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Collateral Damage? Juvenile Snitches in America’s 'Wars' on Drugs, Crime and Gangs

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ARTICLES

COLLATERAL DAMAGE? JUVENILE SNITCHES IN AMERICA'S "WARS" ON DRUGS, CRIME, AND GANGS

Andrea L. Dennis*

I. OPERATING OFF THE RADAR: THE REGIMENT OF JUVENILE INFORMANTS
   A. Mission Defined
   B. Recruitment Efforts
   C. Deployment Levels
   D. Operating Procedures

II. BORDER CONFLICT: PARENTS PATRIAE, POLICE POWER, AND JUVENILE INFORMANTS IN THE "WARS" ON DRUGS, CRIME, AND GANGS
   A. The Government as Child Protector
   B. The Government as Warrior
   C. Juvenile Informants behind Enemy Lines
      1. The Government's Perspective
         a. Efficient and Necessary Crime-Solving Strategy
         b. Juveniles Are Miniature Adults
         c. Promotes Rehabilitation
      2. Through the Eyes of a Child
         a. Physical Harm
         b. Psychological and Ethical Harm
         c. Family Tension

III. DRAW DOWN: MODEL APPROACHES TO CURTAILING THE USE OF JUVENILE INFORMANTS
   A. Model #1: A Categorical Rule

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INTRODUCTION: WHERE'S WALLACE?

Sixteen-year-old drug dealer Wallace wants to get out of the Baltimore City drug trade. Orphaned and homeless, Wallace previously dropped out of school and now wants to go back. He's tired of the drug “game” and conflicted about his role in it. He tells this to D'Angelo, his boss and friend. Always supportive, D'Angelo gives Wallace some money to help him get out of the business.

Shortly thereafter, however, Wallace is arrested. Still eager to get out of the game, Wallace tells the arresting officer he is willing to give up information he knows. He identifies three of his drug crew members who were involved in the torture and murder of another teenager. He also explains his role as the one who pointed out the youth to the murderous thugs. To keep him safe before he testifies, the officers take Wallace to stay with his grandmother in the Maryland countryside.

Meanwhile, Wallace's and D'Angelo's bosses, who ordered the teenager's homicide, decide that Wallace needs to be eliminated because he can link them to the crime. When D'Angelo's bosses ask him where Wallace is, D'Angelo tries to protect Wallace. He assures them that Wallace is not a threat because he is no longer in the drug business and has moved out of town.

Out in the country at his grandmother's house, Wallace is homesick and bored. Not knowing that he's been tagged for elimination, he decides to go back to the city projects to ask for his “job” back. When he returns, he is immediately killed by the organization's “muscle.” D'Angelo, unaware of Wallace's death, is later arrested by officers after completing a drug run. During interrogation, officers show D'Angelo pictures of Wallace's dead body and accuse him of not protecting his own. D'Angelo is upset but non-responsive to their accusations. Later, when D'Angelo's boss and the crew's lawyer visit him in jail, D'Angelo repeatedly implores them: “Where's Wallace?” He gets no answer to his question.1

America has long had an ambivalent relationship with its children, especially regarding criminal and juvenile justice issues. On one hand, society views children as vulnerable incompetents requiring protection from themselves and others. Thus, the government invokes the doctrine of *parens patriae*, meaning the authority of the sovereign to protect vulnerable individuals, to create and maintain juvenile delinquency systems. On the other hand, at times, children are "adultified," i.e., viewed as miniature adults with similar abilities, obligations, and responsibilities. This contrasting view is exemplified when the government transfers juveniles to adult criminal court for prosecution, rather than adjudicating the matter in juvenile delinquency court.

America's "wars" on drugs, crime, and gangs have exacerbated this tension-filled relationship. The government has waged these "wars" to protect the public's safety from these perceived threats. To that end, it exercises its police power to adopt aggressive strategies and tactics to investigate and prosecute crimes. However, these strategies frequently clash with the government's long-standing commitment to protect children, pursuant to *parens patriae*.

One example of this clash is the government's use of juvenile informants in the investigation and prosecution of criminal and juvenile delinquency cases. Within the criminal justice system, a vibrant snitching institution operates to assist the government in its "wars" on drugs, crime, and gangs. Alongside adults, government officials enlist and conscript juveniles—some of whom are engaged in criminal activities and some who are not—to act as informants. As a result of their informant activities, some children have been killed. Others have suffered verbal and other non-physical intimidation or have been shunned by their peers. Even children who were simply suspected of being snitches have been killed.

claim that, though characters such as Wallace are fictional, they are rooted in the reality of inner-city life. See Ed Burns et al., *Saving Cities, and Souls*, TIME, Mar. 17, 2008, at 50. Indeed, Wallace's story is similar to the true-life stories of some child informants. See discussion infra Part I.A.

2. See BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

3. Throughout the article, the terms "child informant," "juvenile informant," and "underage informant" are used interchangeably.

4. This article interchangeably uses the term "informant" and its pejorative colloquial alternative "snitch."


The use of children as informants has been largely unacknowledged. Regulations of informants generally fail to distinguish between adults and juveniles. Similarly, legal scholarship discussing the use of informants primarily focuses on adult informants. Yet, the concerns respecting the use of juvenile informants are different from those of adult informants and require special attention. Because of their immaturity, underage informants raise special physical, psychological, ethical, and familial concerns.

Wallace’s story, though fictional, dramatically demonstrates both the tension between *parens patriae* and police power, and the need for stricter regulation of juvenile informants. Wallace “worked” on the “front lines” in the streets of one of America’s poor inner-cities rife with drugs and violence. He was orphaned, truant, and homeless. The government stood to gain substantially from his information and testimony. It would have closed a homicide case and obtained the arrest of several serious criminals long sought by the government. Wallace’s motivations for informing were complex. He at once desired to get out of a criminal lifestyle, make amends for his involvement in a murder, and obtain criminal leniency. Without parents and legal counsel, however, his agreement to inform and actions thereafter were unguided and misguided. Ultimately, his decision cost him his street “family” and his life.

The police and prosecutor in Wallace’s case, however, gave little weight to the particular vulnerabilities of child informants in comparison to their desire to investigate and prosecute crimes. In assuming a war-like approach to solving domestic social problems, the government abdicated its protector function vis-à-vis children and instead embraced a bunker, ends-justify-the-means mentality. To


Conceptualizing the crime-control mission in military terms—"War on Drugs" and "War on Gangs"—can encourage an "ends justifies the means" attitude. The resulting police conduct can vary from the oft-reported false testifying of officers regarding the circumstances surrounding a stop or search, to the more extreme case of shooting and then framing an innocent man.
the government, Wallace was simply yet another crime-fighting weapon, and the
government paid little regard to the harms such use posed to his life.10

This Article contends that governments should temper the use of juveniles as
informants by reliance on the doctrine of parens patriae. Doing so requires
consideration of the harms that juveniles experience as a result of informing, rather
than focusing solely on winning the “wars” for public safety. Consideration of the
harms in turn dictates that governments adopt an extremely conservative approach
to the use of juveniles as informants, thereby severely limiting and closely
regulating their use.

This Article is divided into three sections. Part I describes the current practice of
using children as informants. More particularly, it defines and exemplifies “child
informant,” describes the government’s recruitment techniques, and discusses the
prevalence of child informants. This Part also discusses the de minimis level of
regulation of child informants.

Part II describes the tension between the government’s dual responsibilities to
protect child informants and promote public safety. First, the Part begins with a
discussion of how the parens patriae doctrine and general police powers have
traditionally been used to protect children. Second, it explains the government’s
war-like approach to public safety challenges, exemplified by the “wars” on drugs,
crime, and gangs. Third, it analyzes the government-proffered justifications for
using underage informants to reveal the tension between the use of child inform-
ants and the government’s responsibility to protect children. Finally, it utilizes a
child-centered perspective to posit harms to juveniles resulting from their use as
informants. This Part contends that these harms weigh in favor of law enforcement
agents and prosecutors adopting conservative policies regarding their use of child
informants.

Part III offers several alternative measures to ensure that children are only used
as informants in limited and reviewable circumstances. First, it proposes a
categorical age-based restriction limiting the use of underage informants. Second,
it suggests requiring judicial pre-approval before a child may act as an informant
and sketches out a procedural mechanism and alternative standards for approval,
i.e., whether it is in the best interests of the child to act as an informant or whether a
“mature minor” has given informed consent. Ultimately, the Article concludes that
governments should adopt the best interests of the child standard. The Article
closes by positing some ramifications of the limited use of children as informants.

Id.; see also James Blair, Ethics of Using Juvenile Informants, CHRISTIAN SCI. MONITOR, Apr. 14, 1998, at 3 (“It
goes on a lot more than people realize because of the mentality of the drug war . . . . It’s a holy war . . . and so the
police use a lot of tactics that probably would shock the public if they came to light.”)

10. Beres & Griffith, supra note 9; see also Blair, supra note 9.
I. OPERATING OFF THE RADAR: THE REGIMENT OF JUVENILE INFORMANTS

A. Mission Defined

An “informant” or “snitch” is any individual—whether a criminal, witness, victim, or tipster—who provides information to government authorities for use in investigating and prosecuting the illicit activities of another. The subject or target of information may be anyone, including, but not limited to, family members, friends, acquaintances, co-conspirators, or unrelated individuals. A “child infor-

11. “Informant” or “snitch” is a term open to various interpretations depending on the speaker and context. Some have adopted a more narrow definition. For example, the term is frequently limited to “jailhouse snitches” or other criminals who provide information in exchange for a government benefit. See, e.g., Natapoff, Unreliable, supra note 8, at 107; Natapoff, Snitching, supra note 8, at 653; Simons, supra note 8, at 2. Alternatively, the term could be defined as an individual who, being a member of a particular community, especially an alienated or outsider community, provides information to authorities about members of that same community.

The term as used herein is intentionally broad because the concerns surrounding underage informants are not limited to those who receive a government benefit. See infra Part II. Moreover, Fourth Amendment jurisprudence takes a broad view of the term informant. Criminals and those involved in the criminal milieu, victims, and witnesses are all a type of informant, although victims and witnesses are usually further identified as citizen-informants. See 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 3.3(c), 3.3(d) (3d ed. 2007); 79 C.J.S. Searches § 215 (2008). Legal culture reflects a trend toward defining informant to include all human sources of information, regardless of their motivations. Cf. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES 4 (2006) [hereinafter CONFIDENTIAL SOURCE GUIDELINES], available at http://www.fas.org/irp/agency/doj/fbi/chs-guidelines.pdf. The FBI defines “confidential human source” as:

[A]ny individual who is believed to be providing useful and credible information to the FBI for any authorized information collection activity, and from whom the FBI expects or intends to obtain additional useful and credible information in the future, and whose identity, information, or relationship with the FBI warrants confidential handling.


"juvenile informant" or "juvenile informant" is simply an informant who is under the age of eighteen years. 13

The government relies on child informants in an assortment of criminal cases ranging from the less serious to more serious. On one end of the spectrum, since the 1980s, children have been used to identify retailers who sell alcohol to minors.14 In the 1990s, the federal government’s Substance Abuse and Mental Health Services Administration (“SAMHSA”) expressly sanctioned the use of children as informants in the investigation and prosecution of tobacco cases.15

At the other end of the spectrum, government officials use juvenile informants to investigate and prosecute more serious matters including gun, drug, burglary, sex abuse, and violent crime cases.16 For example, a South Carolina law enforcement official publicly acknowledged creating a program—"Gunstoppers"—designed to induce children to provide tips about individuals possessing guns and encouraged other law enforcement agencies to do the same.17 In Kentucky, a sixteen-year-old sued the City of Covington alleging that law enforcement officers forced him to engage in undercover acts of homosexual solicitation in furtherance

citizen informant working as desk clerk at a motel provided information to law enforcement supporting search warrant for motel room).

13. For other definitions of juvenile informant see Osther, supra note 8, at 108-09; Sinclair & Herbert, supra note 8, at 33-34.


