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A Closer Look at Police Policy

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Foreword I

Informants play an undeniably large role in current law enforcement, contributing to the investigation and prosecution of a wide variety of crimes. For example, research suggests that while the overall use of warrants has declined considerably, significant numbers of search warrants are still based on information from confidential informants (CIs). Yet, there has been relatively little focus on CI usage in the recent literature in law, criminal justice, and policing.

The inadequacy of the current literature is significant given the long-standing and serious problems of CI abuses. CIs have lied to police and fabricated evidence, leading to conviction of innocent people. CIs have used their relationship with police to continue their own criminal activities with impunity, harming individual victims and larger communities. Police officers have even been known to fabricate the existence of or information from CIs to further their investigations. CI abuses therefore undercut both the accuracy of police investigations and community trust in police and the criminal justice system as a whole.

I have attempted to fill some of the gap in the legal literature by focusing on improving judicial oversight of the role that CI information contributes to police investigations, particularly search warrants based on CI tips. My 2010 article, "Truth or Consequences: Self-Incriminating Statements and Informant Veracity," critiques the current heavy reliance by courts on CIs' self-incriminating statements as a significant factor supporting the reliability of the CI's information when finding the existence of probable cause necessary to issue a search warrant. In almost all other circumstances, admissions of criminal activity undercut, rather than support, credibility. And jurisprudence from the US Supreme Court in other contexts undercuts the reliability of using self-incriminating statements to support the veracity of other information. I therefore propose a much more rigorous approach to analyzing when CIs' self-incriminating statements could help support the informant's veracity and therefore the existence of probable cause based in part on an informant tip. I argue that courts should look carefully at both the substance of the CI's statements and the circumstances surrounding the making of the statements. As to the substance of the statements, courts should analyze whether the statements are actually incriminating and whether they relate to the subject of the investigation for which

the search warrant is sought. As to the surrounding circumstances, courts should analyze the CI's motives in making the statement, including whether the CI has an incentive to provide accurate information and a disincentive to provide lies or guesses. CIs often receive significant benefits from law enforcement for providing information, but courts must scrutinize the extent to which the circumstances suggest that the CI could benefit from providing rumors or even lies without detection by the police.

My follow-up article, "Full Disclosure: Cognitive Science, Informants, and Search Warrant Scrutiny," builds on "Truth or Consequences" and focuses more specifically on the cognition research that can help explain how CIs can provide inaccurate information without detection by police or reviewing courts. Cognitive theories of implicit bias, tunnel vision, priming, and hindsight bias all help explain the gap between courts' stirring rhetoric about the importance of magistrate scrutiny of search warrants and the actual practice of extreme deference to police officers' statements when magistrates review search warrant applications. These cognitive biases can affect each stage of the search warrant process, including targeting decisions, the drafting process, the magistrate's decision whether to grant the warrant, and post-search review by trial and appellate courts. This cognitive research paints a fairly bleak picture of the extent to which police, prosecutors, magistrates, and appellate judges all lack the incentives to identify and challenge false information from CIs in search warrant applications. To combat these biases, I propose a number of interconnected solutions, all revolving around the idea of full disclosure. These solutions include education for police officers, magistrates, and judges about cognitive biases generally and the value of meaningful judicial review of warrants for combating these biases. To facilitate this judicial review, I propose that police should use a checklist when preparing search warrant applications to help them identify and disclose all relevant information. The article then suggests changes for judicial review of challenges to the accuracy and completeness of search warrant information. My goal in writing "Full Disclosure" was to help identify what information magistrates should be given in connection with search warrants and to make it easier for police to provide that information.

The role of police is crucial. While there certainly is room for improving judicial oversight, Dr. Shane correctly notes in this monograph that judicial review occurs "in a setting far removed from the tactical operation of deploying the CI, where the burden for assessing integrity and ability should rest with police…." Police officers, rather than magistrates or reviewing judges, are in the best position to evaluate informant motivation and to prevent informant abuses before they occur. That is why I consider this monograph to be so valuable: It synthesizes theoretical, historical, and empirical research into informant usage and abuses; it offers its own empirical study of police policies regarding informants; it also offers a number of valuable practical and policy recommendations for improving police control of CIs.

