lower federal courts achieved mixed results.\footnote{159}

The Supreme Court eventually addressed the progeny of the Black Codes through the lens of the Anti-Peonage Act,\footnote{160} passed by Congress in 1867 pursuant to its Thirteenth Amendment enforcement authority.\footnote{161} The first of the peonage cases came before the Court in 1905 and the last in 1944.\footnote{162} Though "peonage," defined as "a status or condition of compulsory service, based upon the indebtedness of the peon to the master,"\footnote{163} is only a limited sub-class of involuntary servitude, a number of themes run consistently through the peonage cases, that clarify the scope and function of the Thirteenth Amendment’s prohibition on involuntary servitude, as well as the principles that underlie the Court’s interpretation of the Amendment.

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\item (describing the vagrancy codes established throughout the south); see also Thompson v. Bunton, 22 S.W. 863 (Mo. 1893) (granting relief to habeas corpus petitioner subject to being hired out for six months to highest bidder after non-criminal finding of vagrancy).
\item \footnote{157} NOVAK, supra note 155, at 31–41.
\item \footnote{158} Id.; Schmidt, supra note 155, at 650.
\item \footnote{159} See Schmidt, supra note 155, at 663–71; William Wirt Howe, The Peonage Cases, 4 COLUM. L. REV. 279 (1904) (noting that the first criminal prosecution under the Anti-Peonage Act did not occur until 1901 and discussing subsequent lower court decisions).
\item \footnote{161} U.S. CONST. amend. XIII, § 2; Clyatt v. United States, 197 U.S. 207, 218 (1905).
\item \footnote{162} See Pollock v. Williams, 322 U.S. 4 (1944); Taylor v. Georgia, 315 U.S. 25 (1942); United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911); Clyatt, 197 U.S. at 207. It is noteworthy that while the cases considered by the Supreme Court involved only statutory provisions enacted by Southern legislatures, peonage was a pervasive problem throughout the United States in the early half of the twentieth century. See Pollock, 322 U.S. at 18–20 & nn.29–32 (describing Congressional findings of peonage in "every state in the Union except Oklahoma and Connecticut" (citing Report on Peonage, Abstracts of Reports of the Immigration Comm’n 447, S. DOC. No. 747, 61st Cong., 3d Sess.)).
\item \footnote{163} Clyatt, 197 U.S. at 215.
\end{itemize}
First, the Court repeatedly struck down statutory schemes that, either de jure or de facto, made the breach of a labor contract a criminal offense on the ground that a condition of involuntary servitude exists when labor is coerced by threat of criminal sanction. As the Court first explained in *Bailey v. Alabama*, “[t]he state may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.”164 In *Pollock v. Williams*, the Court reiterated the point: “[N]o state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor.”165

Second, the Court recognized that the existence of an agreement between a master and servant, entered into voluntarily or otherwise, is irrelevant to whether the servant labors in a condition of involuntary servitude:

The fact that the debtor contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. The full intent of the constitutional provision could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory service.166

As a corollary, the Court recognized that peonage differs from a constitutional, voluntary labor agreement, because while the peon must either work off the debt or be punished criminally, “the debtor . . . [is] subject, like any other contractor, to an action for damages for breach of [his] contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service.”167 This

164. *Bailey*, 219 U.S. at 244.
165. *Pollock*, 322 U.S. at 18; see also *Taylor*, 315 U.S. at 29 (“The necessary consequence is that one who has received an advance on a contract for services which he is unable to repay is bound by the threat of penal sanction to remain at his employment until the debt has been discharged. Such coerced labor is peonage. . . . It is of course clear that peonage is a form of involuntary servitude within the meaning of the Thirteenth Amendment . . . .”); *Reynolds*, 235 U.S. at 146 (“This labor is performed under the constant coercion and threat of another possible arrest and prosecution in case he violates the labor contract which he has made with the surety . . . . Compulsion of such service by the constant fear of imprisonment under the criminal laws renders the work compulsory . . . .”)
point reiterates that the existence of criminal, rather than civil, sanctions differentiates involuntary from voluntary servitude.

Third, the Supreme Court consistently echoed the abolitionist rhetoric of the Thirteenth Amendment’s supporters, emphasizing the centrality of free labor precepts in interpreting the scope of the Amendment. In *Bailey*, the Court recognized that the goal of the Amendment was “to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another’s benefit, which is the essence of involuntary servitude.” The Supreme Court reiterated the point in *Pollock*: “The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States.” These decisions underscore that the Amendment’s reach extends beyond African slavery and its direct analogues to any servitude that undermines the American system of free and voluntary labor.

Fourth, the Court recognized that the Thirteenth Amendment’s guarantee of free labor serves the practical end of protecting workers from unduly harsh labor conditions by guaranteeing the right to change jobs freely:

> [T]he defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.

Thus, the Thirteenth Amendment not only protects individual workers caught in conditions of involuntary servitude from unsafe working conditions, but also prevents

169. *Pollock*, 322 U.S. at 17–18; see also *Bailey*, 219 U.S. at 245 (“There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based.”).
other workers from being forced to accept poor conditions in order to compete with those compelled to serve.

C. The Kozminski Decision

Following Pollock, the Supreme Court did not address the scope of the Thirteenth Amendment's ban on involuntary servitude for more than four decades. In 1947, however, Congress passed 18 U.S.C. § 1584, which punishes anyone who "knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term." Following its passage, the Federal Courts of Appeals split over whether a threat of physical harm or criminal sanction is required to create a condition of involuntary servitude, or if other means of coercion can be sufficient.

This circuit split set the stage for the Supreme Court's most recent discussion of the scope of the Thirteenth Amendment's ban on involuntary servitude in United States v. Kozminski. Ike and Margarethe Kozminski, operators of a dairy farm in Michigan, forced two mentally handicapped men, Robert Fulmer and Louis Molitoris, to live in inhumane conditions at their farm and to work daily for no pay. The Kozminskis physically and verbally abused the men when they failed to work, threatened at least one of them with institutionalization, forbade them from leaving the farm or communicating with outsiders, and returned them to the farm when they left it. A jury convicted the Kozminskis of, inter alia, violating § 1584 by knowingly holding Fulmer and Molitoris in a condition of involuntary servitude. The defendants appealed, arguing that the trial court improperly instructed the jury that coercion that does not arise from

171. 18 U.S.C. § 1584 (2006). A violation of § 1584 is punishable by a sentence of up to twenty years or, if death results from the involuntary servitude, of life. Id; see also 18 U.S.C. § 1581 (2006) (imposing the same punishments with respect to conditions of peonage).

172. Compare United States v. Mussry, 726 F.2d 1448, 1453–55 (9th Cir. 1984) (holding that non-physical coercion can create a condition of involuntary servitude), with United States v. Shackney, 333 F.2d 475 (2d Cir. 1964) (holding that coercion by threats of force, criminal sanction, or continued imprisonment is required to hold another in involuntary servitude).


174. Id. at 935.

175. Id.

176. Id. at 934.
threats of physical violence or criminal sanctions can create a condition of involuntary servitude. 177

The Supreme Court adopted the narrower definition of involuntary servitude that was submitted by the defendants, and upheld the Sixth Circuit’s reversal of the Kozminskis’ convictions. 178 In reaching its decision, the Court first noted that under § 1584, Congress intended the term “involuntary servitude” to be co-extensive with the understanding of the Thirteenth Amendment’s prohibition on involuntary servitude that prevailed when the statute was passed. 179 The Court then found that involuntary servitude historically could result from two kinds of coercion. First, the Court examined its earlier peonage decisions and noted that in each case a condition of involuntary servitude existed because labor had been compelled by the threat of criminal sanction. 180 These prior cases, coupled with the Amendment’s express exception for involuntary servitude as punishment for a crime, led the Court to conclude that “involuntary servitude includes at least situations in which the victim is compelled to work by law.” 181 Second, the Court deduced that because the Thirteenth Amendment sought to abolish conditions “akin to African slavery,” it also forbids servitude compelled by threat of physical harm. 182

The Court rejected the Government’s argument that “involuntary servitude” should be construed broadly to “prohibit the compulsion of services by any means that, from the victim’s point of view, either leaves the victim with no tolerable alternative but to serve the defendant or deprives

177. Id. at 937–39.
178. Id. at 952.
179. United States v. Kozinski, 487 U.S. 931, 944–48 (1988). The Supreme Court expressly left open the possibility that the Thirteenth Amendment’s ban on involuntary servitude is broader than the definition of involuntary servitude identified in its opinion. Id. at 944 (“We draw no conclusions from this historical survey about the potential scope of the Thirteenth Amendment.”). Speculation on potential expansion of the Thirteenth Amendment is unnecessary for purposes of this article, however, because, as explained infra Part III.A, the situation faced by coerced informants fits within the scope of the Thirteenth Amendment as discussed in Kozinski.
181. Id. at 942.
182. Id.
the victim of the power of choice." This construction, the Court noted, would make criminal liability dependent upon the victim's state of mind. Instead, the Court held that "the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of coercion through law or the legal process."