16. E.g., United States v. Howard, 447 F.3d 1257, 1260 (9th Cir. 2006) (juvenile informant provided information that defendant was a firearms dealer and gang member); United States v. Payne, 341 F.3d 393, 396 (5th Cir. 2003) (seventeen year-old victim of child sex exploitation, who had been arrested on unrelated credit card abuse charge, provided information in support of search warrant of defendant’s home); United States v. Moore, 92 F.3d 1183 (4th Cir. 1996) (juvenile arrested for illegal possession of a handgun was recruited to act as informant and participated in controlled buys); United States v. Taylor, 302 F. Supp. 2d 909, 914 (N.D. Ind. 2004) (juvenile who associated with defendant provided information linking defendant to homicide and robbery at the encouragement of a parent); Morrow v. State, 704 P.2d 226, 228 (Alaska Ct. App. 1985) (juvenile who confessed to attempted drug distribution informed against supplier providing testimony in support of search warrant); Munoz v. State, 629 So. 2d 90, 101 (Fla. 1993) (sixteen-year-old who had been arrested for drug distribution was recruited by law enforcement for participation in a “sting” to uncover the sale of pornography to minors); State v. Hendrex, 865 So. 2d 531, 532 (Fla. Dist. Ct. App. 2003) (finding that juvenile informant, who was known to police and had provided information in the past, provided credible information supporting probable cause to arrest); People v. Potts, 374 N.E.2d 891, 893 (Ill. App. Ct. 1978) (juvenile informant allegedly involved in homicide provided information supporting arrest warrant for another juvenile); State v. Krajewski, 16 P.3d 69, 71 (Wash. Ct. App. 2001) (juvenile informant provided information regarding theft of bicycle from store); State v. Carver, 753 P.2d 569, 570 (Wash. Ct. App. 1988) (ten-year-old and eight-year-old child informants provided information supporting search warrant application for neighbors’ home for criminal drug activity).

17. For more discussion of the program, see infra text accompanying notes 55-59.
of a law enforcement sting operation.\textsuperscript{18} He had been involved with drugs.\textsuperscript{19} He alleged that he was forced to participate in the sting without parental knowledge or permission and as a result “sustained severe psychological damage.”\textsuperscript{20}

Some instances of the government using juvenile informants have had deadly results. In California, Chad MacDonald acted as an underage informant in a drug case. His mother unsuccessfully sued the City of Brea Police Department after Chad was tortured and killed by gang members upon whom he had informed.\textsuperscript{21} Police had arrested Chad on charges of drug distribution, and he offered to provide information to “correct” his mistakes.\textsuperscript{22} His arresting officer asked if he would identify his suppliers in exchange for dismissal of the pending charges.\textsuperscript{23} Chad’s mother learned of this agreement only after it was made and Chad had already begun to provide information.\textsuperscript{24} Chad’s mother faced a dilemma: on one hand, she was afraid that Chad would be incarcerated if he did not continue to cooperate, but she alternately feared that the individuals he informed on would seek retribution for his betrayal.\textsuperscript{25} Eventually, she acquiesced to the police using him as an informant, hoping that they would protect him on both accounts.\textsuperscript{26} To have his charges dismissed, Chad provided information regarding drug dealers and helped set up “drug busts.”\textsuperscript{27} Eventually, individuals began to threaten Chad.\textsuperscript{28} About a month later, gang members tortured and killed him.\textsuperscript{29}

Seventeen-year-old Robbie Williamson contacted the City of Virginia Beach, Virginia, police department and volunteered to provide information regarding the illegal drug activities of others.\textsuperscript{30} The City accepted Robbie’s offer and used him as an informant without obtaining parental permission or completing a background check. Robbie committed suicide after he was threatened by the individuals upon whom he had informed. His mother filed suit against the City of Virginia Beach, alleging claims based on the City’s use of Robbie as an informant.\textsuperscript{31} The case

\begin{footnotes}
\item[18] Martin v. City of Covington, 541 F. Supp. 803, 803 (E.D. Ky. 1982); see also Munoz, 629 So. 2d at 101 (sixteen-year-old who had been arrested for drug distribution was recruited by law enforcement for participation in a “sting” to uncover the sale of pornography to minors).
\item[20] Id. at 804.
\item[22] Id.
\item[23] Id. at *1-2. The local prosecutor handling Chad’s case agreed with the deal. Id. at *3.
\item[24] Id. at *2.
\item[25] Id.
\item[26] Id.
\item[27] Id. at *2-3.
\item[28] Id. His tires were slashed and a phone caller threatened that his informant activities “would cost him his life.” Id. at *2.
\item[29] Id. at *4. Prior to his murder, Chad had been terminated as an informant and his police handler refused to request the prosecutor grant Chad leniency. Id. at *3.
\item[31] Id. at 1241-42.
\end{footnotes}
reportedly settled. 32

Finally, when Virginia law enforcement officers arrested sixteen-year-old Brenda Paz, she began to inform on the Latin gang Mara Salvatrucha (MS-13), which eventually led to her death. 33 Police arrested Brenda on car theft charges. 34 Despite the relatively minor nature of that crime, she was able to provide information to federal law enforcement agents and police officers from other states regarding MS-13 gang leaders and members whom she had known intimately since she was a pre-teen. 35 Slated to be a witness at a murder trial against MS-13 members, federal agents put her into the federal witness protection program. 36 She did not remain there, however, as she later rejoined her gang family. 37 After learning she had informed on them, MS-13 members killed her. 38

Ultimately, law enforcement and prosecutors use the information provided by child informants in a number of ways. Government officials may collect the information and place it in an investigatory case file to use it passively to identify other suspects or avenues of investigation or prosecution. 39 More affirmatively, the police use the information for securing or justifying a search or arrest warrant. 40

34. Markon & Glod, supra note 5.
35. Id.
36. Id. The federal government has placed other teens into the program. See Briscoe, supra note 5.
37. Markon & Glod, supra note 5. One can speculate on the reasons a juvenile in Brenda’s position would initiate contact with those on whom she was informing and she knew to be dangerous, including peer pressure, loneliness, boredom, naivete, high tolerance for risk-taking, or a high level of attachment.
38. Id.
the extreme, a child may be expected to perform undercover activities or testify in court proceedings.  

**B. Recruitment Efforts**

Any number of concerns, working individually or collectively, may be influential in a child's agreement to inform. Children are often motivated by internal factors relating to their own criminal activity or victim-hood and external sources such as parents or law enforcement. Often their motivations are mixed and complex.

Parental input can play a factor in whether a child informs. A child who is accused of criminal activity may consult a parent when making decisions about a case, particularly whether to talk to the police. Such consultation offers parents the opportunity to approve a child's individual desire to inform and encourage or instruct a hesitant or unwilling child to cooperate. Some parents, however, will counsel their child not to inform.

Pressure from law enforcement is a significant factor in a child's decision to become an informant. Criminologist Dr. Mary Dodge collected qualitative social science data suggesting that the government's persuasive efforts can be characterized as undue influence, because of either the particular vulnerabilities of children or the nature of the efforts to convince children to inform. A study by law professor Professor Barry Feld provides greater insight into the desire of law enforcement officials to convince juveniles facing criminal prosecution to act as informants and the lengths to which the officers will go to accomplish their goal. In 2006, Feld published a quantitative and qualitative study regarding routine law enforcement interrogation of juveniles sixteen years of age or older in

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41. *E.g.*, Hong v. Att'y Gen. of the U.S., 165 F. App'x 995 (3d Cir. 2006) (asserting that fifteen-year-old boy provided information to government and agreed to testify at trial regarding international illegal smuggling operation run by Chinese gang).


43. See id. at 182 (concluding that most parents who advised a child on whether to cooperate with police interrogation about criminal involvement told the child to cooperate); Pfeifer et al., supra note 32 (quoting father of Gregory "Sky" Erikson, a juvenile informant who was murdered, as stating: "I feel responsible because I talked him into this . . . ").

44. See GRISSO, supra note 42, at 182 (concluding that a small percentage of parents advised their child not to cooperate with law enforcement interrogation).


[It seems probable that where children are induced to confess by “paternal” urgings on the part of officials and the confession is then followed by disciplinary action, the child’s reaction is likely to be hostile and adverse – the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.}
The juveniles had been charged with felony offenses and had waived their Miranda rights. The aim of Feld’s research was to produce empirical data regarding juvenile competence during police interrogations. The study also revealed, however, law enforcement efforts to recruit juvenile informants. In about thirteen percent of the interrogations reviewed, juveniles were reticent about, though apparently not adamantly against, informing on co-offenders. For those juveniles who exhibited a potential willingness to provide information, the interrogator engaged in a variety of tactics designed to overcome the hesitation.

Feld’s study revealed that various types of reward and punishment were used to induce children to become informants. To reward potential juvenile informants, in one case, officers assured juvenile suspects that prosecutors and judges would react favorably if they cooperated and helped recover evidence. In another case, law enforcement offered an immediate release from pre-trial detention if the juvenile assisted. To punish a reticent juvenile informant, law enforcement threatened the juvenile with adult criminal charges. Even more extreme is the case involving an officer who threatened to detain the juvenile’s sister if he did not cooperate with the investigation. Law enforcement pressure may be exerted in a more benign way. For example, in response to a juvenile’s hesitation about providing information, an interrogator in Feld’s study advised the juvenile that friendship should be put aside, that the juvenile had to take care of himself first because no one else would, and that failing to cooperate could result in more severe consequences for the juvenile.

The government also incentivizes children to inform by offering monetary payment for their information. For example, in 1996, Reuben Greenberg, then Chief of Police of the Charleston South Carolina Police Department, spoke

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46. Barry C. Feld, Police Interrogation of Juveniles: An Empirical Study of Policy and Practice, 97 J. CRIM. L. & CRIMINOLOGY 219 (2006). Feld is not the first to examine juvenile interrogations. In the mid to late 1970s, psychiatrist Thomas Grisso gathered similar data in St. Louis, Missouri. See generally Grisso, supra note 42. Grisso was researching juveniles’ “understanding of the meaning and significant of the rights to silence and counsel.” Id. at 8.

47. Feld, supra note 46, at 220.

48. Id.

49. Id. at 275.

50. Id. at 282-85.

51. Id. at 301-302.

52. Id. at 298-302. Given the increasing numbers and rate of children transferred to adult criminal court and the severity of the penalties available in adult criminal court, the incentive to inform in order to avoid adult prosecution may be great.

53. Id. at 276.

54. Id. at 275.

55. See Reuben Greenberg, Solving the Problem: Rehabilitation, Reformation, and Other Solutions, 23 PEPP. L. REV. 909, 915-916 (1996) (discussing how the Charleston Police Department “decided to give one hundred dollars to anybody who reported someone who had an illegal gun in public”); see also Susan DeFord, Fur Flies After School Food Fight, WASH. POST, Jan. 11, 2008, at B01 (describing offer of principal of a Maryland county high school to give thirty dollars to students who provided the names of those students earlier involved in a food fight).
publicly regarding his agency’s efforts to reduce crime committed by and against juveniles.\(^5\) Among other programs, he described the Gunstoppers Program. Gunstoppers was a gun reporting program that provided one hundred dollars to individuals who provided law enforcement with detailed information regarding individuals carrying guns—a so-called “hot tip.”\(^5\) Greenberg admitted the program was aimed at juveniles, whom he deemed “the greatest snitches in the world . . . [Y]ou tell them they are going to get a hundred bucks, then they become super snitches with respect to other kids having guns and so forth.”\(^5\) The juveniles wanted immediate compensation, so law enforcement developed a system to compensate them the same day they reported a hot tip.\(^5\)

Intangible personal desires can also factor into a child’s reason for informing. Children are more likely than adults to engage in thrill-seeking behaviors, owing to decreased risk aversion.\(^6\) Such thrill-seeking may explain why juvenile informants who are not involved in criminal activity volunteer to act as informants.\(^6\) Moreover, redemption and the desire to change one’s life may play a role in the decision. Thus, for example, the government suggested that Brenda Paz willingly informed in order to turn her life around and leave MS-13.\(^6\) A juvenile may also inform to avoid law enforcement retribution—that is, to keep law enforcement from harassing him either at the time or in the future.\(^6\) Finally, some—in particular the tipster, victim, or witness child informant—may inform out of a sense of civic responsibility or personal safety.

C. Deployment Levels

The extent to which the government uses juvenile informants is difficult to
collateral damage

quantify for a number of reasons. First, law enforcement and prosecutorial communities disagree over whether the practice even occurs, and if so, with what frequency. Some law enforcement and prosecutorial agencies do not admit the practice occurs at all. 64 Others say that the use of children is "negligible." 65 In contrast, others willingly acknowledge that their use is "frequent" or "higher than many think." 66

More importantly, no government agency tracks the use of juvenile informants. 67 Even if agencies tracked their use, however, government authorities may distort or conceal the number. 68 The fact that law enforcement and prosecutors inconsistently define the term informant contributes to minimization. Some law enforcement officers distinguish the informal use of juveniles for information gathering from the formal use of them as informants by characterizing some juvenile informants as "friends" who voluntarily give information. 69 In exchange, law enforcement may do "friendly favors" for the child (e.g., job placement, buy diapers, find babysitters). 70 Confidentiality also imposes barriers to tracking the government's use of informants. Police are in general loathe to reveal the use of informants, preferring to keep their use a secret. 71 Moreover, the use of child informants may remain concealed within the realm of highly discretionary and confidential juvenile court filings and proceedings that cannot be studied without special dispensation. 72

64. See Dodge, supra note 45, at 243. In this article, Dodge sets forth results from a qualitative study of law enforcement perspectives on the use of juvenile snitches. She notes that the "low number of participants limits generalizability and may not reflect majority perspectives in other cities, though consistent themes were identified among this group of respondents." Id. at 239; see also Blair, supra note 9 (noting that after a juvenile informant was killed, the Brea Police Department "maintained that Chad took part voluntarily and that they were not responsible for his death").