Dr. Shane and I agree about a key foundational point underpinning this monograph: the importance of examining CI motivation and how that can intersect in problematic ways with institutional pressures on police to allow for both intentional wrongdoing and unintentional poor judgment. For example, he notes how paid in-

formants may commit intentional wrongdoing in order to get paid. He also looks at "hammered informants" who provide information about others' wrongdoing in order to obtain leniency for their own crimes. His analysis is consistent with my analysis in "Truth or Consequences" about the dangers that can arise when informants have no reason to fear that false information will be held against them but everything to gain when police believe that false information. Dr. Shane also discusses the structural incentives for CIs to tailor their stories to what police want to hear, for police to accept this information rather than looking skeptically at it, and even for police to engage in other problematic practices regarding CI usage.

Building from that important foundation, Dr. Shane provides a great deal of useful information about how police actions and choices can improve police assessments of CI credibility and their control over CIs to help improve the reliability of CIs' information. Specifically, this monograph focuses on two key aspects of police usage of CIs.

First, Dr. Shane focuses on assessment of CI credibility. He correctly notes two flaws with the courts' current emphasis on a CI's track record of providing useful information. That analysis does not help with the initial deployment of CIs, and it requires record-keeping that police agencies often fail to do. Dr. Shane therefore focuses in particular on integrity testing (i.e., "placing a prospective CI in a predefined covert, controlled and simulated situation, where the CI has the opportunity to equally report truthful or fabricated details"). The CI would be given a situation in which he or she would have a role to identify or develop information, without knowing that the situation was a simulation. To pass the integrity test, the prospective CI would have to follow directions and accurately and truthfully report various details of the situation. Police could then assess both the CI's ability to gather and report accurate information and the CI's willingness to fabricate or embellish that information. Integrity testing thus provides police with a powerful tool to analyze the CI's credibility and the reliability of the CI's information.

Second, Dr. Shane focuses on the important role that police policies can play in oversight of CI usage. After providing an overview of the value of police policies and the model policy on informant usage that was promulgated by the International Association of Chiefs of Police (IACP), he details his empirical investigation into actual police policies from more than 30 states and some federal police agencies. His research uncovers that virtually all of the police policies on informant usage differ significantly from the model policy. The findings of this research are very interesting and suggest significant room for internal police reform:

- He notes that only one of 165 policies recommends integrity testing before CIs are deployed for the first time. Yet, Shane provides a strong argument for the value of integrity testing as a best practice.
- He notes that more than 30% of policies do not require officers to establish the CI's reliability at any point in the process. And of the policies that address informant reliability, many of those policies do so in ways that are vague or otherwise inadequate and vulnerable to abuse.

- He also notes that most policies are deficient regarding practices involving informant control. Problems identified include an inconsistent or unclear definition of who qualifies as a CI, inadequate training and supervision of both CIs and officers engaged with CIs, and failures related to keeping adequate records of CIs' track records.

Shane therefore correctly concludes that the data suggest that police management is unaware of these policy deficiencies, which can contribute to "organizational accidents" in the form of CI or officer misbehavior.

The monograph goes beyond just identifying these problems, however. Instead, it offers some concrete recommendations for improving police policies and practices. For example, it recommends increased use of integrity testing to assess potential CIs and to weed out people who are more likely to provide inaccurate information. It includes guidance on ways to improve training and supervision for both CIs and officers dealing with the CIs. It recommends how to clarify definitions of who constitutes a CI in the first place to help aid in distinguishing between different types of individuals who provide information to police, as there are different risks associated with these differing categories. And the monograph provides recommendations regarding record-keeping to assist with ongoing evaluation of CI credibility and reliability so that police can take steps as needed to change or terminate relationships with CIs whose activities prove problematic in practice. Together, these reforms should foster police legitimacy and should improve the effectiveness of police investigations and the criminal prosecutions based on those investigations.

This monograph therefore should be very useful for law enforcement officials who want to improve their policies and practices surrounding informant usage. It also provides valuable insight for legal academics like me who are interested in improving the accuracy and effectiveness of the criminal justice system, as well as the public's confidence in that system.