III. APPLYING THE THIRTEENTH AMENDMENT TO COERCED INFORMANTS

The Kozminski decision streamlines the argument for applying the Thirteenth Amendment to the use of coerced informants. Though the Court's prior involuntary servitude jurisprudence involved only cases of alleged peonage, Kozminski confirmed that the Thirteenth Amendment applies outside of that context. As a result, the Thirteenth Amendment analysis of coerced informants no longer requires any discussion of the informant's indebtedness to the state.

A. The Prima Facie Argument

As the Court held in Kozminski, the Thirteenth Amendment prohibits "a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." This standard can be broken down into two elements: first, the victim must engage in "work" of some kind at the behest of another; and second, the victim's continued performance of that labor must be enforced by the use or threat of physical

183. Id. at 949.
184. Id.
185. Id. at 952.
186. Although the Court reversed the Kozminskis' conviction, it affirmed the Sixth Circuit's refusal to find that a judgment of acquittal was warranted. United States v. Kozminski, 487 U.S. 931, 953 (1988) ("[B]ecause we believe the record contains sufficient evidence of physical or legal coercion to enable a jury to convict the Kozminskis even under the stricter standard of involuntary servitude that we announce today, we agree with the Court of Appeals that a judgment of acquittal is unwarranted.").
187. The necessity of focusing on indebtedness led to prior analyses being more contorted than is required under Kozminski. See Misner & Clough, supra note 24, at 732–34.
188. Kozminski, 487 U.S. at 952.
harm or legal process.\textsuperscript{189}

With respect to the first element, the Court has not defined exactly what minimum level of work must be compelled before the Thirteenth Amendment is violated.\textsuperscript{190} Nonetheless, the Court’s peonage cases and Thirteenth Amendment decisions in lower courts show that at a minimum, work of economic value is enough to satisfy the definition of involuntary servitude. In the peonage cases, the Court held that the Thirteenth Amendment was violated when the victims were compelled to engage in farm labor

\textsuperscript{189} See, e.g., United States v. Alzanki, 54 F.3d 994, 1000 (1st Cir. 1995) (“In sum, the requisite compulsion under section 1584 obtains when an individual, through an actual or threatened use of physical or legal coercion, intentionally causes the oppressed person reasonably to believe . . . that she has no alternative but to remain in involuntary service for a time.”); Doe I v. Gap, Inc., No. CV-01-0031, 2001 WL 1842389, at *7 (D. N. Mar. I. Nov. 26, 2001) (“To establish the crime of involuntary servitude under 18 U.S.C. § 1584, a prosecutor must allege and prove beyond a reasonable doubt the use or threatened use of physical restraint, physical coercion or legal coercion to compel labor.” (citing Kozminski, 487 U.S. at 952)).

\textsuperscript{190} See Kozminski, 487 U.S. at 945 (“While the general spirit of the phrase ‘involuntary servitude’ is easily comprehended, the exact range of conditions it prohibits is harder to define.”). The Court has recognized exceptions to the Thirteenth Amendment’s ban on involuntary servitude for government compulsion of certain civic duties, such as jury service, roadwork, and military service, and exceptional situations well-established in common law, including parental control of their children and laws preventing the desertion of sea vessels. \textit{Id.} at 944 (citing Hurtado v. United States, 410 U.S. 578, 589 n.11 (1973); Selective Draft Law Cases, 245 U.S. 366, 390 (1918); Butler v. Perry, 240 U.S. 328 (1916); Roberston v. Baldwin, 165 U.S. 275 (1897)). These exceptions share a common-law lineage that predates the passage of the Thirteenth Amendment. See Butler, 240 U.S. at 330–33 (discussing long common-law precedent for compelled roadwork and holding that the Thirteenth Amendment “introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the state, such as services in the army, militia, on the jury, etc.”). Providing active assistance to the state does not share this historical foundation, however. While there is precedent for a duty to provide the police with information about past crimes, \textit{see} Vogel v. Gruaz, 110 U.S. 311, 316 (1884) (“[I]t is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws . . . .”), that duty is best characterized as moral rather than legal. \textit{See} Sandra Guerra Thompson, \textit{The White-Collar Police Force: “Duty to Report” Statutes in Criminal Law Theory}, 11 WM. & MARY BILL RTS. J. 3, 8–9 (2002) (noting absence of affirmative legal duties to report crimes under federal and majority of state laws). Moreover, despite misprision of felony statutes that may suggest otherwise, the duty to assist the police historically has been limited to providing information and has not included active assistance in apprehending or preventing crime. Gabriel D. M. Ciociola, \textit{Misprision of Felony and Its Progeny}, 41 BRANDEIS L.J. 697, 700–01 (2003).
under threat of criminal sanction.\textsuperscript{191} Other courts have found Thirteenth Amendment violations where the victim was coerced into performing household work,\textsuperscript{192} working in a medical office,\textsuperscript{193} and engaging in prostitution.\textsuperscript{194} Indeed, at least one circuit has held that the coerced labor need not even have economic value and that any coerced expenditure of physical or mental effort for the benefit of another may be sufficient.\textsuperscript{195}

In light of these precedents, the work undertaken by coerced informants easily meets the Thirteenth Amendment threshold. As defined previously,\textsuperscript{196} coerced informants gather physical evidence, wear recording devices, infiltrate alleged criminal organizations, and establish personal and sometimes sexual relationships with suspected criminals.\textsuperscript{197} All of these activities have significant value to police and prosecutors. The successful prosecution of vice crimes and criminal enterprises depends in great part on the use of informants,\textsuperscript{198} and evidence obtained by active informants can be the lynchpin in a particular case.\textsuperscript{199} Indeed, the state

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\item[191] See Bailey v. Alabama, 219 U.S. 219, 230 (1911) (involving contract to work for one year as a farm hand); see also Pollock v. Williams, 322 U.S. 4, 19 n.30 (1944) (describing peonage system in Maine involving foreign laborers forced to work for lumber companies).

\item[192] United State v. Djoumessi, 538 F.3d 547 (6th Cir. 2008); United States v. Alzanki, 54 F.3d 994 (1st Cir. 1995).

\item[193] United States v. Udeozor, 515 F.3d 260 (4th Cir. 2008).


\item[195] United States v. Kaufman, 546 F.3d 1242, 1260 (10th Cir. 2008) ("Labor' means the expenditure of physical or mental effort. 'Services' means conduct or performance that assists or benefits someone or something.").

\item[196] See supra Part I.B.

\item[197] See supra notes 60–64 and accompanying text.

\item[198] See HARNEY & CROSS, supra note 48, at vii ("From the dawn of our history, internal law and order has had to depend in greater or less measure on the informer. While we hope that [new forensic techniques] will be helpful, they will, in most cases, only minimize the importance of and not eliminate the necessity for the informer."); SKOLNICK, supra note 56, at 119 ("There can be no doubt that informants are essential for law enforcement, especially for narcotics control.")

\item[199] See, e.g., United States v. Landrau-Lopez, 444 F.3d 19, 21 (1st Cir. 2006) ("DEA confidential informant infiltrated the smuggling ring. Posing as a cocaine supplier, the informant brokered a deal with Melvin Poupart to smuggle [thirty] kilograms of what was actually 'sham' cocaine onto a flight from LMMIA to Newark, New Jersey."); United States v. Abdullahu, 488 F. Supp. 2d 433, 435 (D.N.J. 2007) ("[Informants] earned the trust of defendant and the other charged individuals and ultimately learned about the plan to attack Fort Dix.");
\end{footnotes}
routinely quantifies the value of work done by active informants by paying them. Likewise, it is axiomatic that were it not for active informants, police officers would be paid to collect the evidence that these informants now obtain.

With respect to the second element, a coerced informant's labor, is by definition, performed under threat of criminal punishment. Once the coerced informant has agreed to work for the police and until the police or prosecutor deems her services completed, she has two options: continue to do as the police ask, or face either prosecution on new criminal charges or longer criminal penalties from pending charges. Of course, this choice is typically framed as an offer of leniency by the state, but regardless of the gloss put on it, the coerced informant's decision is the same as the peon's—work or be subject to criminal process. This dilemma falls squarely within the Kozminski standard for involuntary servitude.

B. Considering Some Obvious Criticisms

Two obvious differences between coerced informants and "typical" involuntary servants raise questions about the

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United States v. Hector, No. CR 04-00860 DDP, 2008 WL 2025069, at *20 (C.D. Cal. May 8, 2008) (discussing the case based mainly on circumstantial evidence and "the informant—as the only direct evidence tying Defendant Hector to the crime—was a crucial witness"); Bergman v. United States, 565 F. Supp. 1353, 1365 (W.D. Mich. 1983) ("Any information which the FBI had was gained exclusively through the use of confidential informants and documentation generated through the use of informants.").

200. See supra note 57 (listing examples); see also SKOLNICK, supra note 56, at 123–24 (noting that burglary informants “are sometimes paid substantial sums of money”).

201. See MALLORY, supra note 11, at 2–4 (setting forth a multitude of ways in which informants can assist police and prosecutors in the development and prosecution of cases).


203. See, e.g., Matican v. City of New York, 524 F.3d 151, 156 (2d Cir. 2008) (discussing section 1983 action brought by informant who “agreed to serve as a confidential informant in exchange for more lenient treatment”); Hervey v. State, 764 So. 2d 457, 459–60 (Miss. Ct. App. 2000) (holding that federal witness tampering statute was not violated for allowing testimony from an undercover informant who was promised leniency if he participated in a controlled buy).