65. See Blair, supra note 9 (quoting prosecutor who says use of child informants is "very infrequent"); Dodge, supra note 45, at 235 (quoting officer who says use of child informants is "negligible").

66. See Blair, supra note 9 (citing former police chief who thinks that "the number of underage operatives being used may be higher than many think"); Dodge, supra note 45, at 235 (citing commentators who "claim the use of underage operatives is frequent").

67. Data on adult informants is likewise not routinely and widely collected. See Natapoff, Snitching, supra note 8, at 654. The United States Sentencing Commission occasionally collects data on the use of adult cooperators in the federal criminal justice system. See, e.g., U.S. SENTENCING Comm'n., SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 25 (2007), available at http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm (stating that 0.5% of cooperating offenders received a downward sentence from the guideline range); see also Linda Drazga Maxfield & John H. Kramer, Nat'l Inst. of Corr., Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice 9 (1998) ("Approximately two-thirds (67.5% or 158 of the 234 cases with available data) of all defendants provided some form of assistance to the government during prosecution.").

68. Dodge, supra note 45, at 239.

69. Id.

70. Id.

71. See Natapoff, Snitching, supra note 8, at 657 ("Police jealously guard the identities of their informants, often failing to reveal that an informant has contributed to a case.").

72. See Dodge, supra note 45, at 235 (noting that the secrecy surrounding the use of juvenile informants is "connected to the particular rights of minors, the confidentiality of juvenile records"); Oster, supra note 8, at 107.
Despite the discrepant information regarding the scope of use of child informants, the practice exists in more than just a few, isolated instances. As early as the late 1960s, appellate courts in criminal cases have characterized children as informants.\textsuperscript{73} Since that time, opinions referencing juvenile informants can readily be found.\textsuperscript{74} Additionally, news reports confirm that their use is more than rare. Beginning in the late 1990s and continuing today, reporters have recounted stories of juveniles who were killed for informing.\textsuperscript{75} Finally, recent empirical studies have begun to confirm their more than infrequent use. Professor Dodge's qualitative study was directed at exploring the practice and revealed that it is occurring, although the levels may be debatable, and Professor Feld's data on police interrogation of juveniles revealed quantitatively and qualitatively that law enforcement officers interrogating juvenile suspects seek to convince the juvenile to act as an informant (i.e., "flip" the minor).\textsuperscript{76} While Dodge's study was limited in scope and Feld's study was both limited in scope and not focused on studying juvenile informants, it is reasonable to infer from their data that the attempted and actual use of child informants is more than minimal.

The lack of collected data regarding child informants creates difficulty in determining the characteristics of underage informants. Without study, the types of cases involving and endeavors undertaken by juvenile informants cannot be known. Additionally, the demographic characteristics of the group are unclear. The lack of social science studies of juvenile informants also makes it difficult to understand the actual impact of informing on juvenile informants. Further study is needed to develop these types of information.\textsuperscript{77}

\section*{D. Operating Procedures}

There are no national guidelines on the use of juvenile informants by prosecutors. The United States Attorney General's guidelines for federal prosecutors do not specifically regulate the use of children as confidential informants in federal cases.\textsuperscript{78} The National District Attorneys' Association has not suggested the

\textsuperscript{73} Pollock v. Superior Court, 272 Cal. App. 2d 548, 555-56 (Cal. Ct. App. 1969) (stating that juvenile who was arrested for, and admitted to, burglary informed on the individual to whom he sold the stolen items).

\textsuperscript{74} See cases cited supra notes 16, 39-41.

\textsuperscript{75} See Blair supra note 9; Pfeifer et al., supra note 32; Stockwell supra note 33.

\textsuperscript{76} See Dodge, supra note 45; Feld, supra note 46, at 275 (noting that in 13% of cases juveniles were reluctant to inform and officers used varying strategies to overcome their reluctance). See supra Part I.B for a discussion of "flipping" tactics.

\textsuperscript{77} Short of a full-blown empirical study, one method to generate such information may be to extrapolate from data on juvenile victims and offenders. In 2006, the federal government issued a report providing comprehensive, nationwide data on juvenile crime, which may serve as a source of information on the demographics of juvenile criminals and criminal activity. Howard N. Snyder & Melissa Sickmund, U.S. Dep't of Justice, Juvenile Offenders and Victims: 2006 National Report 125-52 (2006).

\textsuperscript{78} See Confidential Source Guidelines, supra note 11. Indeed, the terms "juvenile" or "minor" appear nowhere in the guidelines.
adoption of such guidelines.79

Like prosecutors, law enforcement agencies as a whole have not established formal regulations on the use of juvenile informants.80 Some individual law enforcement agencies, however, have adopted regulations. Commonly, these regulations limit the use of children to “extraordinary” or “critical” circumstances, and require parental permission, waiver of liability, or approval by the supervisor of the law enforcement handler.81 At least one agency’s guidelines require juvenile court approval or parental consent for juvenile informants who are granted anonymity or compensation, but the guidelines do not set out specifics for obtaining that approval.82

Some jurisdictions have adopted state-wide guidelines particularly addressing the use of child informants. Unfortunately, they are anomalies. First, in 1997, the New Jersey Attorney General issued “Law Enforcement Guidelines on the Use of Juveniles as Informants” to supplement New Jersey’s general guidelines on the use of informants.83 The juvenile-specific guidelines do not apply to underage witnesses, investigative targets, or operatives in tobacco stings, none of whom are considered informants.84 Further, under no circumstances may law enforcement use a child under twelve years of age as an informant.85 Law enforcement can use children under sixteen years of age a very limited basis.86 One exception arises when the “illegal activity is occurring regularly among a group of juveniles under the age of 16.”87 In addition to age, other factors limit the use of juveniles. First, children undergoing drug and/or alcohol counseling may not be recruited.88 Second, children who have a mental or physical illness may not be used.89 Third, in recruiting juvenile informants, law enforcement officers may not “make any promises, express or implied, with regard to prosecution without first obtaining the

79. Blair, supra note 9. On January 23, 2008, the author submitted an online information request through the National District Attorneys Association (NDAA) website inquiring whether the organization had such regulations. On January 24, 2008, the author received a voice message from Susan Broderick of the NDAA-Juvenile Section confirming that the NDAA does not have any regulations.
80. See Blair, supra note 9.
81. See, e.g., Boston Police Dep’t supra note 11; Cincinnati Police Dep’t, supra note 11, at 12.131(C)(1)(a); Denver Police Dep’t, supra note 11, § 307.04(1); Iowa City Police Dep’t supra note 11, § IV.F; Olympia Police Dep’t, supra note 11.
82. Olympia Police Dep’t, supra note 11(requiring juvenile court approval for use of juveniles as confidential informants).
84. See id. These exclusions make New Jersey’s definition of informant narrower than the definition adopted herein. See supra Part I.A.
85. See N.J. JUVENILE GUIDELINES, supra note 83.
86. Id.
87. Id.
88. Id. at A10-2.
89. Id.
express approval of the prosecutor or his designee.90 Fourth, a child may not make a controlled buy or act as an undercover operative unless law enforcement has "obtain[ed] written authorization from the county prosecutor, the Attorney General, or their designee."91 Finally, prior to acting as an informant, both the child and the child's parent must consent in writing, and waive liability.92

The second set of statewide regulations came in 1998, when, after Chad MacDonald was killed by gang members on whom he had informed, the California legislature enacted a criminal procedure statute conditioning the use of minors as informants.93 California's statute defines a "minor informant" as a child who participates, on behalf of a law enforcement agency, in a prearranged transaction or series of prearranged transactions with direct face-to-face contact with any party, when the minor's participation in the transaction is for the purpose of obtaining or attempting to obtain evidence of illegal activity by a third party and where the minor is participating in the transaction for the purpose of reducing or dismissing a pending juvenile petition against the minor.94

Essentially, an informant is a juvenile who engages in undercover activities at the behest of law enforcement in exchange for criminal leniency for pending juvenile delinquency charges.95 A child who simply provides information without engaging in undercover activities is not a "minor informant." Neither is a child whose incentive is monetary or something other than criminal leniency for a juvenile petition. The statute does not regulate these types of informing. California absolutely bans government authorities from using children under the age of twelve years as informants.96 Children older than twelve years of age may be used only with prior court approval, unless they are involved in a tobacco sting program.97

Before ordering that a child may act as a "minor informant," a court must consider the child's age and maturity, the gravity of the offense filed against him, the public's safety, and the "interests of justice."98 The court must also find that the child is voluntarily, knowingly, and intelligently agreeing to serve as an infor-

90. Id.
91. See id.
92. See id.
93. CAL. PENAL CODE § 701.5 (West 2006) (commonly called "Chad's Law"). For scholarly discussion of the legislation, see Santiago, supra note 8, at 782-83 (noting the arguments for and against the California statute). See also Oster, supra note 8, at 124-26 (critiquing the use of age and maturity as the only guiding factors for the capacity of the child to inform).
94. § 701.5(e).
95. The California definition is significantly narrower than the definition of informant adopted in this article. See supra Part I.A.
96. § 701.5(e). The original legislation sought to ban all juveniles from acting as "minor informants," but law enforcement officials successfully defeated this measure. See E. Bailey, Law Signed Limiting Use of Youth Informants, L.A. TIMES, Sept. 26, 1998, at B04.
97. § 701.5(b).
98. § 701.5(c). On its face, the statute does not require the court to hold a hearing to make such a determination.
In addition to consideration of the enumerated factors, the court must ensure several conditions have been satisfied. The court must find probable cause that the juvenile’s charged offense was committed; advise the child of the mandatory minimum and maximum sentence exposures; and inform the minor of benefits he is to receive by cooperating. Finally, excepting instances in which the parent or guardian is the target of information, the court must confirm that the child’s parent or guardian has consented to the informant activities.

To investigate and prosecute a wide range of crimes from the less serious to most serious, police and prosecutors turn to underage informants with knowledge of criminal activity among adults and juveniles. Their use, however, has largely gone unrecognized, unexplored, and unregulated. At times the government uses children simply as information sources and at other times goes so far as to employ them to actively gather information, make introductions, or conduct undercover buys of contraband. If necessary, the government may require an underage informant to testify in criminal proceedings. Children agree act as informants because of governmental persuasion through offers of leniency, money, or threats. Parental pressure and a child’s own internal motivations also play a role in whether a child will inform. Ascertaining the number and experiences of juveniles who have served as informants is difficult because of disagreement over whether the practice even occurs, and if so, who constitutes an informant. Additionally, no agency routinely and methodically collects information regarding the use of informants, whether adult or juvenile. The practice of using children as informants is for the most part unregulated, and an examination of existing, readily available informant regulations reveals that, whether at the federal, state, or local level, there is generally a lack of focus on the use of juveniles as informants and an incoherent approach to their use.

II. BORDER CONFLICT: PARENTS PATRIAE, POLICE POWER, AND JUVENILE INFORMANTS IN THE “WARS” ON DRUGS, CRIME, AND GANGS

Traditionally, jurisprudence and policy have protected children. In contemporary times, however, the traditional protections accorded children have been undercut by the government’s warrior-like approach to solving the crime, gang, and drug problems. While general recognition of this transformation in perspective is not novel, the exploration of this transformation in the context of the government’s use of underage informants has been inadequate. This Part confronts and critiques the primary justifications for using juvenile informants, revealing incon-

99. Id.
100. § 701.5(d)(1).
101. § 701.5(d)(2).
102. § 701.5(d)(3).
103. § 701.5(d)(4).
sistencies, and employs a child-centered perspective to unearth and examine some of the unrecognized, or not yet fully explored, harms potentially experienced by juvenile informants. The discussion ultimately suggests that governments should take a conservative and measured approach to their use of child informants.

A. The Government as Child Protector

The government regularly acts to protect children, whether owing to its parens patriae role or general police power function. The parens patriae doctrine permits the state to act to protect the interests of a child. It is grounded in the belief that children are incompetent to care for themselves and make decisions. Thus, children must be protected from themselves and others. In contrast to parens patriae, the government's police power grants the government plenary authority to promote generally the health, safety, and welfare of children, irrespective of the interests of any particular child. While conceptually distinct, parens patriae and general police power are often simultaneously relied upon to justify state protection of children.