Mary Nicol Bowman is a professor of lawyering skills and an associate director of the Legal Writing Program at Seattle University School of Law. Professor Bowman's scholarship is focused on criminal procedure and legal writing issues. She has written scholarly articles focusing on informants: "Full Disclosure: Cognitive Science, Informants, and Search Warrant Scrutiny" (Akron Law Review) and "Truth or Consequences: Self-Incriminating Statements and Informant Veracity" (New Mexico Law Review). She also writes about prosecutorial trial misconduct, and her article "Mitigating Foul Blows" is forthcoming in the Georgia Law Review. She has also written several short pieces dealing with bringing social justice issues into the legal writing curriculum. Professor Bowman received her J.D. in 1998 from Stanford Law School, where she was a member of the Order of the Coif.

Foreword II

It's 5:00 a.m.; a couple sleeps soundly in their bedroom. Their young child is asleep down the hall. With no warning, the couple awakens to loud, forceful banging. They think they are being robbed. The wife runs to her child's bedroom while the husband cautiously makes his way to the front of the apartment. Dressed in only his underwear, he stands paralyzed as the front door is violently forced open, and a militia of masked men, dressed in black and armed with long guns, storms the apartment. A chaotic scene ensues with the men aggressively shouting at the husband and his wife to get down on the floor where they are handcuffed. The child is terrified and crying. The confused couple question why the men are there. The men refuse to answer and begin ripping through the residence, emptying drawers, tearing down curtains, and tossing mattresses. The couple watches in horror as their family photos, a baseball card collection, and children's toys are strewn around. They are finally able to piece together that the masked men are police officers, allegedly acting pursuant to a valid search warrant. The couple demand to see the search warrant; their requests are ignored. After what feels like hours, the men recover a small amount of marijuana in the couple's bedroom, and they are placed under arrest. Thankfully, a neighbor agrees to look after the frightened child as the husband and wife are taken away.

When I finally have the opportunity to hear this story for the first time, my clients are furious. I explain to them that a search warrant gave the officers authority to forcefully enter their home without notice and search the premises for evidence of narcotics trafficking. My clients are indignant, "We aren't drug dealers!" They demand to know how the police came to believe otherwise. They ask me what gave the police the right to raid their apartment as if it was a drug kingpin's hideout. The affidavit in support of the search warrant contains the arresting officer's detailed narrative, swearing that two confidential informants (CIs) carried out controlled buys of narcotics from their apartment. My clients insist that the narrative is false. They want to know who these CIs are. I tell them the disappointing truth: They probably will never learn the answers to their questions.

I still find it difficult to explain to clients that as a general rule, the government is not obligated to reveal the identity of their CIs. Courts have long recognized that the government enjoys a "privilege to withhold from disclosure the identity of

persons who furnish information of violations of law to officers charged with the enforcement of that law" (*Roviaro v. United States* 1957). The privilege purportedly encourages reporting crime and is designed to protect a CI's safety. The privilege is particularly strong in cases involving drugs.

The justification behind the "confidential informant privilege" has never satisfied me. From where I stand, the secrecy surrounding the identity of CIs runs afoul of the basic tenets on which this country's criminal justice system rests, namely principles of open discovery, the right to confront one's accuser, and the adversarial process as a whole. Without the right to test the veracity of a CI, it is virtually impossible to defend a case like the one I describe above. This is particularly frustrating when I know my client is speaking the truth. They are not drug dealers. They were not packaging and selling narcotics out of their apartment.

Although courts operate under the assumption that an officer who relies on a CI reports valid information and relies on their source in good faith, my instincts and experience tell me that this presumption is misguided. Dr. Shane's monograph bolsters my theory that, as a matter of custom and practice, law enforcement does little to independently verify the trustworthiness of their CIs, their policies are weak, and supervision and training are inadequate. This, combined with the rule against disclosing an informant's identity, leaves their use completely unchecked. The result? The citizenry remains vulnerable to false criminal charges and unjustified intrusions, as I have described. The victims are left with no real remedy to vindicate their Fourth Amendment rights, and the "right of the people to be secure in their houses" is rendered a fiction.