204. See O'HARA & O'HARA, supra note 51, at 190 (recognizing that an informant "who is apprehended in the commission of a minor offense and seeks to avoid prosecution by revealing information concerning a major crime" is motivated by "[a]voidance of [p]unishment").
propriety of applying the Thirteenth Amendment in the informant context. First, the service provided by a coerced informant may fit at least the colloquial definition of "voluntary," especially if the informants actively seeks to work for the police or never attempts to breach his cooperation agreement.\(^{205}\) This realization suggests that unless the circumstances of servitude alone, regardless of the mental state of the servant, can create a condition of involuntary servitude, many coerced informants are not held in a condition of involuntary servitude.

Second, unlike the peon who works under the threat of a criminal charge that arises directly from his failure to fulfill the terms of his labor contract, the coerced informant faces a valid criminal prosecution that arises from actions independent of and preceding the agreement to serve.\(^{206}\) This distinction requires an examination of the Amendment’s language and raises the issue of whether a Thirteenth Amendment violation can arise from an otherwise valid threat.

1. Voluntariness

It is not difficult to imagine that the relationship between Rachel Hoffman and the Tallahassee Police Department could have ended with both parties satisfied. Hoffman, like many coerced informants, agreed with at least some level of volition to assist the TPD and was happy to have an opportunity to avoid the negative consequences that would have resulted from another prosecution on drug charges.\(^{207}\) Meanwhile, the TPD welcomed the opportunity to use a relatively minor drug offender to obtain evidence of more severe crimes against other dealers.\(^{208}\) In this case, that meant using Hoffman, a

\(^{205}\) See, e.g., Boyington v. State, 389 So. 2d 485, 487 (Miss. 1980) (discussing the fact that the informant told police during extradition that he would like "help himself" by becoming an informant).

\(^{206}\) For the purposes of this part, this article assumes that the threatened criminal charges are based on valid, admissible evidence sufficient to sustain a conviction. Given that at least some police are advised to bluff and recruit informants by threatening charges for which there is insufficient evidence to obtain an indictment, see supra note 93 and accompanying text, this assumption is unsound in an unknown number of coerced informant cases. Nonetheless, by assuming the validity of the changes, we address the strongest counterargument to applying the Thirteenth Amendment in this context.

\(^{207}\) Portman, supra note 4.

\(^{208}\) See SKOLNICK, supra note 56, at 118 ("The narcotics officer is primarily
low-level marijuana dealer, to get evidence of narcotics and firearm trafficking by Bradshaw and Green. There is no
evidence that Hoffman ever sought to back out of the agreement; indeed, when the arranged deal began to fall
apart, Hoffman may have pushed on against the direction of her police handler. Had Hoffman successfully and safely
completed the drug buy, this one deal might have been enough to satisfy the TPD. If so, the TPD presumably
would have released her from her service and never prosecuted her for the drugs found during the April 2008
search, and both parties would have gone their separate ways, wholly satisfied with the arrangement. Would the
Thirteenth Amendment still have been violated if this had happened?

This question can be generalized and broken into two distinct parts. First, does the coerced informant’s initial
voluntary decision to assist the state shield the relationship from Thirteenth Amendment scrutiny? Second, must the
coerced informant wish to break the agreement at some point for the servitude to be involuntary? The first question is
quickly resolved by reference to the Supreme Court’s peonage cases. As the Court made clear in Bailey, the existence of

209. See supra notes 1–9 and accompanying text.
210. See Presentment, supra note 1, ¶ 5.
211. See Portman, supra note 4 (according to her boyfriend, Hoffman believed that she needed to complete only “one big deal” to satisfy her obligations to the TPD).
212. One of the few courts to address the applicability of the Thirteenth Amendment to a coerced informant erroneously dismissed the informant’s argument on this basis. See Boyington v. State, 389 So. 2d 485 (Miss. 1980). In
Boyington, the defendant was indicted in Mississippi on charges arising from the sale of marijuana to an undercover agent. Id. at 487. After being apprehended in Pennsylvania, he waived extradition and, en route to Mississippi, told a Bureau of Narcotics agent that he wanted to “help himself.” Id. The agent told Boyington that if he served as an informant for the Bureau, the agent would recommend probation on the marijuana charges. Id. at 487–88. Boyington worked for the Bureau for six months and assisted in the development of ten cases. Id. at 488. Despite the prosecutor’s recommendation that he receive probation, the trial court refused to accept a plea bargain for probation and indicated that Boyington would be sentenced to two years. Id. Boyington rejected the plea, went to trial, and was convicted and sentenced to eight years in prison. Id. at 487–88. Boyington appealed, arguing in part that his employment as a confidential informant violated the Thirteenth Amendment. Id. at 488. The Mississippi Supreme Court dismissed this argument summarily, noting only that Boyington “freely and voluntarily
an initial voluntary agreement does not remove the relationship from the Thirteenth Amendment’s purview; rather, the focus of the Thirteenth Amendment analysis is on the existence of a criminal sanction should the servant fail to perform. Labor contracts generally are valid because the servant, even though he is “subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service.” Thus, “compulsion of . . . service by the constant fear of imprisonment under the criminal laws” violates the Thirteenth Amendment, regardless of how the service begins. To hold otherwise would allow easy circumvention of the Amendment’s prohibition any time an employer could obtain a laborer’s signature on a contract.

This answer only makes the second question more important. Because the Court has consistently discussed the Thirteenth Amendment in the context of service that is “compelled,” “forced,” or “coerced,” all terms that imply that the service is at some point involuntary. In common parlance, the term “involuntary” is amenable to two meanings. According to the Merriam-Webster Online Dictionary, for instance, an action is involuntary if it is done either “contrary to . . . choice” or “without choice.” Under the first meaning, and analogous to common-law torts like

214. Id.
217. Id. at 227.
220. The difficulty of divining the meaning of “involuntary” in the context of the ban on involuntary servitude is underscored by the Court’s cryptic and circular observation in United States v. Reynolds that “[c]ompulsion of . . . service by the constant fear of imprisonment under the criminal laws renders the work compulsory.” United States v. Reynolds, 235 U.S. 133, 146 (1914).
221. Merriam-Webster Online Dictionary.com, http://www.merriam-webster.com/dictionary/involuntary (last visited Nov. 13, 2009) (defining “involuntary” as “done contrary to or without choice”). In Kozminski, the trial court instructed the jury similarly that involuntary means, “done contrary to or without choice—compulsory—not subject to control of the will.” Kozminski, 487 U.S. at 936–37 (internal quotation marks omitted). The Court neither accepted nor rejected this instruction.
battery\textsuperscript{222} or crimes like rape,\textsuperscript{223} labor is involuntary only if the servant possesses some affirmative desire to stop working, and thus a prosecutor or plaintiff would be required to prove a subjective lack of consent on the part of the servant to establish a condition of involuntary servitude.\textsuperscript{224} But pursuant to the second meaning, a condition of servitude could be involuntary if the alternatives to service are so dire that the servant essentially is deprived of any choice at all. This latter view of volition would not ask the jury to inquire into the mental state of the servant; rather, the conditions of service alone would be enough to establish involuntary servitude.

Put another way, if labor is involuntary only if the laborer subjectively does not wish to work, then an individual effectively can waive the Amendment’s ban on involuntary servitude as it applies to her. However, while most constitutional protections can be waived,\textsuperscript{225} Professor Seth Kreimer presents two theories for why the Thirteenth Amendment’s protections cannot.\textsuperscript{226} First, beyond protecting an individual’s right not to be forced into slavery, the Thirteenth Amendment “defines . . . the structure of a decent society” and specifically “eradicate[es] a social practice

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\item \textsuperscript{222} See 6 AM. JUR. 2D Assault and Battery § 2 (2009) (“A battery is a wrongful or offensive physical contact with another through the intentional contact by the perpetrator and without the victim’s consent.”).
\item \textsuperscript{223} See Greene v. State, 673 S.E.2d 292, 296 (Ga. Ct. App. 2009) (“[T]he trial court explicitly instructed the jury that the State bore the burden of proving beyond a reasonable doubt that the victim did not consent to the conduct at issue.”).
\item \textsuperscript{224} See United States v. Kaufman, 546 F.3d 1242, 1263–65 (10th Cir. 2008) (discussing whether sufficient evidence supported jury’s finding that victims did not subjectively consent to servitude).
\item \textsuperscript{225} See Jason Mazzone, The Waiver Paradox, 97 NW. U. L. REV. 801, 801 (1992) (recognizing that defendants can waive Fourth, Fifth, and Sixth Amendment rights in exchange for sentence reduction).
\end{itemize}
deemed incompatible with a free society." Thus, an individual may not waive the Amendment's prohibition on slavery, because doing so would undermine the Amendment's broader societal purpose. Second, the prohibition on slavery can be viewed as "self-paternalistic"; it protects individuals from making a decision—here, selling oneself into slavery—that, however tempting it may seem at the time, a rational citizen might wish that she did not have the power to make.