The government's role as a protector of children is exemplified in many doctrines and policies. Some examples represent a choice to protect the child even when in conflict with other significant rights or interests. For example, the government's parens patriae authority permits it temporarily or permanently to remove children from their homes to protect their health or safety, despite their parents' substantive due process rights to raise their children. Similarly, police power permits the government to enact laws regulating the public conduct of children—but not adults—in order to promote the welfare of children generally. Such regulations are permitted even if they interfere with the parents' free exercise of religion and substantive due process rights respecting their children.

Other examples represent a choice to protect the child despite the potential resulting harm to society. Juvenile delinquency is the archetypal scenario in which such a choice is made. The juvenile delinquency system was created in the early 1900s to protect children from adult prison facilities and to improve the lives of

105. See Parham v. J.R., 442 U.S. 584 (1979) (upholding the commitment of a child to a mental health facility against his will on the grounds that children are unable to make sound judgments concerning their need for treatment and that parents are assumed to act in the best interests of their children).
109. See Prince, 321 U.S. at 165 ("Against these sacred private interests . . . stand the interests of society to protect the welfare of the children . . . ")
110. Id. at 167.
Thus, the system is traditionally characterized by (1) individualized rehabilitation and treatment, (2) civil jurisdiction, (3) informal procedure, (4) confidentiality, and (5) incarceration separate from adults. Each of these characteristics is aimed at furthering the desire to protect children and improving their lives. Even today, as the juvenile delinquency system has been transformed into a more punitive system, its rehabilitative aims still remain vital to the operation of the system. In the delinquency context, the need for children to be protected from others and themselves, and for specific legal mechanisms to do so, is balanced against society's interests in its safety.

The Supreme Court's recent abolition of the death penalty for minors underscores the importance child protection maintains in society. In Roper v. Simmons, the Supreme Court held that the Eighth Amendment to the United States Constitution prohibits the execution of individuals who were juveniles at the time they committed a capital crime. The Court concluded in Roper that juveniles are demonstrably different from adults; therefore, juvenile offenders cannot be reliably classified as among the worst offenders meriting the death penalty. The Court acknowledged that there might be sufficiently mature juveniles who commit acts depraved enough to warrant the death penalty. Nevertheless, the Court rejected this as a rationale for permitting juries, on a case-by-case basis, to consider age as a mitigating factor. The Court also rejected the argument that the death penalty has a deterrent effect on juveniles, concluding that it is unlikely that juveniles consider the long-term consequences their actions (i.e., capital punishment).

Thus, even though maintenance of the death penalty may protect society from some harmful juvenile acts, on balance, the line drawn by the Supreme Court favors of protection of children as a group.

B. The Government as Warrior

Claiming to act in the interest of public safety, the government sacrifices the interests of children in order to succeed at large-scale efforts to combat domestic social issues, which the United States government characterizes as “wars.”


114. Id. at 569-70.

115. Id. at 572.

116. Id.

117. Id. at 571-72.

118. For example, U.S. Presidents have declared “war” on traditional social and health issues such as poverty, illiteracy, and cancer. The “War on Poverty” was launched by President Lyndon Johnson during his January 1964 State of the Union address to Congress. In 1971, President Nixon launched the “War on Cancer.” See Dwight B. Heath, The War on Drugs as a Metaphor in American Culture, in DRUG POLICY AND HUMAN NATURE 279, 280 (Warren Bickel & Richard J. DeGrandpre eds., 1996).
America has waged these domestic social wars on drugs, and its closely related counterparts, crime and gangs. In furtherance of these metaphorical wars, federal and state governments use results-oriented tactics that increase the punitive nature of criminal and juvenile justice policies and negatively affect children. The negative impact of these “wars” on children is realized in the use of military tactics and strategies to combat crime, the dramatic increase in incarceration rates and sentences, and the use of adult criminal courts and sanctions to punish juveniles.

First, governments now rely upon military tactics and strategies for criminal investigation and prosecution. The federal government has devoted significant tangible and intangible resources to state and local law enforcement agencies seeking to convert themselves into military style forces. Governments have supplanted the traditional law enforcement roles of protection and investigation with no-knock warrants, SWAT teams, and other military-style police tactics. Today, law enforcement agencies routinely employ force against individuals suspected of criminal activity. Tragically, these uses of force have been employed against juveniles. For instance, in November 2007, police officers in Brooklyn, New York, shot and killed a mentally ill eighteen-year-old who had been holding a hairbrush. The teenager’s mother had called 911 asking for help with her son. Police responding at the home opened fire on the teen, killing him. It is unclear what transpired to cause the shooting or how many bullets hit the teen.

Second, governments have enacted legislation and policies resulting in burgeoning prison populations which in turn have negatively impacted children. Between 1980 and 2005, drug arrests surged exponentially, from 581,000 to more than 1.8

120. Some have commented that the use of conventional war and military tactics and strategies transforms the rhetorical war into a literal war. E.g., Heath, supra note 118, at 281; Nunn, supra note 119, at 386.
121. Id. at 404-09.
122. Id.
123. Many jurisdictions have been subject to wide-scale investigation by the United States Department of Justice for civil rights violations. Information regarding investigations and settlements is available on the Department of Justice website. See U.S. Dep’t of Justice, Civil Rights Div.: Special Litig. Section Documents and Publ’ns, http://www.usdoj.gov/crt/split/findsettle.htm#Police%20Misconduct%20Settlements (last visited Mar. 20, 2009).
125. Id.
126. Id.
127. Id.
The average length of prison sentences increased due to federal and state legislation establishing mandatory minimum sentences, drug weight sentencing disparities, and lengthy sentences for recidivists.\textsuperscript{129} Between 1991 and 1999, the number of children with an incarcerated parent increased, by more than 500,000, to 1.5 million.\textsuperscript{130} The incarceration of mothers has increased, causing many children to be orphaned.\textsuperscript{131} The impact of these policies and trends hits poor and/or minority populations the hardest; black children, for example, have disproportionately lost their parents.\textsuperscript{132}

Third, the government increasingly treats suspected and actual juvenile offenders as adults. Governments have established gang databases that amass information regarding juveniles who are alleged or actual gang members.\textsuperscript{133} In contravention of longstanding juvenile justice policies, children accused of criminal activities are transferred to the adult criminal justice system where they receive adult criminal sentences.\textsuperscript{134} Finally, juveniles adjudicated for or convicted of sex offenses have been subjected to sex offender registration and public disclosure.\textsuperscript{135}

\section*{C. Juvenile Informants behind Enemy Lines}

The use of juvenile informants represents another collision between \textit{parens patriae} responsibilities and police power duties. On one hand, child informants provide information that is used to investigate and solve crimes. Indeed, child informants, like all witnesses, are a valuable tool in the criminal justice process. Thus, the government’s use of child informants promotes public safety, and necessarily, children’s individual and collective safety. In this vein, when justifying its use of underage informants, the government points to their use as (1) a necessary and efficient approach to public safety; (2) a recognition of the individual autonomy of children; and (3) a means of promoting juvenile rehabilitation. These justifications, however, are debatable. Indeed, they ring hollow in light

\begin{itemize}
    \item \textsuperscript{128} MARC MAUER & RYAN S. KING, \textsc{The Sentencing Project, A 25-Year Quagmire: The War on Drugs and Its Impact on American Society} 3 (2007), available at http://www.sentencingproject.org/Admin/Documents/publications/dp_25yearquagmire.pdf (citing FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, Arrest tbl. (2005)).
    \item \textsuperscript{129} Id. at 7.
    \item \textsuperscript{131} \textit{See id.}; \textsc{The Sentencing Project, Women in the Criminal Justice System: Briefing Sheets} 5 (2007), available at http://www.sentencingproject.org/Admin%5CDocuments%5Cnews%5Cwomenincj_total.pdf.
    \item \textsuperscript{132} In 1999, approximately 1.5 million children had a parent in state or federal prison, up by more than 500,000 in 1991. MUMOLA, supra note 130, at 2. “Black children (7.0%) were nearly 9 times more likely to have a parent in prison than white children (0.8%).” \textit{Id}.
    \item \textsuperscript{133} For discussions of California’s gang database, see Beres & Griffith, supra note 9, at 759-63; Joshua D. Wright, \textsc{The Constitutional Failure of Gang Databases}, \textit{2 STAN. J. CIV. RTS. & CIV. LIBERTIES.} 115 (2005).
    \item \textsuperscript{134} \textit{See} SNYDER & SICKMUND, supra note 77, at 186 (describing trends in judicial waivers of juveniles).
\end{itemize}
of the reality facing child informants and the necessary protection children need. Governments are failing either to acknowledge or give due weight to the interests and concerns of juvenile informants. Concern for the child merits equal voice alongside the substantial state interests in crime fighting and public safety. Juvenile informants are not simply miniature adult informants. They have special interests and concerns needing accommodation, particularly the physical, ethical, intra-family, and psychological harms that may result from their use as informants. Ultimately, these concerns faced by underage informants suggest that parens patriae should play a strong role in considerations of whether children should be used as informants.

1. The Government's Perspective

a. Efficient and Necessary Crime-Solving Strategy

Law enforcement officers and prosecutors claim child informants are necessary and efficient. They claim that adults cannot penetrate the world of juveniles, law-abiding or otherwise. They suggest that adults cannot comprehend the sub-culture of juveniles, so the need for minors is greater when minors are being investigated. Finally, officials assert that when an adult criminal preys on juveniles or relies on juveniles to commit crimes, only juveniles will be close enough to the adult criminal to have incriminating information.

Collectively, these justifications signify the belief that no “practical alternative” to using children as informants is available to achieve successful criminal prosecutions that

136. See infra Part II.C.
137. The legal problems that may arise from the use of juvenile informants, particularly facilitating criminal conduct and delinquency, have been elsewhere discussed. See Sinclair & Herbert, supra note 8, at 35-39 (analyzing government’s use of child informants as violation of alcohol, tobacco, and drug laws as well as contributing to the delinquency of a minor). One additional consideration may be whether the government’s actions constitute abuse and neglect of children because of the potential serious harm that may result from being an informant. See Letter from David L. Armstrong, Att’y Gen., Ky., to Hon. R. Hughes Walker, General Counsel, Cabinet for Human Resources, 1985 WL 193277 (1985) (advising that police use of juveniles in child sex abuse sting could constitute abuse under child welfare laws).
138. See Blair, supra note 9 (explaining that using teen informants can sometimes be the only way to enter a world where only minors are trusted); Dodge, supra note 45, at 235; see also N.J. JUVENILE GUIDELINES, supra note 83, at 88 (“Juvenile informants should be used only when there is no practicable alternative that will enable a law enforcement agency to end an illegal activity is endangering the community.”). Despite such claims, in 2006, a female, undercover law enforcement officer in Falmouth, Massachusetts, posed as a student in the local high school. During her stint, she was able to purchase marijuana and ecstasy from other students, leading to the arrest of those students. See Brian Ballou, Officer Posing as High Schooler Leads Drug Sting, BOSTON GLOBE, Apr. 8, 2006, at A1.
139. Dodge, supra note 45, at 235.
140. See id.; see also N.J. JUVENILE GUIDELINES, supra note 83, at 88 (“Juvenile informants should be used only when there is no practicable alternative that will enable a law enforcement agency to end an illegal activity that is endangering the community.”); Blair, supra note 9; Ransom, supra note 8, at 108 (“Law enforcement is made up of the adult population, therefore it is faced with a dilemma when attempting to infiltrate criminal activity conducted by juveniles.”).
protect public safety. Consequently, law enforcement officers are simply doing "good police work" when they vigorously recruit juveniles as informants.