In the 23 years of practicing law, I can count on one finger the number of times a court has ordered police officers to disclose the identity of their CI. That one case provides an elucidating real-world example of the pitfalls associated with allowing law enforcement to operate almost entirely in secrecy when it comes to CIs. There, the affiant officer obtained a "no-knock" search warrant of my client's home where he lived with his long-time girlfriend and her two young daughters. Based on the word of two CIs who claimed that my client was selling drugs from his home, a SWAT team was assembled, and in the dead of night, 15 men dressed and armed like militia raided the house, detonating flash-bang devices and terrorizing the unsuspecting family. No contraband was recovered from the home and the "dangerous" drug dealers (my clients) were never prosecuted.

On its face, the officer's affidavit based on tips provided by his CIs appeared to justify the warrant. However, what the issuing judge did not know was that one of the CIs was a career-burglar with a serious drug addiction who was coerced into acting as a CI after being arrested on burglary charges that if successfully prosecuted would have sent him to prison for years. The other CI was my client's bitter ex-wife who had engineered his arrest on a near-monthly basis for nonpayment of child support. The officer did not mention any of these qualifying facts about his CIs when he swore to the affidavit under oath. It should come as no surprise really that the information provided by these CIs turned out to be false. Yet, the most troubling aspect of this case is that, but for the rare, almost unprecedented, decision of the court to force the disclosure of the identities of the CIs, the circumstances surrounding this warrant would have remained a secret, and my clients would have been

left powerless to vindicate this egregious Fourth Amendment violation. Simply put, the courts do not provide a meaningful check on using CIs, either prospectively or retrospectively. History tells us that when the government is allowed to operate in secrecy, society suffers. Thus, it is imperative that law enforcement self-impose appropriate measures to ensure CIs are properly vetted prior to being released, which is accomplished by scrupulously observing procedural law and established industry standards.

Dr. Shane's monograph bravely calls for much-needed policy reform that requires the police to test a prospective CI's integrity *before* relying on that CI in any way. He notes that integrity testing has been used in other settings such as marketing and business to uncover unbiased perspectives of retail shoppers and to observe a person's natural reaction to a real or manufactured condition; could there possibly be a setting more important than policing, where a person's natural reaction to a situation is tested and scrutinized for its honesty? After showing the shortcomings in police policy, he urges law enforcement to adopt best-practice principles that include rigorous suitability determinations, strict protocols for dealing with CIs, and maintaining detailed records of cases involving informants. Implementing these practices and a commitment from law enforcement to assiduously abide by them is the only way to solve the dilemmas identified by these anecdotal cases, especially when the government's case rests on the informant's information. This means placing the responsibility for an informant's veracity in the hands of the *police* instead of the courts should be a standard part of quality law enforcement; by the time the case gets to court, we will have waited too long…especially when the police are prepared to use deadly force as they come crashing through the (wrong person's) door ready to kill or be killed for little more than drugs, as happened in Kathryn Johnston's case in Atlanta (November 21, 2006), or Detective Jarrod Shivers' case in Chesapeake, Virginia (January 17, 2008).

In the case I described above, not only did the police have a weak policy on managing CIs, but there was little to no supervision and control over how they were used, there was *absolutely* no corroborating evidence of drug dealing during the alleged investigation, the information provided by the informant was not corroborated, and there was no test of either informant's integrity before they were sent to work—the very aspects of a sound CI policy Dr. Shane identifies in his analysis. Dr. Shane's monograph is an exceptionally important writing that if given due consideration will go far to protect the community at large and preserve the rights guaranteed by the Fourth Amendment. Properly managing CIs is a small price to pay in time and effort given the price we pay as a society when we do not do so.

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Foreword III

The use of confidential informants (CI) by police has been woven into the scheme of investigative practices in the USA. Nevertheless, as with many tools available to police, the widespread use of informants is not without its problems. In this monograph, Dr. Shane highlights the wholesale use of informants and the areas of controversy surrounding such use in order to enlighten the field about important issues to take into consideration when determining whether the use of a CI is useful, appropriate, and/or necessary.

The relationship established between the law enforcement agency and the CI can be conceived of as either one of social exchange or of agency. In social psychology, social exchange theory[1] posits that individuals weigh the costs and benefits associated with relationships in order to determine whether or not to engage or disengage with others. However, this may lead to an assumption by some that reward and/or coercive power is equal between police and CIs. Yet, bargaining power is often greater for the group that controls more of the rewards and/or punishments in so much as the power relationship often may shift to one of coercive power. According to Emerson (1976), "self-righteous moral justifications for the use of social power are easily fashioned" (p. 355). That said, it is important to understand the motivations of both the police and the CI when determining the appropriateness of their use.