These arguments also have considerable force when applied to involuntary servitude in the abstract. As originally contemplated, the inclusion of involuntary servitude in the Thirteenth Amendment was intended to target labor systems, like long-term apprenticeships or serfdom that, while not slavery in the strict sense, are essentially equivalent to it from the standpoint of their interference with individual rights and societal interests. As such, these conditions of involuntary servitude were deemed as offensive to a free society as slavery, and allowing waiver of the Amendment's protections would undermine this broader societal interest. Similarly, if "involuntary servitude" is conceived merely to include conditions of servitude like peonage that are directly "akin to African slavery," then self-paternalism suggests that citizens should be protected from making the unwise choice of agreeing to labor in such a

228. Id. at 1389. Professor Kreimer also explains that the Thirteenth Amendment could be deemed un-waivable under a purely paternalistic argument that choices made by victims of an inherently discriminatory society are "unreliable." Id. at 1388. He convincingly rejects that argument, however, as inconsistent with the "presuppositions of the rest of the American legal system and not least the underpinnings of many constitutional rights." Id. (footnotes omitted).
229. Some commentators have considered the prohibition on involuntary servitude as part and parcel of the ban on slavery for purposes of waiver. See Eugene Kontorovich, What Standing Is Good For, 93 VA. L. REV. 1663, 1695 n.64 (2007). This approach is problematic as the term "involuntary servitude" itself suggests that it should be treated differently. Because the word "involuntary" can mean "contrary to choice," the issue of the servant's wishes must be addressed more explicitly in order to ensure that the modifier retains some meaning. Moreover, consideration of Professor Kreimer's argument in the specific context of involuntary servitude provides a valuable opportunity to relate the use of coerced informants to the Amendment's history and context.
condition under the same logic that applies in the context of slavery.

The use of coerced informants, however, is not what one might immediately consider to be involuntary servitude "akin to African slavery." Rather, one must consider whether Professor Kreimer's logic carries the same force when the service to which the Amendment might arguably be applied drifts farther away from African slavery and the labor systems intended to mimic it. In the instant context, then, the first question is whether the use of coerced informants is offensive to the same fundamental societal values that animated the passage of the Thirteenth Amendment. As an initial matter, the use of coerced informants interferes with the informant's right to profit from her labor. A coerced informant's work has significant value, as shown by the substantial sums, which can run into the hundreds of thousands of dollars, that police are willing to pay active, non-coerced informants. The value of a coerced informant's work stems largely from her criminal connections, which police officers may be unable to recreate or which, at the very least, would require the investment of enormous police time. Yet, coerced informants are unpaid and thus deprived of the fruits of their valuable labor. Of course, lesser punishment and freedom from criminal prosecution can be viewed as a form of payment. But this reward is not one that society is willing to place an economic value on, because criminals are not permitted to buy an acquittal or purchase a lighter sentence. Moreover, as discussed later, allowing coerced informants to be paid for their work with leniency undermines the integrity and communicative value of criminal punishment in high-crime communities.

232. This concern echoes that of some commentators who see attempts to apply the Thirteenth Amendment to novel situations as a potential threat to the core force of the Amendment. See Carter, supra note 37, at 1356 n.160 ("Overly creative interpretations of the Amendment that pay little attention to its actual history and context can result in cases and scholarship diminishing the Amendment rather than strengthening it.").

233. See supra note 57.

234. MALLORY, supra note 11, at 2–4.

235. But see R. GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 32 (1965) ("The American bail system discriminates against and punishes the poor. The rich can afford to buy their freedom, and do; the poor go to jail because they cannot afford the premium for a bail bond.").

236. See infra Part VI.
The threat of criminal sanctions also interferes with the coerced informant’s right to escape “oppressive hours, pay, working conditions, or treatment” by leaving one job for another. This right was of particular importance in the Reconstruction and post-Reconstruction eras, when the Southern states, through legislative action, forced significant numbers of civilians to work under extremely dangerous conditions for little or no pay under threat of criminal punishment. Coerced informants face a similar predicament. They are civilians given little or no training and compelled to work in environments where they face likely injury or death if their cooperation with the police is discovered. And, like a peon, a coerced informant who realizes that her life is in danger has few options to escape the situation without facing the possibility of additional criminal punishment for doing so.

Finally, as discussed in more detail below, the widespread use of informants causes a number of attendant societal ills that reach far beyond the informants themselves. These harms, though different in detail than the collateral effects of slavery and peonage, are nonetheless broad in their reach, extending beyond the servant to other innocent parties and society in general.

Of course, there are features of the peonage and slavery systems that differ from the use of coerced informants. Most notably, though law enforcement generally and narcotics enforcement more specifically are frequently criticized for racial bias, the use of coerced informants does not involve the same level of racial animus or unequal racial impact inherent in both slavery and peonage. Regardless, to limit

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238. See NOVAK, supra note 155, at 18–43 (noting, inter alia, that convict labor leased out to private entrepreneurs suffered annual mortality rates of sixteen to forty-five percent).
239. See infra Part VI.
the scope of the Thirteenth Amendment only to servitude based on some immutable characteristic ignores the Amendment’s broad language and weakens the moral force it gains from its absolute prohibition on slavery and involuntary servitude. With these societal concerns in mind, Professor Kreimer’s reasoning for not allowing waiver of the Thirteenth Amendment protection applies with equal force to the use of coerced informants. The state’s use of the threat of criminal sanctions interferes with the coerced informant’s natural rights, and the collateral harms caused thereby make the use of coerced informants, like involuntary servitude generally, “incompatible with a free society.” Thus, an individual should not be permitted to waive the ban on involuntary servitude and agree to serve as a coerced informant.

Professor Kreimer’s “self-paternalism” argument also justifies prohibiting the waiver of Thirteenth Amendment protections by coerced informants. Coerced informants labor under threat of severe injury or death, should their cooperation with police be discovered. The terms by which they are able to escape that danger are typically unclear and the determination of whether they have met those terms is out of their control. Thus, even though some individuals may choose voluntarily to become coerced informants, the danger and uncertainty of that work suggest that agreeing to become a coerced informant is a decision individuals may wish that they did not have the power to make.

Finally, it is worth noting that an involuntary servitude standard that is not dependent upon the informant’s mental state is consistent with the Supreme Court’s Thirteenth Amendment jurisprudence. While the peonage cases did not require the Court to decide whether the servant must

241. See Slaughter-House Cases, 83 U.S. 36, 72 (1872) (“Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.”).

242. See supra note 103 and accompanying text.

243. See supra notes 84–86, 119 and accompanying text.

244. See Kreimer, supra note 225, at 1389.
subjectively desire to stop working, the Court repeatedly struck entire statutory schemes rather than finding Thirteenth Amendment violations on a case-by-case basis. But if the crux of a finding of involuntary servitude were the laborer’s subjective desire to stop working, these statutory schemes could have been allowed to stand in favor of a case-by-case analysis. Moreover, in Kozminski, the Court specifically refused to adopt a standard for involuntary servitude that would have required inquiry into the mental state of the victim. Though this reasoning was based at least in part on lenity concerns particular to the criminal statute at issue, it suggests that servitude guaranteed by threat of criminal sanction or physical harm is inherently coercive, regardless of the servant’s subjective mental state.

2. Independence of Criminal Charges

In its peonage cases, the Supreme Court invalidated on Thirteenth Amendment grounds numerous statutory schemes that shared one common characteristic: they made the breach of a labor contract a crime. The coerced informant’s situation is different. Like the peon, the informant who chooses not to work for the police is subject to criminal charges or greater punishment, but unlike the peon, those charges arise independently of the cooperation agreement and could be proven legally and constitutionally if they were

245. The laborer’s desire to work was not at issue because in each of the peonage cases, the servant either was subject to criminal prosecution for refusing to work or had previously fled his employment. See Pollock v. Williams, 322 U.S. 4, 6 (1944) (addressing a laborer who refused to work and was convicted of fraudulently entering into labor contract); Taylor v. Georgia, 315 U.S. 25, 27 (1942); United States v. Reynolds, 235 U.S. 133, 139–40 (1914); Bailey v. Alabama, 219 U.S. 219, 230–31 (1911); Clyatt v. United States, 197 U.S. 208, 218–19 (1905) (discussing petitioner challenged conviction for returning laborer who had fled to condition of peonage).

246. See, e.g., Pollock, 322 U.S. at 25 (“[W]e are compelled to hold that the Florida Act of 1919 as brought forward on the statutes as §§ 817.90 and 817.10 of the Statutes of 1941, F.S.A. are, by virtue of the Thirteenth Amendment and the Anti-peonage Act of the United States, null and void.”).

247. See United States v. Kozminski, 487 U.S. 931, 949–50 (1988) (“Moreover, as the Government would interpret the statutes, the type of coercion prohibited would depend entirely upon the victim’s state of mind. Under such a view, the statutes would provide almost no objective indication of the conduct or condition they prohibit, and thus would fail to provide fair notice to ordinary people who are required to conform their conduct to the law.”).

248. See supra notes 162–63 and accompanying text.
pursued prior to that agreement.\textsuperscript{249} For instance, the threatened charges that motivated Hoffman to cooperate with the TPD arose from the drugs and drug paraphernalia that were found during an apparently valid search of her apartment, and the state's attorney could have validly prosecuted her on charges stemming from that evidence.\textsuperscript{250} But does the independent validity of the criminal charges mean that the state may use them to compel an individual to work as an informant?