Consequently, testimonial witnesses are fundamental to the criminal justice system. Without information and testimony from witnesses, many criminal cases would not be solved, and the criminal justice system would come to a virtual standstill. The system's reliance on witnesses is not boundless, however. On occasion, prosecutors prioritize substantially competing interests over protecting public safety. One such instance involves the protection of child sexual abuse victim-witnesses. Children who have suffered sexual abuse can experience additional trauma, if required to testify in court in front of the alleged perpetrator. When handling child sex abuse cases, prosecutors weigh (1) the interest in not causing additional harm to the child by forcing her to testify against the defendant and (2) the desire to protect children and society from the defendant. The balancing is made all the more difficult because the child may be the only witness to the crime, and there may not be other admissible physical or corroborating evidence. The Supreme Court has authorized prophylactic measures aimed at preventing harm to the child victim while testifying in the defendant's presence. In some instances, however, the measure may be ineffective at preventing harm, or even if effective, the prosecutor may nevertheless choose not to call the child to testify. In such circumstances, if the child does not testify, a jury may acquit the defendant or the government may choose to dismiss the case against the defendant. The defendant remains free, possibly jeopardizing public safety.

b. Juveniles Are Miniature Adults

Some government agents claim that permitting children to act as informants respects the individual autonomy of children, particularly those children who are

141. See N.J. JUVENILE GUIDELINES, supra note 83, at 88 (the use of juveniles as informants "may be necessary to protect juveniles in a community from the distribution of controlled dangerous substances, the sale of firearms, or gang activity"); Blair, supra note 9; Dodge, supra note 45, at 244.
142. See Dodge, supra note 45, at 240.
144. See Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) ("Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim."). Additionally, current Supreme Court precedent makes it difficult for the government to admit as trial evidence the child's out-of-court statements regarding the abuse. See Crawford v. Washington, 541 U.S. 36, 59 (2004) (explaining that statements of witness absent from trial may only be admitted "where the declarant is unavailable, and only where the defendant has had prior opportunities to cross-examine"). But see Robert P. Mosteller, Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses, 39 U. RICH. L. REV. 511, 591-92 (2005) (discussing a hearsay exception that "any and all hearsay describing 'an act of sexual conduct with or on the child' is admissible if the child 'testifies at the proceeding and is subject to cross-examination'").
145. See Craig, 497 U.S. at 836 (holding use of one-way closed circuit television that prevents a child from testifying face-to-face with the defendant does not violate Confrontation Clause).
146. On remand from the Supreme Court, the government in Maryland v. Craig dismissed the case reportedly because the parents did not want their children to have to testify in a second trial. See Stephen Buckley, Prosecutors Reject New Trial in Sandra Craig Abuse Case, WASH. POST, July 3, 1991, at C1.
adolescents or are "mature." This justification suggests that child informants are no different from adult informants, whose use is generally accepted. In support of this rationale, many will point to data suggesting that adolescents as young as fourteen years of age engage in the same decision-making process as adults and are thus competent decision-makers and of equal culpability. Alternatively, in some instances, law enforcement will characterize particular juveniles as street-savvy, criminal-minded, de facto adults. It is proclaimed that because children with criminal histories have repeatedly engaged in criminal, i.e., adult behaviors, they should be treated as adults and allowed to inform without limitation.

Such beliefs were evidenced in Brenda Paz’s case. After her death, Brenda’s witness protection handler remarked that his responsibility “was to provide her with a safe place to live and food and sustenance . . . . The burden of personal responsibility for safety [fell] upon [Brenda].” In essence, the handler expressed the position that while the government will do its best within reason to protect juvenile informants, the child assumes the risk of informing, and if harmed in the process, it is not the government’s responsibility.

The broad-sweeping adolescent maturity claim has been challenged by the Supreme Court. In Roper v. Simmons, the Supreme Court, citing scientific data, significantly undercut the rationale for treating juveniles as adults for criminal

147. This rationale—that teenagers are able to make decisions equally as well as adults and so therefore are competent to decide to inform—wholeheartedly embraces the personhood jurisprudential approach to children. See Oster, supra note 8, at 118-20. In the juvenile delinquency context, personhood and autonomy theories are used to support the conclusion that children are competent to waive their Miranda rights. See Fare v. Michael C., 442 U.S. 707, 724, 726 (1979) (holding that there is no special protection for Miranda waivers by children because they are potentially competent); see also Bellotti v. Baird, 443 U.S. 622, 630 (1979) (applying the mature minor doctrine to the abortion context). Additionally, the recent trend toward waiver of juvenile court jurisdiction in favor of adult criminal court jurisdiction is rationalized by the claim that children are competent decision-makers who have chosen to engage in criminal activities warranting their treatment like adults. Cf. Roper v. Simmons, 543 U.S. 551, 618-19 (2005) (J. Scalia, dissenting) (quoting Stanford v. Kentucky, 492 U.S. 361, 374 (1989)) (“It is absurd to think that one must be mature enough to drive carefully, drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one’s conduct to that most minimal of all civilized standards.”).

148. See Elizabeth S. Scott & Thomas Grisso, The Evolution of Adolescence, A Developmental Perspective on Juvenile Justice Reform, 88 J. CRIM. L. & CRIMINOLOGY 137, 158-59 (1997) (discussing claim that, by about fourteen years of age, juveniles have similar cognitive decision-making capacity as adults).

149. Dodge, supra note 45, at 241; see also Fare, 442 U.S. at 726 (approving Miranda waiver by a juvenile who was sixteen-and-a-half-years-old and had “considerable experience with the police”).

150. Bradley, supra note 33.

151. Id. (quoting an officer: “My responsibility with Miss Paz was to provide her with a safe place to live and food and sustenance . . . . The burden of personal safety falls upon the witness.”); Dodge, supra note 45, at 242 (quoting an officer: “We always run the risk that people will discover the source because kids are stupid. If the perpetrator does find out, it is most often the kid’s fault for bragging to all of his friends about his undercover adventures with the police.”); Pfeifer et al., supra note 32 (quoting an officer commenting on the death of a juvenile informant: “It’s a risk they take . . . . They know it in the back of their minds. And we take every precaution we can with our informants. We don’t throw them to the wolves with their eyes closed. I feel bad about it. But I don’t see [sic] responsible for it.”).
justice purposes.\textsuperscript{152} The Court's holding that invalidated laws authorizing the death penalty for children was premised in part on science demonstrating juveniles' immature decision-making capacity, limited life experience, low risk aversion, increased impulsivity, and emphasis on short term gains rather than a balancing of long and short term behavioral consequence.\textsuperscript{153}

Likewise, social science data undercut the claim that, by virtue of their criminal history and experience, some juveniles are as savvy as adults and should be treated as such in the criminal justice system. To varying degrees, juveniles have difficulty adequately understanding \textit{Miranda} warnings to intelligently and knowingly waive their \textit{Miranda} rights.\textsuperscript{154} With limited exceptions, they do not adequately understand the utility and import of the rights to counsel and silence.\textsuperscript{155} Children do not necessarily understand the operation of the criminal adjudicatory process.\textsuperscript{156} Moreover, prior exposure to the justice system does not necessarily translate to greater understanding of the process.\textsuperscript{157} Thus, social science data suggests that even children who have experience with the juvenile or criminal justice system may lack adult levels of understanding regarding the criminal process.

Finally, the adultification of children also stands in tension with the general legal incapacity of children. Arguably, for children otherwise viewed as the equivalent of adults, many categorical, age-based restrictions should fall to the wayside, such as the minimum drinking age, voting age, age for military service, marital minimum age, contracting age, and age for jury service. Instead, regardless of their adultification in the criminal justice context, society maintains that children as a class should not engage in these activities because they are incapable of properly exercising these important privileges and rights.

c. \textit{Promotes Rehabilitation}

Some police officers allege that informing promotes the rehabilitation of children involved in criminal activities.\textsuperscript{158} It is claimed that the child who acts as an informant may develop increased self-esteem, accept greater responsibility, repent for past conduct, and learn from mistakes.\textsuperscript{159} Consequently, a child informant is less likely to re-offend. Even if the child does not develop internal

\begin{itemize}
\item \textsuperscript{152} \textit{Roper}, 543 U.S. at 569-75 (holding that juveniles are ineligible for the death penalty).
\item \textsuperscript{153} \textit{Id.} at 568-74.
\item \textsuperscript{154} See \textit{Grisso}, supra note 42, at 90-93.
\item \textsuperscript{155} \textit{Id.} at 128-30. The exception is for those children who have a lengthy history of prior serious offenses and commensurate exposure to the court system. \textit{Id.} at 128. These juveniles had the understanding typical of adults. \textit{Id.}
\item \textsuperscript{156} “Current evidence suggests that compared with adults, youths under age fifteen are at greater risk of having a poor knowledge of matters related to their participation in trials. For adolescents fifteen and older, on average their understanding may be more like that of adults.” \textit{Thomas Grisso, Youths' Capacities, in Youth on Trial} 139, 152 (Thomas Grisso ed., 2000).
\item \textsuperscript{157} \textit{Grisso}, supra note 42, at 91.
\item \textsuperscript{158} \textit{See also Simons}, supra note 8, at 33-41 (advancing a similar argument in relation to adult informants).
\item \textsuperscript{159} \textit{See Dodge}, supra note 45, at 241(quoting officers' descriptions of “positive aspects” of informing).
\end{itemize}
controls as a result of the experience, officers maintain that informing will create external limits on future criminal conduct. In particular, they reason that a child who informs is often forcibly expelled from criminal cohorts, making it more difficult to engage in criminal activities in the future. \textsuperscript{160} Children who inform are thus required to find others to befriend, preferably and usually those not involved in criminal activities.

Claims that juveniles can be rehabilitated by informing fail to take into account that using children as informants may violate prohibitions on contributing to the delinquency of a minor and sending minors to immoral places. \textsuperscript{161} When government personnel send juveniles out to gather incriminating information, the juveniles are exposed to and may engage in additional criminal activity thereby undermining any rehabilitative gains. Additionally, as discussed in the next section, using children as informants exposes them to other harms from which they arguably should be protected, possibly undermining any rehabilitation that may have occurred.

2. Through the Eyes of a Child

At present, government actors appear to give short-shrift to the risks a child informant assumes. Informing is an inherently dangerous activity. Juvenile informants are exposed to physical, ethical, intra-family, and psychological harms during their highly formative years. \textsuperscript{162} Utilizing a child-centered perspective, this section posits harms that the government, as child protector, ideally should balance against the benefits of informing. \textsuperscript{163}

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\textsuperscript{160} See Markon & Glod, supra note 5 (noting a juvenile informant’s experience losing her gang friends after informing). When law enforcement asked Brenda Paz why she was cooperating against her gang family, she reportedly responded that it was “a way out. It’s a way to start turning the corner . . . . Either I help you put these people away and I don’t have anyone to hang out with and I’m forced to find new friends. Or they kill me.” Id.

\textsuperscript{161} See Sinclair & Herbert, supra note 8, at 35-39; Ransom, supra note 8, at 109-11; Santiago, supra note 8, at 784-92.

\textsuperscript{162} In addition to a child-centered perspective, this Article’s discussion of children’s concerns is suggestive of a therapeutic jurisprudence lens. See generally David B. Wexler, Therapeutic Jurisprudence: An Overview, 17 T.M. COOLEY L. REV. 125 (2000). The severity of the harms may vary with the age of the child, the nature of the informer activities, and the nature of the crime being investigated. Without delving into the particular variables, this section describes those harms.

\textsuperscript{163} See Barbara Bennett Woodhouse, Hatching the Egg: A Child-Centered Perspective on Parents’ Rights, 14 CARDOZO L. REV. 1747, 1838 (1993) (proposing that children’s needs and experiences should be the lens through which parental rights and responsibilities should be considered). Woodhouse notes the following:

[We] must apply adult intelligence to examine children’s status in law and move children from the margin to the center of formal legal analysis. Adults must begin to ask “the child question”—how have children’s experiences and values been left out of the law? How does the mismatch between children’s experiences and law’s assumptions and imposed structures serve the interests of those who hold power over children? In an ideal world, what would the life situation of children look like and how could law play a role in bringing this ideal world about?

\textit{Id.} (footnote omitted).
a. Physical Harm

Because of their relationships with and physical proximity to the target, juvenile informants may be especially susceptible to physical harm or death at the hands of individuals seeking to intimidate or eliminate them. Children who inform on their parents, other family members, or close friends are unlikely to or unable to avoid these individuals or sever these close relationships. For example, Brenda Paz was killed by members of her gang “family” from whom she could not permanently separate, even though she entered federal witness protection. Similarly, because of their daily living patterns and inability to relocate on their own, children are commonly in close proximity to neighbors, peers, and community members, including criminals, who might physically harm them.

In addition to the likelihood of emotional closeness and physical proximity to a target, underage informants may not exercise appropriate restraint in conducting their informant activities, leading to physical harm. Again, Brenda Paz could not emotionally separate from her gang “family.” Reportedly, she knew that maintaining contact with them could lead to her death if her informant status was revealed, but did not appreciate the amount of physical risk in which she had placed herself. Also, Chad MacDonald was killed by drug dealers when he tried to set up a drug bust for the police without their awareness. The inabilities of juveniles to safeguard themselves may be attributable to their decreased risk aversion.

b. Psychological and Ethical Harm

Anticipating the physical harm that often attends informing may cause a range of psychological trauma including fear, paranoia, anxiety and depression. Similarly, juvenile informants who are actually intimidated may suffer emotionally. Children who inform face many varieties of intimidation, including verbal threats of violence, being followed or stalked, and vandalism. They may be intimidated...
by friends, family, or acquaintances. It is to be expected that intimidation may cause psychological harms to children. Indeed, by its very nature, intimidation is intended to cause fear and apprehension.