On the other hand, one could consider the use of CIs by police as one of agency; that is, the CI is an agent of the law enforcement agency. In corporate law, any contractual relationship in which one party acts on behalf of another renders that party in essence an "agent." According to Hansmann and Kraakman (2004), "the agent has an incentive to act opportunistically,[2] skimping on the quality of his performance, or even diverting to himself some of what was promised to the principal. This means, in turn, that the value of the agent's performance to the principal will be reduced, either directly or because, to assure the quality of the agent's performance, the principal must engage in costly monitoring of the agent" (p. 21). Regardless of

[1] It should be noted that Emerson (1976) takes exception with the term "theory" for social exchange and instead refers to it as a framework in which multiple theories could exist.

[2] We use the term "opportunism" here, following the usage of Oliver Williamson, to refer to self-interested behavior that involves some element of deception, misrepresentation, or bad faith. See Oliver Williamson, The Economic Institutions of Capitalism 47–49 (1985).

whether one interprets the role of CIs as stemming from social exchange or agency, there is typically a power differential where the law enforcement organization wields more of the power.

As a result of the underlying motivations of the law enforcement organization, its investigators, and those of the CI, a greater degree of scrutiny over the agent is necessary as would be the case in any supervisory role. However, it is incumbent upon the law enforcement agency to assure the quality of the agent's performance and engage in monitoring, consistent with Hansmann and Kraakman's (2004) standards applied in corporate law. Perhaps a key component of monitoring performance of CIs, then, is to regularly monitor their veracity and integrity. Dr. Shane accurately notes that the initial establishment of credibility, as defined by the courts, relies on an assessment of past performance and further suggests that it is insufficient for establishing up-front veracity. Even in proposed efforts to use a Daubert-type inquiry with CIs, Shane wittingly notes that such an effort does not make sense as a post-hoc evaluation.

Of course, as in any employer–employee relationship, the burden of securing personnel with the least risk of poor performance or those who demonstrate high integrity rests with the employer. Just because CIs are not considered regular employees of organizations, does not exempt the organization from thoroughly scrutinizing them prior to their use as they would their own recruits. At issue is really the means by which police departments should do this (the "how").

Employers have been using integrity testing for many years and prior to the Polygraph Protection Act of 1988 were also allowed to use polygraphs for hiring purposes as well as for screening incumbents (and suspects). Most paper and pencil integrity tests include items that are designed to elicit direct admissions regarding questionable activities, personality traits believed to be associated with dishonesty, or opinions about various types of inappropriate behavior. While many in the law enforcement community believe that they can detect deception on the basis of observed behaviors, the evidence does not bear this out (Vrij and Mann 2005; Granhag and Vrij 2005) despite some newer research suggesting that officers are better at predicting behavior when reviewing tapes than in live interviews. Moreover, Strömwall and Granhag reported that police and criminal justice personnel "admitted to knowing close to nothing about scientific research on deception" (2003, p. 19). As such, it is possible that many police officers believe that they can detect deception in informants (or in suspects for that matter), despite the mounting evidence to the contrary.

Importantly, the fact that individuals are not good at detecting deception, whether they be psychologists, police officers, or the general public, suggests the need for alternatives. Clearly, evidence has mounted for the validity of integrity testing for predicting employee performance and counterproductive behaviors (see, e.g., Ones et al. 2003; National Research Council 2003), despite wide variance in the specific tests used. Dr. Shane's proposed use of the "situational integrity test" offers much promise for law enforcement agencies wishing to secure honest information from CIs. Moreover, Shane's examination of the existing policies and practices suggests that law enforcement agencies have a long way to go in ensuring the integrity and efficacy of their CI programs.

Karen L. Amendola Ph.D. is the chief behavioral scientist at the Police Foundation, Washington, DC, and an industrial/organizational psychologist. Dr. Amendola examined the rationalization of unethical behavior and permissive attitudes that served as the basis for her dissertation in 1996. Since then, she focuses on research associated with officer safety, health, wellness, and performance, and improving police policy and practices in an array of areas.