At best, an affirmative answer to this question suggests that an individual who has committed a criminal offense is not entitled to the same protection under the Thirteenth Amendment as someone who has not. Certainly, the Amendment expressly excludes from its protections an individual who has been "duly convicted" of a crime.\textsuperscript{251} However, if an individual can be forced to work simply because she \textit{may} be validly \textit{prosecuted} for a crime, then this textual exception is superfluous. Additionally, conditioning the existence of a Thirteenth Amendment violation on whether the threat of prosecution is independently valid raises a number of thorny practical issues. What standard would have to be met before the individual could be compelled to work for the state? Would probable cause or reasonable suspicion be sufficient, or, as suggested by the text of the Amendment, would the prosecution have to show actual guilt? Would the prosecution have to show that it could meet that standard prior to compelling the individual to serve or could the state wait until the informant tried to enforce the cooperation agreement or any criminal charges that the state eventually brought? What forum would decide whether the prosecution has met its burden, particularly if the state eventually decides not to prosecute on the underlying charges?

Furthermore, the Thirteenth Amendment's free labor goals are no less undermined if the threats used to compel service are of independently valid criminal prosecutions or of

\textsuperscript{249} Again this article assumes, solely for the purposes of making the strongest argument against applying the Thirteenth Amendment to coerced informants, that the state has valid and admissible evidence sufficient to convict the informant on other criminal charges. \textit{See supra} note 205.

\textsuperscript{250} \textit{See} \textit{Presentment, supra} note 1, \textit{¶} 1.

\textsuperscript{251} U.S. CONST. amend. XIII, § 1.
prosecution based solely on the breach of a contract for servitude. In either case, the servant provides valuable service without pay and has no viable opportunity to escape oppressive or dangerous working conditions.

Finally, there is nothing novel in the argument that the threat of an otherwise valid prosecution is illegal. For instance, the common-law crime of extortion involves a public official, under color of his office, taking money to which he is not entitled.\textsuperscript{252} Similarly, blackmail punishes a defendant who takes an action that he has a legal right to take, like reporting criminal activity, for an improper purpose, such as for monetary gain.\textsuperscript{253} Similarly, the Equal Protection Clause forbids police and prosecutors from making otherwise valid prosecution decisions on the basis of animus towards any race, nationality, or other protected class.\textsuperscript{254} Though these analogies are not complete, they suggest that the Thirteenth Amendment’s prohibition on labor that is coerced through threat of criminal sanction may extend to cases where the sanctions are otherwise constitutional. Kozminski also suggests that such an extension is appropriate, as the Court notes that threats of deportation or institutionalization, valid or not, could be sufficient to give rise to a condition of

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\item \textsuperscript{253} Blackmail is “[a] threatening demand made without justification.” \textsc{Black’s Law Dictionary} 180 (8th ed. 2004); \textit{see also} Marx, supra note 104, at 156 (“The controller-informer relationship is usually seen to involve the former controlling the latter. There may be a kind of institutionalized blackmail. Prosecution, prison, and/or public denouncement as an informer are held in abeyance as long as cooperation is forthcoming . . . .”). Moreover, as it is defined today, extortion includes coerced payment or other action by threat of force. \textit{See} \textsc{Black’s Law Dictionary} 623 (8th ed. 2004) (“The act or practice of obtaining something or compelling some action by illegal means, as by force or coercion.”); \textit{see also} People v. Hesslink, 167 Cal. App. 3d 781, 787–88 (Ct. App. 1985) (rejecting appellant’s argument that conviction for extortion arising from threat to arrest prostitute must be overturned because appellant had legal right to conduct citizen’s arrest, noting that “even if defendant had the right to arrest the victim, he was not at liberty to threaten to arrest her for the purpose of extorting money or property from her”); Berger v. Berger, 466 So. 2d 1149, 1151 (Fla. Dist. Ct. App. 1985) (recognizing that husband violated Florida’s extortion statute when he threatened to turn his estranged wife into the I.R.S. despite that he had a legal right to do so because he did not have the right “to threaten to do it for his own pecuniary advantage”).
\item \textsuperscript{254} Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).
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involuntary servitude.255

IV. A NEW MODEL FOR THE USE OF ACTIVE INFORMANTS

Recognizing that the Thirteenth Amendment forbids the use of coerced informants will require significant changes in how the state uses informants. These changes will impact all phases of the state-informant relationship, from the recruitment of new informants to the handling of active informants and attempts by injured informants to achieve redress. Though it is not exhaustive, this part sets forth a model of the state-informant relationship that incorporates at least some of those changes.

A. Recruitment

The most obvious change required by the Thirteenth Amendment is that police and prosecutors may not use the threat of criminal sanctions, couched as an offer of leniency or otherwise, to recruit active informants. This prohibition, however, leaves open at least three other recruitment options.

First, the police may offer leniency to individuals in exchange for information already in their possession.256 For instance, a drug user or low-level dealer could exchange information about the source of her drugs for a lighter sentence, or an individual facing prosecution could give the police information about an unrelated, unsolved crime in exchange for dismissal of charges. Second, to the extent that the state desires to recruit a civilian as an active informant, the police or prosecutor may appeal to any motive other than fear of criminal prosecution to encourage cooperation. For instance, the police could offer the individual money or play to her sense of civic duty, her desire to make amends for past

255. United States v. Kozminski, 487 U.S. 931, 948 (1988) ("Similarly, it is possible that threatening an incompetent with institutionalization or an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude . . . .").

256. Though a detailed discussion of the Thirteenth Amendment’s application to informants who only provide previously-obtained information to the police is beyond the scope of this article, the long common-law history of criminal misprision statutes, see Ciociola, supra note 190, at 699–706, suggests that the duty to assist the state by merely sharing information may join other long-standing duties, such as jury service, military service, and roadwork, as an exception to the Thirteenth Amendment. See Kozminski, 487 U.S. at 944 (listing other exceptions to the Thirteenth Amendment).
crimes, or a desire for revenge to encourage her to assist the police.

Should these avenues be unsuccessful or undesirable, the police and prosecutors also may use the Thirteenth Amendment's express exception for involuntary servitude "as a punishment for crime where of the party shall have been duly convicted." The state could charge and convict the prospective informant at trial or negotiate a plea bargain with her before requiring her to work off her sentence by cooperating with the police as an active informant. Of course, unlike more traditional forced labor, which can be imposed effectively without the convict's assent, the individual's agreement to cooperate would be required for the arrangement to be effective. Moreover, unlike current arrangements between the state and coerced informants, defense counsel would be involved in the negotiation of the agreement, and the court would at least have knowledge of its terms. Federal Rule of Criminal Procedure 35 contemplates this sort of agreement and permits a motion for reduction of sentence when a convicted defendant provides assistance in investigating or prosecuting a third party. Some states have similar rules.

B. Handling

Much as an informant cannot be recruited with threats of criminal sanctions, the police also cannot use such threats to control a reticent or misbehaving active informant. But a number of options remain for dealing with difficult informants. If an informant violates the terms of his cooperation, then the police may withhold any payments, stop using the informant, or attempt to coax the informant to resume proper assistance through the use of any other relevant leverage short of threats of criminal sanction or physical harm. Thirteenth Amendment issues come to the

258. See FED. R. CRIM. P. 35(b).
260. While a threat of direct physical force by the police would clearly violate the Thirteenth Amendment, see Kozinski, 487 U.S. at 952, it is also worth noting that the Thirteenth Amendment forbids the police from using an indirect threat of force to compel cooperation. For instance, the police may not threaten
forefront if the police learn that an informant has engaged in unapproved criminal activity during the course of her cooperation. Under the current model, an informant’s handler typically will either terminate the relationship and initiate criminal charges or use the threat of prosecution on the new offense to compel additional cooperation. With the latter option foreclosed, the handler still has a number of options: he may initiate criminal charges; forego prosecution at least temporarily; ignore the new offense entirely; chastise or otherwise punish the informant, such as with a reduction in pay; or terminate the cooperation agreement and withhold any benefit. The only thing the handler may not do is condition his decision on whether to pursue criminal charges on the informant’s continued cooperation.

Where the active informant is a convict working in a condition of involuntary servitude after being “duly convicted,” the situation changes from the current model because the convicted informant’s cooperation will be subject to the oversight of the sentencing judge. Though the sentencing judge is unlikely to be involved on a consistent basis, she likely would be much more cognizant of the terms and conditions of the informant’s service than is the current norm in the use of coerced informants. This judicial oversight provides an avenue for both the informant and the prosecution to raise any concerns about the informant’s cooperation. For instance, the informant could complain to the sentencing judge if she believes that the state is subjecting her to unnecessary risks, or that she has...

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...to reveal an informant’s status as a cooperator, thus making her the likely target of criminals, in order to compel her service. See Crain v. Krehbiel, 443 F. Supp. 202, 205–06 (N.D. Cal. 1977) (alleging that officers threatened informant with exposure to compel continued cooperation); Eugene Oscapella, A Study of Informers in England, 1980 CRIM. L. REV. 136, 144 (“An unscrupulous officer might, for example, hint to a theretofore secret informer that his identity will ‘accidentally’ be exposed if he does not cooperate.”).

261. See supra notes 103, 111 and accompanying text.

262. See supra note 249 and accompanying text.

263. Federal Rule of Criminal Procedure 35(b) and its state analogues are again instructive. By requiring the sentencing judge to assess whether the defendant has provided substantial assistance, these rules suggest that the court will remain involved in the case.