Even underage informants who do not face physical danger or witness intimidation may suffer emotional trauma. Juveniles do not like informants and let them know this through ostracization or stigmatization that takes the form of shunning, teasing, or exclusion. It is well known, however, that peer acceptance is extremely important to juveniles; they do not want to be excluded or distrusted. Juvenile informants who are ostracized by their peers may experience emotional trauma such as withdrawal, depression, and anxiety to anger and acting out.

Underage informants may also suffer in their ethical development. Children who are returned to the street to gather information passively about others or engage in undercover operations are thrust back into a criminal environment. In such a scenario, the juvenile is provided an opportunity to be educated about or commit additional criminal conduct, and he may take advantage of the opportunity.

Juvenile informants may not learn accountability. By informing in exchange for absolution or leniency, children may learn that they can avoid responsibility for wrongful behavior by “working it off.” As a result, they may continue to commit additional crimes, expecting that they will continue to avoid liability.

An unhealthy sense of self-interest and self-preservation may result from informing. In their efforts to recruit children to inform, law enforcement officers and prosecutors may exploit power differentials. Children may be—or feel as if they have been—“coerced” into informing, either by the circumstances generally or the particular recruitment tactics of law enforcement and prosecutors. Using their authority and adult statuses, government officials obtain agreements that may

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170. See Finn & Healey, supra note 165, at 9 (explaining why juveniles are vulnerable to witness intimidation, including inability to relocate and susceptibility to family and peer pressure).

171. See Whitman & Davis, supra note 6, at 24; Judi Villa, Who’s the school snitch? Alertrecall.com, THE ARIZ. REPUBLIC, Oct. 4, 2005, http://www.azcentral.com/arizonarepublic/news/articles/1004alert04.html (explaining that, according to a high school senior, “being labeled a snitch is one of the worst things that can happen. ‘You get excluded and people want to fight you . . . . You become a snitch and nobody likes you anymore. That’s the Number 1 rule in high school. You don’t do it.’”).

172. See N.J. JUVENILE GUIDELINES, supra note 83, at A10-4 (“[E]nforcement officers should avoid introducing the juvenile to offenders or conduct which might immerse the juvenile more deeply in a criminal or delinquent culture.”).

173. Cf. Natapoff, Snitching, supra note 8, at 687-88 (describing how informants continue to commit criminal activities while out in the community).

174. See Dodge, supra note 45, at 234 (describing power differential between law enforcement officers and informants); cf. In re Gault, 387 U.S. 1, 51-52 (1967). The court in Gault commented:

[I]t seems probable that where children are induced to confess by “paternal” urgings on the part of officials and the confession is then followed by disciplinary action, the child’s reaction is likely to be hostile and adverse—the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.

Id.
be bad for the child informant, although beneficial for the government. Consequ-
ently, underage informants may come to learn that vulnerable individuals are a
means to an end to be sacrificed for “the greater good” or to achieve self-interested
goals, regardless of the consequences to those individuals.

Child informants may develop an unhealthy distrust of law enforcement and
other authority figures. This perspective may result from the undue influence
government officials exert in an effort to gain cooperation. Juvenile-police
interactions that are considered coercive, harassing, over-reaching, or otherwise
unfair contribute to negative attitudes toward law enforcement among juveniles.

Additionally, when children do inform, they may become distrustful if they feel
that government authorities are not doing enough to protect them from retribution.

Finally, children who inform may learn to tell individuals, especially police and
other authority figures, what they want to hear. Police and prosecutors surely will
react more favorably to child informants who greatly facilitate their investigations
and prosecutions. Children are likely to be aware of this. Thus, in the extreme, a
child informant may intentionally fabricate or shade information. More mildly,
it may mean that children, who are particularly suggestible, unintentionally
provide false information. In either case, adhering to the value of truth-telling may
be difficult.

c. Family Tension

When children act as informants without parental notice or approval, the
parental child-rearing right, duty, and function are infringed, potentially causing
family disharmony. Parents are primarily responsible for making or assisting their
children in making major life decisions, including legal decisions. The decision

175. In other circumstances, bargains resulting from such power differentials would be void. See Restate-
ment (Second) of Contracts § 177 (1981).
176. See Blair, supra note 9 (“What it teaches—to become a betrayer, to become a seducer, to become a traitor
to the trust of other people—is certainly a bad thing to teach to young people.”).
177. See Patrick J. Carr et al., We Never Call the Cops and Here is Why: A Qualitative Examination of Legal
Cynicism in Three Philadelphia Neighborhoods, 45 CRIMINOLOGY 445, 457-58 (2007); Terrance J. Taylor et al.,
178. It is well-documented that adult informants will fabricate information. For example, snitch cases
accounted for 45.9% of the 111 death row exonerations since capital punishment was resumed in the 1970s. Rob
WARDEN, NORTHWESTERN UNIV. SCH. OF LAW, CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW
SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH 3 (2004), http://
www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/.
179. This Article does not address the reliability of juvenile informants and their impact on the criminal justice
process. For such research, see generally Tamar Birckhead, The Age of the Child: Interrogating after Roper v.
Simmons, 65 WASH. & LEE L. REV. 385, 413-14 (2008) (discussing studies of the suggestibility of child
witnesses).
180. See Bellotti v. Baird, 443 U.S. 622, 635 (1979). The Bellotti Court discussed limits placed on children,
stating:
[T]he States validly may limit the freedom of children to choose for themselves in the making of
important, affirmative choices with potentially serious consequences. These rulings have been
to act as an informant is a legal decision with significant legal ramifications. Thus, parents arguably should assist their child in making the decision to inform if the need arises. Furthermore, parents are responsible for instilling moral standards and good citizenship in their children.\textsuperscript{181} To the extent that informing is viewed as morally appropriate and good citizenship, parents arguably should be involved in the decision-making process. Parents who do not have an opportunity to play a role in this decision may feel as if their child has acted improperly without parental permission. Finally, parents are tasked with protecting their children. When not included in their child’s decision to inform, they may feel that they have not been given an adequate chance to ensure the child’s safety.

Parents who are provided an opportunity to be involved in their child’s decision to inform may find themselves in a no-win situation which may be troubling to the parent. On one hand, the parent who encourages her child to inform may place the child in a perilous or harmful situation. Conversely, the parent who does not support informing may subject the child to greater criminal repercussions or may feel as if she is not modeling appropriate citizenship. Parents who are internally conflicted about the situation may bring stress to the family situation.\textsuperscript{182}

Lastly, when there is a conflict between parent and child as to whether the child should inform, the child’s relationship with his parents and family may be strained.\textsuperscript{183} Parents encourage their children to cooperate with law enforcement inquiries for a number of different reasons. It might be the case that the encouragement is done out of the parent’s civic-mindedness, respect for authority, law-abidingness, desire to reclaim their community from crime, or other similar concerns, and the parent wants to instill those values in her child. Perhaps the parent or someone close to the parent is the victim. Or perhaps a parent wants their child to inform to facilitate expulsion from a group of criminal-minded cohorts or to receive criminal leniency. These examples suggest positive motivations. Alter-
natively, a parent’s encouragement may not have the child’s interests at the forefront. For example, a parent may encourage cooperation because of the parent’s embarrassment or anger at the child’s criminal conduct, or because of her own inability or unwillingness to resist coercive authority figures or conduct, or out of ignorance of the child’s legal rights.

In any of these scenarios, if the child refuses or is hesitant to inform despite the parents’ desire for him to do so, there is the immediate potential to cause general discord in the home or family that in turn could be psychologically and emotionally damaging to the child and the family. Moreover, in the long-term, a child who half-heartedly informs due to parental pressure and does so unsuccessfully might generate physical retribution from the target. As discussed earlier, this outcome may cause the parent trauma.

In contrast to the parent who encourages the child to inform, some parents may not want their child to inform, despite the potential benefits that may accrue to the child. This scenario also has the potential to cause familial disharmony. The parent may primarily be concerned with the child’s physical safety or other negative repercussions of informing. The parent may also desire to protect the suspect, who may be the parent him or herself or another individual close to him or her. Perhaps the parent may not trust law enforcement or the criminal justice system, or the parent may simply want the child who is subject to criminal charges to face those charges without leniency. Regardless of the reason, the child who informs despite parental objection may cause family disharmony and strain by challenging the parent’s authority and guidance.

The government has seemingly broken its traditionally protective stance toward children and adopted a warrior-like approach to dealing with drugs, crime, and gangs. As a consequence, the harms to child informants arising from informing, including physical, ethical, and psychological injuries and family tension, have been ignored or minimized by government investigators and prosecutors. Instead, the government unquestioningly prioritizes its interests in using underage informants to obtain successful criminal investigation and prosecution over children’s interests in government protection, resulting in the unchecked use of child informants. The concerns of child informants should be measured against and, where substantial enough, at times possibly trump, the interests of other societal stakeholders. Tempering the decision to use underage informants by reference to the long-standing parens patriae doctrine provides a measure of protection for juveniles.

184. See Grisso, supra note 42, at 181-82.
III. DRAW DOWN: MODEL APPROACHES TO CURTAILING THE USE OF JUVENILE INFORMANTS

A. Model #1: A Categorical Rule

Jurisdictions could institute a categorical age prohibition on the use of underage informants. With some exception, children under the age of eighteen years are generally restricted from engaging in many (often dangerous) activities without parental consent. In most cases, they are also prohibited from making legally-consequential decisions without parental consent. Acting as an informant is a dangerous endeavor having significant legal consequences. Thus, it is reasonable to impose categorical age restrictions on the use of juvenile informants with exceptions for parental consent. Such restrictions are justified by a child’s diminished capacity and inherent vulnerability. Three sources of law support age-based prohibitions on the use of underage informants: the general age of legal majority in the United States; age restrictions for American military service; and international age restrictions on child soldiers. Collectively, these sources of law suggest that children less than seventeen years of age should not be permitted to act as informants and children seventeen to eighteen years of age may only do so when parental consent is obtained.

1. The Rationale

The general age of legal majority offers one approach to limiting the use of underage informants. Instituting an absolute prohibition on the use of individuals under the age of eighteen as informants, without parental consent, is consistent with the general treatment accorded juveniles respecting legal abilities. It is axiomatic that individuals younger than eighteen years of age are legally disabled. Generally, they may not vote, serve on a jury, or marry. Parents are usually entitled to consent on behalf of the child for receipt of medical treatment. Juveniles who enter into contracts may later void them at their request. When an individual reaches the age of eighteen years, childhood ends as a legal matter and adult legal status is attained. The parent no longer has authority over the child and the state no longer assumes a protective role. With few limitations, individuals over eighteen years of age have the unfettered ability to make decisions of a legal

185. See supra Part I.D for a discussion of age restrictions and parental consent requirements adopted by some jurisdictions with respect to juvenile informants.
186. Whether parental consent should ever be sufficient is beyond the scope of this Article.
188. See generally Planned Parenthood v. Casey, 505 U.S. 833, 899 (1992) (upholding statute requiring parental or judicial approval for a minor’s abortion); Parham v. J.R., 442 U.S. 584, 603-04 (1979) (holding parents have authority to seek their child’s commitment to a mental health institution).
189. See RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981) (“[T]he modern rule in the absence of statute is that they are voidable by the infant.”).
nature. Accordingly, because of their general legal disability, individuals under eighteen years of age could be prohibited from engaging in informant activities without parental consent.

In light of the war rhetoric underlying the use of underage informants, reference to military and war restrictions on juvenile service may be appropriate, although admittedly inflammatory to some. The American government statutorily prohibits children younger than seventeen years of age from enlisting in the American military. Children between seventeen and eighteen years of age may enlist with parental or guardian consent, if a parent or guardian is entitled to custody and control. Such children, however, may not be stationed in active combat. Applying American military enlistment standards to the question of child informants dictates that children under the age of seventeen should not serve as informants. For children over the age of seventeen, the government should be required to obtain parental consent.