Preface

Confidential informants (CIs) are an important component of law enforcement investigations. However, they also come with intrinsic problems (e.g., association with criminal offenders, drug and alcohol dependency, a criminal history of their own, which may include fraud, deceit, or violence), and they are incentivized to lie and fabricate details of their work when facing a (potentially lengthy) custodial sentence, which may jeopardize the integrity of criminal cases. To mitigate these and other control issues, the police should test a prospective CI's integrity before they are deployed to work on a given case. In addition, the agency should promulgate a comprehensive written policy on CIs that adopts the best-practice principles identified by the International Association of Chiefs of Police (IACP). Problems that arise when using CIs may be linked to the failure of the police to test their integrity prior to allowing them to work, as well as issues related to training, supervision, and control.

Using CIs has been explored from the legal, ethical, and theoretical perspectives, but none has examined actual police policy to see how CIs are managed by law enforcement agencies. This study is descriptive and examines published US police policies ($n = 165$) to determine the extent to which law enforcement agencies test a CI's integrity before they are deployed and how closely those policies adhere to the provisions of the IACP model policy. The results show the overwhelming majority of policies do not require an integrity test for a prospective CI before they are deployed. Consequently, the police have little if any perspective on the CI's veracity before releasing them to work on investigations. Moreover, the principles of management and control found in published police policies show a wide divergence from those in the IACP model policy. The published policies were tested for consistency against the IACP model policy at the 95 % level, and all the control principles were significantly lower than expected. This suggests the policies do not adequately reflect the national model policy, which likely reduces control and leaves officers and community members more vulnerable to problems such as false accusations, fictitious information, fabricated evidence, and generalized police-informant misconduct. It also leaves the CI vulnerable because training and supervision may not be adequate.

The findings also reveal shortcomings that bear the hallmark of an organizational accident, where an employee at the operational level is essentially "set up" for a problem because of deficiencies at the policy level. Fortunately, the findings also present an opportunity for police administrators to proactively control CI operations and build quality assurance into practices in ways that reduce the potential for an accident to occur. When accidents occur the police will likely bear the brunt of social and political criticism for errors that lead to grave consequences, particularly if it is later discovered it was their conduct that facilitated an adverse outcome (i.e., unlawful arrest, wrongful imprisonment, injury, death). Adopting a new, or revising an existing policy on CIs consistent with accepted industry standards will relieve some of the unnecessary pressure that comes from having to defend against substandard practices that result in avoidable harm. Doing so also places the accuracy and trustworthiness for CI operations upstream in the hands of the police instead of downstream in the hands of the courts and external groups that are likely to impose their will on the agency and force concessions, or structural reforms the agency had not anticipated.

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Jon M. Shane is an Associate Professor in the Department of Law, Police Science, and Criminal Justice Administration. He retired from the Newark Police Department after 20 years at the rank of captain. Dr. Shane has published in leading criminal justice and policing, including *Crime Science, Journal of Criminal Justice, Justice Quarterly, Policing: An International Journal of Strategies and Management, and Police Practice and Research*. He is the author of *What Every Chief Executive Should Know: Using Data to Measure Police Performance* (2007, Looseleaf Law Publications) and *Learning From Error: A Case Study in Organizational Accident Theory*. Dr. Shane is a graduate of the 193rd session of the FBI National Academy and a graduate of the 25th session of the Senior Management Institute for Police (SMIP) held by the Police Executive Research Forum at Harvard's John F. Kennedy School of Government. He also holds a certification in non-profit management from Rutgers Graduate School of Public Administration. Prior to coming to John Jay College, he was a lecturer at Rutgers University --Newark campus and at Fairleigh Dickinson University --Teaneck (NJ) campus, where he taught courses in policing and criminal justice. He is currently a senior research associate for the Police Foundation, Washington, D.C. and a subject matter expert for the Center for Problem Oriented Policing. Some of his most recent work (2013-2015) includes providing technical assistance to the Uruguay National Police on criminal investigations and solvability factors as they transition from an inquisitorial model of criminal justice to an adversarial model. His current research focus is police policy and practice issues and crime control through problem-oriented policing, situational crime prevention and environmental criminology. Professor Shane can be reached at jshane@jjay.cuny.edu or jmsnpd@gmail.com.