264. For instance, the Eighth Amendment’s prohibition on cruel and unusual punishment may place limitations on the nature of assistance required of the convict. See, e.g., Benefield v. McDowall, 241 F.3d 1267, 1271 (10th Cir. 2001) (recognizing that labeling an inmate a “snitch” violates the Eighth Amendment...
completed the required assistance but the state has not lived up to its obligations.\textsuperscript{265} Similarly, if the prosecution feels that the convicted informant has not complied with the terms of the cooperation agreement, it could seek sanctions of some sort, including a sentencing enhancement, fine, or judicial determination of non-compliance that bars a motion for leniency.

\textbf{C. Termination and Redress for Injuries}

Applying the Thirteenth Amendment to the relationship between the state and active informants will change very little the manner in which the cooperation relationship terminates. The relationship still may end if the informant decides not to cooperate any longer, the state terminates the relationship for informant misconduct, the state no longer requires the informant’s assistance, or the informant is seriously injured or killed.\textsuperscript{266} The only difference from the current model is that the state’s power to coerce additional service if it decides that the informant has not fulfilled her obligation will be limited to convicted informants. And, unlike the coerced informant, whose only recourse if she believes that the state has not fulfilled its end of the bargain is a difficult legal challenge to a subsequent prosecution,\textsuperscript{267} the convicted informant who disputes the prosecutor’s decision may seek relief from the sentencing judge. Moreover, given that a cooperation agreement between a convicted informant and the state is likely to be more explicit and more definite in its terms than current agreements negotiated without court oversight, the resolution of any dispute regarding the satisfaction of that agreement will not depend as heavily on the relative credibility of the informant and state agents.

In addition, should the police or prosecution use the

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\item \textsuperscript{265} See, e.g., Eidman v. State, 671 S.E.2d 292, 293–94 (Ga. Ct. App. 2008) (considering and rejecting defendant’s contention that he provided substantial assistance sufficient to entitle him to a reduced sentence); State v. Johnson, 630 N.W.2d 583, 590 (Iowa 2001) (confirming sentencing court’s discretion to determine amount to reduce sentence for substantial assistance by confidential informant and remanding for consideration of defendant’s argument that he was entitled to greater sentence reduction).
\item \textsuperscript{266} See supra notes 109–13 and accompanying text.
\item \textsuperscript{267} See supra notes 117–20 and accompanying text.
\end{itemize}
threat of criminal sanctions to compel assistance, the coerced
informant will have at least two new avenues to seek
redress.268 First, a coerced informant may complain to federal
authorities, who can charge the offending government agents
criminally under 18 U.S.C. § 1584 with holding the informant
in a condition of involuntary servitude.269 Of course, the
availability of this avenue may be curtailed by the
unwillingness of prosecutors to investigate or file criminal
charges against law enforcement officials generally and
federal investigators or attorneys more specifically.270
Nonetheless, the possibility of criminal liability will hopefully
chill at least somewhat the use of threats of criminal
prosecution to compel informant cooperation.

Second, a coerced informant may file a civil action for
damages under 42 U.S.C. § 1983 alleging a violation of the
Thirteenth Amendment by state entities responsible for the
use of threats of criminal sanctions to compel her service, as
well as for any injuries resulting from that service.271
Similarly, a coerced informant working for federal officials
may assert a claim under Bivens v. Six Unknown Named
Agents of Federal Bureau of Narcotics272 for any injuries
resulting from a Thirteenth Amendment violation.273

268. See supra notes 121–31 and accompanying text. This article does not
attempt to set out an exhaustive assessment of the practical viability of
attempts to redress Thirteenth Amendment violations, as the law on remedies
for Thirteenth Amendment violations is woefully underdeveloped. Rather, it
seeks only to provide an outline of some avenues that eventually may be
pursued.

269. Similar state statutes exist, as well. See, e.g., CAL. PENAL CODE § 181
(2009) (prohibiting holding another in a condition of involuntary servitude);
MICH. COMP. LAWS § 750.349(1)(e) (2009) (defining kidnapping to include
holding a person in involuntary servitude); OHIO REV. CODE. § 2905.01(B)(3)
(2009) (defining kidnapping to include holding a person in involuntary
servitude). Despite the availability of state criminal avenues, convincing state
prosecutors to file charges against their colleagues or peers will face systemic
obstacles similar to those outlines above.

270. See David Rudovsky, Police Abuse: Can the Violence Be Contained?, 27
HARV. C.R.-C.L. L. REV. 465, 488 (1992) (discussing the unwillingness of
prosecutors to indict police for misconduct).

271. See, e.g., Alkire v. Irving, 330 F.3d 802 (6th Cir. 2003) (reversing
dismissal of § 1983 claim alleging violation of the Thirteenth Amendment claim
relating to imprisonment for failure to pay fine).


273. See Humphries v. Various Fed. USINS Employees, 164 F.3d 936, 946
(5th Cir. 1999) (finding deported immigrant's Thirteenth Amendment Bivens
claim non-frivolous). But see, e.g., Jane Doe I v. Reddy, No. C 02-05570 WHA,
Initially, a coerced informant's ability to recover against individual defendants under § 1983 or Bivens will be limited by arguments that qualified immunity applies because the right in question is not clearly established. These hurdles, however, would only survive until Thirteenth Amendment jurisprudence develops more fully. Moreover, coerced informants even at the outset, could seek damages from local governmental entities that have policies permitting the use of coerced informants.

V. LAW ENFORCEMENT AND DEFENSE CONCERNS

Given the central role of active informants in most areas of law enforcement, the suggestion that their use violates the Thirteenth Amendment likely will inspire concern among law enforcement officials. Perhaps more surprisingly, concerns also are likely to be raised by defense attorneys and sympathetic commentators, as many defendants and their counsel see cooperation agreements as the simplest way to avoid punishment.

A. Law Enforcement Concerns

Police and prosecutors generally, and particularly those who work in areas, like narcotics, that are highly dependent on informants, will have the most forceful concerns about recognizing a constitutional prohibition on the use of coerced informants. Much of this criticism likely will have a

2003 WL 23893010, at *10 (N.D. Cal. Aug. 4, 2003) (rejecting private cause of action against private citizens for Thirteenth Amendment violation and asserting that “no decision has ever actually upheld a private right of action under the Thirteenth Amendment and many have rejected it”).


275. Despite the Court's recent instruction in Pearson that courts faced with qualified immunity issues need not address the existence of a constitutional right before determining whether it is clearly established, 129 S. Ct. at 819–22, courts retain discretion to do so and other avenues, such as suits for injunctive relief, persist for the development of “new” constitutional rights. Id. at 821–22; see Thomas Healy, The Rise of Unnecessary Constitutional Rulings, 83 N.C. L. REV. 847, 934–35 (2005) (noting alternative ways by which courts can decide the contours of constitutional rights outside of section 1983 suits against individuals).

276. See County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) (recognizing that qualified immunity is not available in actions against municipalities).

277. See, e.g., HARNEY & CROSS, supra note 48, at 12 (“The short summary of
practical bent: if effective law enforcement requires the use of informants, then a constitutional limitation on the use of informants presumably will hamstring the investigation and prosecution of these crimes.

The most direct and principled response to these concerns is simply that they are irrelevant. Many constitutional provisions make police work more difficult, but such difficulties are oftentimes intentional, and even when merely incidental do not justify ignoring the Constitution's plain language. As the Supreme Court has recognized in the Fourth Amendment context, "the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."2

Similar reasoning applies here: Congress drafted and passed, and the States ratified, a sweeping ban on slavery and involuntary servitude on the belief that these conditions are offensive to a free society and interfere with the natural rights of the citizenry.279 This ban cannot be ignored simply because it is inconvenient.

That being said, on the few occasions that coerced informants have raised Thirteenth Amendment arguments, courts have dismissed them with little analysis, suggesting that perceived practical concerns may prevent their serious consideration.280 Also, despite its occasional sweeping declarations to the contrary, the Court does weigh practical considerations when considering the scope of some constitutional protections, such as the due process clause,281

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the stated value of the informer from the prosecution point of view is that he is almost indispensable in narcotics cases. With this we agree . . . ."); SKOLNICK, supra note 56, at 133 ("[B]ecause the maintenance of the information system is perceived by the prosecutor as necessary to law enforcement, the needs of this system tend to be given extra consideration by the prosecutor.").

279. See supra notes 141–50 and accompanying text.
or remedies for constitutional violations, such as the exclusion of evidence obtained in violation of the Fourth Amendment. Thus, a robust argument for the application of the Thirteenth Amendment in the informant context requires a response to likely law enforcement concerns.

First and foremost, the Thirteenth Amendment leaves police and prosecutors with options other than threatening criminal prosecution: they may encourage cooperation with inducements other than leniency, offer leniency in exchange for the provision of previously-obtained information, or compel active cooperation from convicts. All of these alternatives are subject to criticism, however, because they are potentially less efficient or efficacious ways of obtaining cooperation than threatening a potential informant with prison time. Moreover, an informant who only provides previously obtained information is less useful, because the police cannot use the informant to investigate specific individuals or crimes, and to obtain physical evidence that can be used to secure a conviction or convince another defendant to cooperate. Finally, a convicted criminal will be an ineffective active informant unless the informant's conviction and the terms of her sentence can be protected from public disclosure; otherwise, the informant would easily be discovered, criminals would refuse to interact with her, and she may be in physical danger.

importance of plea bargains to the criminal justice system in course of deciding whether prosecutor's decision to seek indictment on more severe charges in retaliation for defendant's decision to decline plea bargain violated the due process clause).