The international treatment of child soldiers offers a similar rationale for imposing categorical age restrictions on the use of underage informants. The use of children as soldiers in active combat is well-documented in the international setting. As a result, international standards have been adopted, setting the age of participation of individuals in war activities at eighteen years, though individuals younger than eighteen-years-old may be recruited. There is no exception in this scheme for parental approval. International standards suggest that governments and law enforcement officials should not use individuals under the age of eighteen

190. Some scholars have suggested that the metaphorical war on drugs has become an actual war. See HEATH, supra note 118, at 281-82. Carrying war rhetoric to its fullest extent, an underage informant arguably may be metaphorically characterized as a “child soldier” for the American government.
192. Id.; see Major John T. Rawcliffe, Child Soldiers: Legal Obligations and U.S. Implementation, 2007 ARMY LAW. 1, 3-4 (2007). Approximately 4% of new enlistees are seventeen years of age at the time they arrive at basic training. Id. at 3.
195. Additional Protocol I to the Geneva Conventions art. 77, (Jun. 8, 1977) (Parties must “take all feasible measures in order that children who have not attained the age of fifteen years do not take direct part in hostilities” and may recruit children between the ages of fifteen and seventeen years. The U.S. is not a party.); see also Additional Protocol II to the Geneva Conventions art. 4 (Jun. 8, 1977); Optional Protocol to the United Nations Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (May 25, 2000) (prohibiting drafting of children under age eighteen years; requiring states “take all feasible measures” to ensure those under eighteen years of age “do not take a direct part in hostilities.” Children under eighteen years of age may not be voluntarily recruited unless certain procedural requirements are satisfied. U.S. satisfied procedures to recruit those who are seventeen years of age.); Office of United Nations High Commissioner for Human Rights, Convention on the Rights of the Child (Nov. 20, 1989) (children under fifteen years of age may not be recruited or participate in armed conflict. The U.S. is not a party.).
as informants in any circumstances.

Grafting the age standards of the American military and international law onto the context of child informants, while an imperfect fit, is nonetheless appropriate. In terms of function, among other activities, soldiers and other personnel may act as spies gathering information. Child informants likewise act essentially as spies or human intelligence sources. Further, the risks of physical and emotional harm to child informants are not unlike the risks to soldiers, particularly those under the age of eighteen.

2. The Pros and Cons

The benefits of using a categorical method are several. Unqualified age limitations are easily administered and predictably applied. The approach is consistent with the age at which children generally are permitted to make legally-significant decisions. These two benefits may be particularly important because the characteristics of the class of child informants are currently unknown. Requiring parental consent for seventeen to eighteen year-olds maintains the authority and duty of parents respecting child-rearing. As well, requiring parental approval is consistent with the juvenile justice system’s preference for parental involvement. Lastly, an age-based approach is consistent with the state’s protective stance respecting children.

The critiques of a categorical method are also numerous, however. First, the rule does not consider the public’s general interest in safety or particularized interest in resolving certain types of crimes. If categorical age restrictions are imposed, in a substantial number of cases, the government might lose beneficial information and

197. A third potential justification is that the children in foreign nations who become child soldiers are not vastly unlike the children who act as informants for the American government. Both are often poor, homeless, parentless, and have limited access to information. Moreover, both child soldiers and child informants agree to serve for similar reasons: fear, economic need, or the desire to protect oneself or one’s family. See Coalition to Stop the Use of Child Soldiers, Some Facts, http://www.child-soldiers.org/childsoldiers/some-facts (last visited Apr. 6, 2009); Human Rights Watch, Facts About Child Soldiers, http://hrw.org/campaigns/crp/fact_sheet.html (last visited Apr. 6, 2009). Indeed, some have argued that juvenile gang members in America are similar to foreign child soldiers and should be treated as such. See generally Elizabeth Braunstein, Are Gang Members, Like Other Child Soldiers, Entitled to Protection from Prosecution under International Law?, 3 U.C. DAVIS J. JUV. L. & POL’Y 75 (1999). Juvenile gang members, and others involved in criminal activity, obviously may have the best likelihood of becoming informants. The similarities are unexplored in this Article.
199. See Roper v. Simmons, 543 U.S. 551, 574 (2005) ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.").
200. See supra Part I.C.
201. Scott, supra note 198, at 560-61.
testimony.

Second, children absolutely will not receive the benefits of informing, whether tangible or intangible. A juvenile facing delinquency or criminal charges, without receiving the benefit of criminal leniency in exchange for informing, will be significantly disadvantaged in the present criminal case. In future cases, the child’s sentence may be enhanced owing to prior offenses that were not ameliorated. Juveniles charged as adults would not have the opportunity to obtain criminal leniency despite facing serious penalties. Children who might be rehabilitated as a result of informing will not have a chance at rehabilitation, and children who are not permitted to inform may continue to be subjected to crime in their home or in their community.

Third, the approach is both over- and under-inclusive. Mature children should have the right to make legal decisions with “grave and indelible” consequences. Nevertheless, the categorical approach treats equally very young children (e.g., nine-year-olds), who undoubtedly suffer from diminished capacity, and possibly mature adolescents (e.g., sixteen-year-olds). Similarly, some minors may be developmentally mature enough to handle the benefits and burdens of cooperating, while others may not be mature enough until after the age of eighteen.

Fourth, child informants who have valuable information and would otherwise be permitted to testify to that information would be unavailable. Youth generally does not serve as an absolute, insurmountable bar to an individual’s provision of evidence. Thus, a prohibition on juvenile informants serving as witnesses would be inconsistent with the presumption that child witnesses can provide important and reliable evidence.

Sixth, vesting approval or disapproval in parents may cause additional concerns. At times, a parent’s consent or non-consent may conflict with the child’s desire or interest. Similarly, a parent may consent without herself fully understanding the implications of the child’s participation in informant activities. Lastly, a categorical approach may encourage criminal-minded individuals, particularly adults, to utilize juveniles for their criminal gain because the juvenile would not be able to provide incriminating information to the government. For the same reason,
such an approach may encourage juveniles to engage in criminal activities.

B. Model #2: Prior Judicial Approval

A more flexible alternative to the bright-line age restriction is to require law enforcement and prosecutors to obtain judicial approval prior to using a child as an informant. What follows is a rough procedure to obtain review and two proposals for standards of approval that could be applied by courts. First, courts could apply the best interests of the child standard to determine whether to authorize a child to become an informant. Alternatively, courts could determine whether a minor is both capable and willing to give informed consent. If so, then the minor would be permitted to make his own decision whether to inform. In either instance, judicial approval does not mandate that the child cooperate, but only results in a determination that the benefits outweigh the burdens for the child or that the child is sufficiently mature and informed to decide to consent. Although a court might approve a child to act as an informant or make the choice to do so, this does not necessarily mean that the child will do so. Of his own volition, the child may nevertheless refuse to assist the government.

1. Procedural Matters

There are several procedural matters to take into account. First, when government authorities desire to use a child as an informant and the child has expressed interest in doing so, the authorities should expeditiously present the matter to a judge for review. Additionally, they should present any subsequent change in earlier approved circumstances (e.g., nature of informant activities) to the judge for approval.

The appropriate judge to give approval may be one of many. Juvenile judges are well-positioned, as are family court judges. Both are experienced in making decisions pertaining generally to children and scrutinizing child witnesses in particular. They may, however, not have extensive prior experience dealing with informant issues. Criminal court judges usually have substantial experience dealing with informants. They may not, however, have substantial experience resolving children's issues, but may have experience with issues pertaining to child witnesses.

Regardless of the particular assigned judge's usual subject matter, the judge should be available immediately or as soon as possible to consider the matter. The opportunity to inform is often time-sensitive. Information may become stale if

210. See supra Part I.D for a discussion of California's statute, which adopts such an approach in addition to setting age-based restrictions.

211. A delay of several weeks or even a few days to appear before a judge and conduct a hearing may make the potential informant's information stale. The child's informant opportunity thus expires, and any expected benefits for the child and the public will not be obtained.
not acted upon quickly. Thus, for immediate review, an “on duty” or “chambers” judge may be the best option.

The judge assigned to the matter should conduct a hearing in chambers or in a sealed courtroom. At the hearing, the court should take recorded testimony from, at a minimum: the child; the child’s parent(s); the child’s mental health provider or counselor, if one exists; and the law enforcement agent(s) handling the case. The purpose of the testimony is to determine each party’s position on the issue and satisfaction of one of the standards proposed herein.

A prosecutor should attend the hearing to represent the government’s position. If the juvenile is too young to adequately express his point-of-view and participate in representation, the court should appoint a guardian ad litem to represent the child’s interests. If the juvenile is older or facing juvenile delinquency or criminal charges, then either the child’s parents should retain an attorney for the child or the court should appoint the child an attorney. In either instance, the attorney should represent the child’s wishes.

All materials related to the matter should be kept confidential. Thus, in addition to the hearing taking place in chambers or a sealed courtroom, the transcript should be sealed. All parties should be advised that breaches of confidentiality, intentional or otherwise, are subject to contempt of court.

The court should apply a clear and convincing evidentiary standard in making its decision. This standard is appropriate because it avoids the risk of error posed by a preponderance standard which is too substantial in light of the serious ramifications of the decision. Moreover, the standard is appropriate because it recognizes the countervailing parental and state interests.

Finally, the court may determine, against the desires of the child or the government, to deny the request. In such a case, the child should be permitted to take an immediate appeal on the record. The record on appeal must also be held in confidence.

2. Proposed Standard #1: The Best Interests of the Child

Consistent with the government’s traditional protector role respecting children, the “best interests of the child” (BIC) test provides one standard of approval for authorities considering the use of an underage informant. The BIC standard is woven through much of the scholarly discourse, jurisprudence, and practical decision-making pertaining to children in the legal system. Parents are presumed and expected to act in the BIC when exercising their fundamental rights to raise their child. The government, in its parens patriae role, acts in the BIC. The BIC standard is the touchstone of the juvenile delinquency and child maltreatment


systems, as well as judicial decisions regarding custody, visitation, support, and adoption.215

The BIC standard aspires to protect the physical, psychological, emotional, and developmental needs of children. Given the varied concerns and interests impacted by the use of underage informants, a multi-factored approach to resolving the issue, such as the BIC standard, is arguably appropriate.

To decide whether or not serving as an informant would be in the child’s short-term and long-term best interests, the court should evaluate the following factors, which may be grouped into two broad categories:

Child’s Background and Characteristics:

- Age
- Physical characteristics
- Emotional and psychological maturity
- Current emotional and psychological status, and history
- Present or past (mis)use of drugs or alcohol
- Educational background
- Family and home-life environment, including impact of informing on family
- Community of residence, including prevalence and instances of witness intimidation
- Criminal history, if any
- Prior informant activities of the child, if any

Potential Informant Activities:

- Nature of the offense about which child will be informing (e.g., drug crime, violent crime, non-violent crime, or gang activities)
- How the child or child’s information came to the attention of law enforcement or prosecutors
- Identity of target and relationship between target and child (e.g., parent, family member, custodian, friend, acquaintance, stranger)
- Physical proximity of child to target and target’s cohorts
- Reputation of the target and target’s cohorts for witness intimidation, and/or actual instances of such
- Nature of informant activities (e.g., information only, testimony, ongoing provision of information, controlled buys, undercover activities)
- Nature of informant agreement (e.g., written or oral)
- Child’s reason for and strength of commitment to informing
- Whether the child will receive a benefit for informing

214. Vivian Hamilton, Principles of U.S. Family Law, 75 Fordham L. Rev. 31, 43 (2006) (describing the state’s role in custodial proceedings as well as other proceedings relating to children in which the parents are presumed to act in the best interests of the child).
215. See id.; see also Simon, supra note 111, at 1405-06.
• If so, the nature of the benefit the child stands to gain
• If criminal leniency will be received, nature of the offense for which the child is suspected or charged, whether the child is merely suspected of illicit activity or probable cause exists to believe the child committed the crime, and the maximum possible sentence exposure without benefit of sentence reduction for informing

- Potential for and gravity of physical, emotional, familial, and psychological harms to child if approved to inform
- Protective measures to be afforded the child, including nature and time-period
- Presence or absence of parental notice, consultation, and/or consent
- Whether the child has received the advice of counsel
- Assessment of potential impact on public safety, if child does or does not inform
- Availability or futility of alternative means to obtain similar evidence.

In reaching a decision, the judge should rely on testimony and argument offered by the various parties at the hearing. The judge should evaluate the above factors in each child’s case to determine whether there is clear and convincing evidence that serving as an informant is not in the BIC (i.e., the benefits outweigh the concerns). If acting as an informant clearly will not be in the BIC, the court should not approve the informing activities.

3. Proposed Standard #2: Informed Consent by a Mature Minor

Requiring police and prosecutors to obtain a judicial determination that a mature minor has given informed consent to act as an informant offers another approach. The mature minor doctrine is frequently utilized in the medical decision-making context. Generally, minors are not legally permitted to consent to medical treatment.216 Under the mature minor doctrine, however, an older, competent child may validly consent to routine or emergency medical treatment, or specified types of medical treatment.217 The rationale underlying application of the doctrine is the recognition that a mature child who is in a vulnerable position should be permitted to make decisions substantially affecting his or her life.218

Applying the mature minor standard to the issue of child informants is reasonable in light of the similarities of concerns between the two scenarios. Both situations can benefit the child if successful, but each also offers the potential for physical, psychological, and emotional harms, even if successful. Furthermore, as

216. See Jennifer L. Rosato, The Ultimate Test of Autonomy: Should Minors Have a Right to Make Decisions Regarding Life-Sustaining Treatment?, 49 Rutgers L. Rev. 1, 17 (1996) ("Under the current common law and statutes on health care decisions, there is little, if any, precedent recognizing a minor's right to make life-sustaining treatment decisions.").
217. Scott, supra note 198, at 567-68.
218. Id. at 568.
in the medical context, there is often a need for expediency in making the decision as to whether to inform.