283. See supra notes 255-58 and accompanying text.

284. WILSON, supra note 49, at 66. For instance, an informant motivated by a sense of civic duty may decide at some point that she has fulfilled her obligation to society or that cooperating with the police has become too risky. If that happens, the police at most can offer money or appeal to a sense of guilt. Though these maneuvers may work, the state's persuasive arsenal is much more robust when it can threaten prison time. See id. at 66-67 (discussing the different experiences and philosophies of two DEA agents in trying to develop useful long-term informants).

285. See HARNEY & CROSS, supra note 48, at 72 ("Secrecy, of course, is of paramount consideration in the continuing effective use of a person who is furnishing information. If we are careless we frustrate our first objective in obtaining evidence."); Pecquet & Corbett, supra note 8 (quoting TPD spokesman explaining why the TPD did not take Hoffman to jail or inform the local
In large part, these concerns only underscore why the use of coerced informants violates the Thirteenth Amendment. The Amendment prohibits using the threat of criminal sanctions to compel labor precisely because the threat is so powerful that it prevents the laborer from choosing not to work or from rejecting oppressive or dangerous conditions. Thus, when police direct a coerced informant’s investigation, they can involve an informant like Rachel Hoffman in more dangerous criminal activity than the informant has the training or ability to handle, and the informant cannot refuse. It is this lack of a real choice that renders the condition of servitude offensive to a free society.

The safety and efficacy concerns that require that an informant’s identity be kept secret are different, however, because they are independent of the underlying rationale for the Thirteenth Amendment. Nevertheless, the interests that counsel in favor of secrecy are counterbalanced by constitutional arguments in favor of requiring that criminal records remain public. While the ultimate resolution of these opposing concerns is beyond the scope of this article, experience shows that it is impracticable to protect the identity of convicts who become active informants. The Federal Judicial Conference recommends that access to sealed documents, such as plea agreements involving cooperation, be prohibited. Additionally, informant plea

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prosecutor, “If we take her to jail, people are more likely to find out about it . . . . It’s an effort to maintain the integrity of the investigation.”). 286. See supra note 170 and accompanying text.

287. See Presentment, supra note 1, ¶ 1 (“Although Ms. Hoffman had a well established business of cannabis distribution with her friends, she had no experience with dealing in ecstasy [sic], cocaine or firearms.”).

288. By analogy, an argument against applying the Thirteenth Amendment to coerced informants on these efficacy grounds is no more convincing than a landowner defending her decision to threaten to beat a laborer on the basis that it is the best way to get him to work hard.


agreements and sentencing records are routinely sealed to protect informants and policing efforts.291

B. Defense Concerns

Criticism by those on the defense side of the aisle is likely to involve two issues: first, that forbidding cooperation in exchange for leniency interferes with a defendant’s autonomy; and second, that forbidding the use of coerced informants will result in defendants receiving more prison time. The first concern is merely a reiteration of the argument that an individual’s agreement to become a coerced informant exempts the arrangement from the Thirteenth Amendment scrutiny, but from a defense perspective. As explained previously, the Thirteenth Amendment cannot be waived by an individual because it protects societal interests in addition to individual rights, and thus the use of coerced informants cannot be defended on the ground that informants themselves have a right to choose to enter into a condition of involuntary servitude.292 Second, forbidding the use of coerced informants is likely to result in at least a temporary lengthening of sentences and increased rate of incarceration. It is unlikely, given the importance of informants to law enforcement, that a more formalized process that involves conviction, sentencing, and a motion for leniency will prevent those with the most to offer from negotiating arrangements with police and prosecutors. But individuals who have less to offer will not receive leniency and will be subject to prosecution and punishment for their crimes. For the reasons explained infra, the more accurate correlation between the committed and the sentences received that would result would be a net positive from a larger societal standpoint.293

Additionally, forcing negotiations between defendants and the state to take place in the context of a formal proceeding will put defense counsel in a position to better protect their clients’ interests. First, many coerced informants agree to cooperate with the police or prosecutors without the advice of counsel, who could explain to their

291. See Marx, supra note 104, at 49 (recounting that in early 1980s, at least seventy-five defendants were permitted to enter secret guilty pleas in order to shield their undercover work); Natapoff, supra note 105, at 1000–01.
292. See supra notes 229–41 and accompanying text.
293. See infra Part VI.
clients the charges at issue, the sentences that they might receive, and their chances of success at trial. A prohibition on agreements that exchange leniency for active cooperation prior to a conviction will guarantee that the informant will have access to counsel, thus allowing informants to negotiate a fairer arrangement based on their actual criminal liability and a realistic assessment of the sentence they would likely receive.

Moreover, the participation of defense counsel and the involvement of the court can guarantee that the obligations of both the informant and the government are clearly defined, set forth in their entirety, and enforceable. Also, because any agreement will most likely be folded into a plea bargain, the defendant will be entitled to the procedural protections that attach thereto, including a colloquy with the judge to ensure that the defendant’s plea is knowing, intelligent, and voluntary. Finally, these procedural protections and the involvement of counsel will minimize the risk that the police will be able to coerce an innocent individual into becoming an active informant through unsubstantiated threats of criminal charges.

VI. THE THIRTEENTH AMENDMENT IN A LARGER POLICY CONTEXT

Thus far, this article has argued that recognizing a Thirteenth Amendment prohibition on the use of coerced informants is justified on doctrinal, historical, and practical grounds. The final prong of the argument is that using the

294. See Natapoff, supra note 11, at 667–68.
295. See id. at 665–66 (discussing the lack of finality, completeness, and enforceability inherent in current cooperation agreements).
297. While there are no reported cases of the police compelling an innocent civilian to act as a coerced informant through the use of false threats, the pressure placed on police to develop informant networks, see MALLORY, supra note 11, at 18 (“When examining productive investigator methods, it becomes obvious that investigators who have numerous informants are the most effective and efficient.”), coupled with the encouragement that they receive to use bluffs to recruit informants, see id. at 23, suggests that such situations are inevitable. Of course, just as it is commonly accepted that some innocent defendants plead guilty despite the procedural protections available, see Scott W. Howe, The Value of Plea Bargaining, 58 OKLA. L. REV. 599, 629–32 (2005), these protections are not likely to prevent all cases where an active informant agrees to assist police in exchange for leniency on charges of which she is innocent.
Thirteenth Amendment to regulate the relationship between the government and informants also will ameliorate some of the policy concerns that others have raised about the use of informants. Though these policy benefits are not sufficient alone to justify this application of the Thirteenth Amendment, an examination of the larger policy context shows that the Thirteenth Amendment can play an important role in addressing problems that are currently wanting for an effective solution.

Social science scholars have long discussed the corrosive effects of the infiltration of social groups by informants, particularly in the historical context of the Stasi, well known for their prolific use of informants in East German society. They have also looked at the sociological context of agents provocateur, informants who incite wrongdoing among fringe social and political groups. Recently, legal academicians, led by Professor Natapoff, have also begun looking at the impact that widespread informant use in our criminal justice system has had on communities in which crime and snitching are most prevalent.

Professor Natapoff postulates that the use of informants both exacerbates existing social problems in crime-ridden communities and creates a number of new ones. First, when police tolerate relatively minor criminal activity by low-level informants under the utilitarian justification that they assist the police in apprehending "bigger fish," marginal communities are made even more dangerous for their law-abiding residents. Second, Natapoff argues that, much like the East German government's pervasive surveillance of its citizens, the widespread use of informants in already crime-ridden communities threatens to "ero[de] the social fabric" of those communities.  

Interpersonal relationships between  

298. See BARBARA MILLER, NARRATIVES OF GUILT AND COMPLIANCE IN UNIFIED GERMANY: STASI INFORMERS AND THEIR IMPACT ON SOCIETY (1999).  
299. See Greer, supra note 52, at 515–18; Gary T. Marx, Thoughts on a Neglected Category of Social Movement Participant: The Agent Provocateur and the Informant, 80 AM. J. SOC. 402, 428–30 (1974) (discussing the diverse impact that agents provocateur can have, including increased radicalization and deflation).  
301. Natapoff, supra note 11, at 691–92.
citizens are infused with mistrust, and individuals can suffer psychological harm. Third, government tolerance of informant criminality undermines the normative messages of the criminal justice system, communicating that criminal liability is not based on a moral judgment of an individual's actions, but only on a utilitarian determination of the value of the individual to the state. This expressive confusion damages the credibility of the police, who are no longer seen as moral agents interested in justice, and interferes with the relationship between the police and community members. Finally, Professor Natapoff contends that widespread deployment of informants, most of whom are criminals, in poor, urban neighborhoods, identifies those neighborhoods as unavoidably criminalized, thus dooming to failure any attempts at self-improvement.

Professor Natapoff suggests a patchwork of solutions to these problems, including increased transparency and accountability in the use of informants, restrictions on the leniency available to informants, open public debate on the use of informants, and research into the impact of informants on high crime communities. Additionally, she proposes that courts should permit discovery on the use of informants in individual cases and hold hearings on the reliability of informant testimony, as well as the publication of informant data and democratic debate on the desirability of using informants. While these are laudable proposals, they are admittedly indirect solutions to the identified problems.

Albeit somewhat coincidentally, recognizing Thirteenth Amendment limitations on the use of informants would provide significant and direct assistance in addressing the policy concerns identified by Professor Natapoff. The main practical impact of prohibiting police and prosecutors from exchanging leniency for active cooperation, absent a conviction, will be a decline in the number of criminals released back into high-crime communities without

302. Id.
303. Id. at 694–95.
304. Id.; Natapoff, supra note 300, at 1750.
305. Natapoff, supra note 11, at 695–96.
306. See id. at 699–703.
307. Id.
308. See id. at 696–98 (recognizing the difficulties in imposing significant direct restrictions on informant use).
punishment. Currently, most individuals who become coerced informants presumably do not already possess information of sufficient value to justify the state foregoing prosecution. Thus, if these individuals can no longer offer assistance in exchange for leniency, they will have little leverage in negotiations with police or prosecutors. Those civilians who are best-situated to become useful informants might be able to negotiate plea agreements that include active cooperation as part of the sentence, but in the remaining cases the state will be forced to assess each as they would any other suspected criminal and make a prosecution decision based on typical discretionary considerations.

Returning fewer criminals to their communities apparently untouched by law enforcement will rejuvenate the value of the criminal law as an expressive, normative, and deterrent force. Individuals contemplating criminal activity will see that the likelihood of punishment is greater because “working off” a charge will no longer be a viable option, and thus will be deterred from involvement in crime. Moreover, law-abiding citizens who currently view the police as driven purely by institutional interests will see law enforcement as more community-focused and thus deserving of greater respect. The decision-making in the criminal justice system will also appear to be motivated less by a utilitarian assessment of an individual criminal’s value as an informant and more by a retributive assessment of the moral desert of the individual’s criminal actions. Additionally, including

309. It is hard to imagine that a civilian possessing such information would choose to become a coerced informant rather than turn over the information. Though the dangers of being discovered as a snitch are significant, particularly if the civilian is required to testify at trial, they would seem to pale in comparison to the dangers faced by an informant who immerses herself in criminal activity in order to obtain new evidence.

310. See supra notes 256–58 and accompanying text.

311. While the exercise of prosecutorial discretion is itself a much criticized aspect of the criminal justice system, see, e.g., Angela J. Davis, The American Prosecutor: Independence, Power, and the Threat of Tyranny, 86 IOWA L. REV. 393 (2001), an increased normalization in the treatment of arrestees would be an improvement over the current system.

312. Recent studies suggest that the probability of punishment is a more important component of deterrence than its severity. Edward K. Cheng, Structural Laws and the Puzzle of Regulating Behavior, 100 NW. U. L. Rev. 655, 660 (2006). If this is true, the systematic and widespread failure to punish informants may have an even greater impact on the criminality of others than might originally have been expected.
work as an active informant as part of a criminal's sentence will make clear that this service is difficult, dangerous, punitive, and not merely a free pass for continuing criminality. Ultimately, effecting these changes in the communicative nature of law enforcement will make the law-abiding members of high-crime communities more likely to cooperate with the police in fighting crime. And with fewer criminals permitted to roam the streets unchecked, these citizens can undertake the difficult work of rebuilding their community with less interference from its deleterious members.

Just as the decline in active informants means that fewer criminals will be released back into high-crime communities, it also means that fewer community members will actively seek to "make cases" against their neighbors in order to avoid criminal sanctions. Though active informants rarely seek out crime aggressively enough to satisfy the strict legal definition of entrapment, they nonetheless encourage criminal activity that may not have occurred otherwise. Fewer active informants thus will mean less crime, thereby creating safer communities and lessening the appearance of collusion between police and criminals. Additionally, as fewer civilians seek to obtain incriminating evidence against their neighbors, law-abiding members of communities will have less reason to doubt the motives of others within the community, thus enhancing trust and permitting stronger internal communal bonds. As these communities become stronger, their members will become more effective partners with law enforcement and become better able to eliminate criminal elements in their midst.

Of course, the Thirteenth Amendment is not a panacea for the problems arising from widespread informant use. The Amendment's goal is the protection of individual rights and the eradication of a narrow range of onerous social practices,

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313. But see United States v. Groll, 992 F.2d 755, 759 (7th Cir. 1993) (finding sufficient evidence in the record to support entrapment defense where defendant only set up deal after an informant called her every day for a month requesting that she sell marijuana to undercover officer and began threatening her and acting belligerently); People v. Bonner, 895 N.E.2d 99, 103–07 (Ill. App. Ct. 2008) (finding entrapment established as a matter of law where defendant agreed to sell drugs only after informant offered him sexual favors to do so).

rather than reform of the criminal justice system. Therefore, some potentially deleterious informant use may still remain. For instance, some criminals will still be released back into their communities and their past crimes thereby tolerated, in exchange for previously-obtained information. As a result, the Thirteenth Amendment's prohibition on the use of coerced informants should be seen as a supplement to, rather than a replacement for, the types of structural reforms suggested by Professor Natapoff and others.

CONCLUSION

Rachel Hoffman’s death is a terrible tragedy marked by a significant human toll: the loss of one life, the likely death of two others in prison or at the hands of the state, and the potential end of at least one law enforcement career. Despite these losses, this tragedy provides an opportunity to reexamine the constitutional implications of the relationship between the state and informants who, like Rachel Hoffman, work under threat of criminal punishment. As a doctrinal matter, this article argues that the use of criminal sanctions to compel service from a civilian falls squarely within the Supreme Court’s definition of involuntary servitude and thus runs afoul of the Thirteenth Amendment. But because of the unique historical foundations of the Thirteenth Amendment, more than a mere doctrinal argument is needed to justify applying the Amendment in this novel context.

Using the Thirteenth Amendment to protect coerced informants appears at first blush to be a significant departure from the Amendment’s immediate aim of eradicating African

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315. See supra notes 136–50 and accompanying text.
316. Such under-enforcement does not necessarily have a negative impact, however, as the trading of leniency on a minor offense for information about a more serious crime can actually engender trust in a crime-ridden community, thus leading to more effective law enforcement in the future. See Natapoff, supra note 300, at 1751–52.
317. See Natapoff, supra note 11, at 697 n.230 (describing other proposals for reform of informant use).
slavery, peonage, and similar institutions. Such a departure triggers the concerns raised by scholars that the unfettered use of the Thirteenth Amendment in novel arenas can lead to unintended consequences, vague legal standards, and an eventual weakening of a totemic constitutional statement. This article seeks to allay those concerns first by recognizing that at its core the coerced informant's situation is the same as thepeon's. Both are forced to labor in dangerous conditions for little or no pay with the full weight of the criminal justice system guaranteeing their continued service. And just as critically, the differences in their predicaments—namely, the informant's putatively voluntary agreement to cooperate and the fact that the criminal charges threatened against the informant are independent of any failure to cooperate—are not of constitutional significance. Finally, the application of the Thirteenth Amendment suggested herein is narrow: it forbids only the use of threats of criminal sanctions as leverage to compel informant cooperation absent a criminal conviction. For these reasons, the use of the Amendment to protect coerced informants, while novel, strengthens the Amendment's prohibition by recognizing that the Constitution forbids involuntary servitude even when the servant is a suspected criminal.

Merely recognizing that the Thirteenth Amendment applies to the use of coerced informants does not resolve the issue of what remedy the Amendment requires. If the Thirteenth Amendment is conceived of as prohibiting a class of conditions that are problematic only because of their deleterious effects on those subjected to them, then the negative impact of a violation of the Amendment may be remedied by safeguards that ameliorate those effects. In the case of coerced informants, such a practical approach would allow a range of possible solutions. For instance, the government could be required to normalize the informant recruitment process by allowing civilians to consult with counsel prior to entering into cooperation agreements, providing better training for informants, or concretely spelling out an informant's obligations. Similarly, limits can be placed on who could be recruited as an informant, forbidding police from requiring cooperation from minors or minors.

320. See supra notes 36–37 and accompanying text.
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nonviolent offenders.321

Such practical measures, however, which address only
the unjust incidental effects of a condition of involuntary
servitude, fail to achieve the expansive goals that animate the
Amendment. The Thirteenth Amendment is nearly unique
among constitutional protections in that it does more than
protect individual rights—it vindicates broader societal
concerns over the fundamental incompatibility of slavery and
involuntary servitude with American ideals of freedom.
Recognizing the primacy of these interests in the Thirteenth
Amendment analysis, this article views the Amendment
consistently with its forceful language as an absolute
prohibition on a class of conditions that are per se sufficiently
harmful to require the termination of the offending condition,
an absolute remedy. Applied in the instant context, this
approach instructs us that because the use of coerced
informants violates the Thirteenth Amendment, half-
measures are inadequate to remedy the constitutional
violation and that use must cease.

321. It is these sorts of reforms that Rachel Hoffman's parents sought, and
largely failed, to have enacted by the Florida legislature. See Leary, supra note
19.
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