The mature minor doctrine requires that, after a hearing, the court make an individual determination of the child's maturity.\footnote{219} \textit{Bellotti v. Baird} sets out the general standard for mature minority in the medical context: whether the child is "mature enough and well enough informed" to make the decision.\footnote{220} Thus, courts make two findings. Initially, the court ascertains the child's maturity to make the decision. The court then makes a finding as to whether the child has given informed consent.

As to maturity, Professor Jennifer Rosato has suggested factors to be considered in the context of life-sustaining treatment decisions.\footnote{221} Adapting the relevant factors to the underage informant scenario suggests the following factors be considered:

- The child's age
- The child's performance in school
- The child's understanding of the concept of informing
- The child's scope of experience with informing, whether his own or others'
- The child's understanding and consideration of the risks and benefits of informing
- The child's reasons for informing
- How the child reached the decision to inform
- Other major legal decisions the child has previously made in the juvenile or criminal justice context
- The strength of the child's commitment to the decision to inform.\footnote{222}

The court should also consider whether the child has consulted with his parents and his attorney, and if consultation did not occur, the court should inquire why it did not take place.\footnote{223} None of the factors should be dispositive, although a child's

\footnote{219} \textit{Id.} at 573-74.
\footnote{220} \textit{Bellotti v. Baird}, 443 U.S. 622, 643 (1979) (considering mature minor doctrine in abortion context); Scott, \textit{supra} note 198, at 574.
\footnote{221} Rosato, \textit{supra} note 216, at 62-65.
\footnote{222} \textit{Id.} at 64-65; \textit{see also} \textit{Fare v. Michael C.}, 442 U.S. 707, 725 (1979). The \textit{Fare} Court held that the totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved . . . . The totality approach permits—indeed, it mandates— inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile’s age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

\textit{Id.}

\footnote{223} \textit{See generally} \textit{Bellotti v. Baird}, 443 U.S. 622, 644 n.23 (1979):

The nature of both the State’s interest in fostering parental authority and the problem of determining “maturity” makes clear why the State generally may resort to objective, though inevitably arbitrary, criteria such as age limits, marital status . . . . Not only is it difficult to define,
age and reticence should be given significant weight.

Next, the court should evaluate whether or not the child has given informed consent to act as an informant. In the bioethics context, informed consent contains three elements: information, comprehension, and voluntariness. With respect to information, in the context of informing, the court should ensure the child understands:

- The nature of the case about which the child is informing
- The informing efforts required to be undertaken by the child
- The nature of the benefits to be received by informing
- The burdens to be expected by not informing
- The nature of the risks of participation—physical or otherwise, short-term and long-term, direct and collateral—to himself or others
- The extent of government protection and support to be provided while informing and thereafter
- The penalties for violating the informant agreement.

The child should have been given the opportunity to ask questions about the informant agreement. Sufficient time to consult with an attorney should be allowed, if requested.

Comprehension requires that a child be advised of the above information in writing and in a manner that is commensurate with his maturity and language capacities. Thus, a twelve-year-old might require use of different language and word choices than a seventeen-year-old. If there is an English-language barrier, a translator should be involved. If necessary, the child should be tested or quizzed to ascertain comprehension.

The child's decision to inform must be voluntary and free from coercion and undue influence. In some instances, the nature of the case requires an incentive sufficient to induce the child to cooperate. Thus, it is difficult to craft a bright-line rule distinguishing permitted and prohibited influential efforts. At a

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225. Id.

226. Id.

227. Id.

228. Id.

229. Id.

230. Indeed, it may be questioned whether an agreement to cooperate is ever truly voluntary. But see Fare v. Michael C., 442 U.S. 707, 727 (1979) ("The police did indeed indicate that a cooperative attitude would be to respondent's benefit, but their remarks in this regard were far from threatening or coercive.").
minimum, the government should not intentionally threaten or intimidate a child or his family with harm to induce cooperation. Nor should the government employ family and close friends to induce cooperation. Finally, law enforcement officers and prosecutors should not use their positions of authority to command cooperation, except to the extent otherwise lawfully allowed.

4. The Pros and Cons

Imposing the requirement of judicial approval provides a check on police and prosecutor zeal. Requiring approval from a neutral judicial entity is preferable to allowing law enforcement and prosecutors to decide internally whether children should serve as informants, even when applying a bright line rule. Police and prosecutor personnel have strong desires to obtain information for investigation and prosecution, which may undercut adequate consideration of the safety interests of the child. Thus, placing the decision in the hands of the court system avoids this concern.

One potential problem with this proposal is that requiring prior judicial approval imposes financial and administrative costs. If, however, a relatively low number of cases or “easy” cases are presented for approval using existing judicial systems, then the increased costs may not be prohibitive. Even if the costs are significant, over time the costs will likely diminish as the methodology becomes standardized and judges become more familiar with the issues.

Another concern is that requiring judicial approval still leaves a considerable amount of discretion within the hands of law enforcement and prosecutors to decide which cases to present to the court and when to present them. Recall that some law enforcement and prosecutors take a narrow view of what constitutes an informant. To counteract that concern, jurisdictions should adopt the broad definition of informant proposed herein. At first contact with a child who will potentially provide information, the government should present the matter to the judge for approval. The reviewing judge should credit delay in presenting the issue—whether due to negligence or malfeasance—against approving the informant activities.

a. Best Interests of the Child Standard

When evaluating the proposed standards for approval of an underage informant, the application of the BIC standard offers several benefits. First, it is a standard which many courts are familiar with and have experience applying. Second, the

231. BELMONT REPORT, supra note 224, at Part C.1.; cf. Fare, 442 U.S. at 727.

232. For example, if a child chose not to inform it would not be coercion for a prosecutor to charge the child with a more serious crime that the prosecutor could irrespective of cooperation.

233. See supra Part I.C.

234. See supra note 11.
multi-variable standard allows decision-making flexibility that recognizes the specific circumstances surrounding a particular child. Moreover, if a judge is familiar with a child because the child previously has been before the court in a child welfare proceeding, status case, or delinquency proceedings, then it is possible that, owing to his familiarity with the child, the judge is actually in a better position to make a BIC ruling.

The BIC standard, however, has long borne widespread criticism that is equally applicable in this context. Commentators have labeled the standard a "vague platitude," a legal "euphemism for unbridled judicial discretion," and a "value-laden, poorly defined standard." These labels arise because of the indeterminacy of the standard and lack of consensus in its application. Whether the standard is objective or subjective is unclear. Similarly, it is unclear from whose perspective the assessment should be made: the child's, the parent's, the state's, or the court's. No consensus has arisen as to what factors are relevant or pivotal in determining the BIC.

The aim of the standard is uncertain. Is the aim to ensure that the child has the best childhood or the best adulthood? Is the aim of the test to make the child "happy" or well-adjusted or merely not a burden to society? In light of the ambiguity surrounding the standard, commentators and litigants opine that the standard promotes judicial unpredictability and fosters self-serving litigation.

In addition to the concerns generally attending the BIC standard, an additional concern arises. The standard is aimed at mitigating government actions; yet, use of this standard may still permit a prosecutor to have significant control over the court's BIC determination. If a prosecutor offers significant criminal leniency or protection, this offer may weigh heavily in the court's decision and overshadow potential concerns.


237. LaFave, supra note 236, at 481.

238. Id.

239. Id. at 481-86.

240. See Charlow, supra note 236, at 268 (noting that "it is not clear whether the 'best interests of the child' means a 'happy' childhood or a childhood that leads to a well-adjusted adult regardless of the happiness experienced").

241. Id.

242. See Charlow, supra note 236, at 270 (self-serving litigation); LaFave, supra note 236, at 497 (unpredictable outcomes).
b. Mature Minor and Informed Consent Standard

The mature minor standard is attractive on a number of levels. First, the flexible, individualized methodology recognizes that some adolescents are mature enough to make decisions. As in the medical context, mature children should have a voice in such a significant personal decision. Second, it allows for protected child informants when parental consent is unavailable. Third, understanding that at times parents may improperly encourage or discourage children from informing, the mature minor approach protects children when the information target is a parent or close family member or when the parent may not act in the best interests of the child.\(^{243}\) Fourth, it protects the government’s interest in receiving useful information from children in order to investigate and prosecute crimes. Unlike the categorical approach, it does not completely eliminate government access to child informants. So long as the court deems the child mature and finds that the child has given informed consent, the child is permitted to act as an informant. Finally, it is consistent with contemporary criminal justice policies that treat many children as adults.\(^{244}\)

Use of the mature minor doctrine is subject to a number of critiques. First, if a mature child chooses not to inform or the court concludes that a child is immature or has not given informed consent, then the same criticisms that arise with respect to categorical age restrictions are applicable. Second, application of the doctrine may place children in legal limbo. Those who are deemed mature enough to make this potentially life-altering decision may not be deemed mature with respect to other legal matters. Alternatively, those not deemed mature for informing purposes may still be found capable of waiving *Miranda* or entering pleas. Third, as with the BIC standard, reviewing courts may import stereotypes into their decision-making, make value-laden judgments, or apply paternalistic thinking and substituted judgment. Fourth, application of the doctrine eliminates parental input and infringes on parental duty and responsibility to protect the child and instill values.\(^{245}\) Finally, the informed consent and mature minor doctrines arguably do not properly account for differences between adults and adolescents in making rational decisions.\(^{246}\) More specifically, they do not determine whether the child has made a sound decision.\(^{247}\)

C. Plotting the Course

Governments may undertake a number of options to ensure that their use of

\(^{243}\) See Scott, *supra* note 198, at 567-68 (discussing the mature minor doctrine in the context of beneficial medical treatment where parental consent is hard to obtain).

\(^{244}\) *Id.* at 583.


\(^{247}\) See *id.* at 224-26.
underage informants is both limited and regulated. Each of the three proposals discussed above have benefits and drawbacks. Bright-line rules, such as the categorical age approach, are comforting in their consistency and ease of administration. They are, though, often overbroad in their application. In contrast, both the mature minor doctrine and BIC standard are designed to account for the peculiarities of particular situations.

The mature minor doctrine recognizes that informing is often as life-altering and dangerous as the receipt of medical treatment. Consequently, as in the medical context, the child should have a voice in such a significant matter. In application, however, the mature minor, informed consent standard may operate as restrictively as the categorical age rule.

As between the three models, this Article concludes that the most ideal standard is prior judicial approval using the BIC standard.248 The BIC standard accounts for public safety, unlike the categorical age restriction and the mature minor standard. Children are not completely or virtually eliminated from acting as informants, as under the categorical age approach. The BIC standard can accommodate concerns about a juvenile’s age, maturity, and capacity to consent. Despite its much maligned character, the BIC standard makes intuitive sense and is a familiar legal standard. Finally, the BIC standard allows a neutral third party to determine whether it would be a sound decision for the child to serve as an informant, rather than leaving the matter to one invested decision-maker such as the government, a parent, or the child.

CONCLUSION

Despite the nation’s desire to win the wars on drugs, crime, and gangs, children should not be sacrificed as collateral damage in these wars. The physical and non-physical harms to children flowing from their use as informants are worrisome and avoidable. Children are one of society’s most vulnerable and impressionable populations, and they are worthy of serious consideration and protection, even in the face of challenges to public safety. Thus, the government’s use of juveniles as informants should be rare and highly regulated. Three possible measures may achieve such a goal: (1) categorically prohibit juveniles from informing unless they are over seventeen years and have parental consent; (2) require a prior judicial finding that such service is in the best interests of the child; or (3) require prior judicial approval, utilizing a mature minor informed consent standard. This Article contends that the second proposal most appropriately balances the public’s interest.

248. This Article takes no position on whether this measure should be independently adopted by law enforcement and prosecutor agencies or established through the legislative process. Arguably, law enforcement and prosecutors have more experience and familiarity with the issue; thus, they are in a better position to adopt policies. Additionally, self-regulation may be preferred. On the other hand, police and prosecutors arguably have a stronger interest in investigation and prosecution than protecting children; thus, democratic adoption of regulations through the legislative process may better serve the public’s interest.
in safety and the concerns of children and provides for accountability.

Admittedly, severely limiting the use of children as informants has the potential of negatively impacting current law enforcement and prosecutorial efforts. Police and prosecutorial agencies relying on information from children may have difficulty resolving cases without benefit of such information. Such difficulties may lead to an increase in crime that in turn negatively affects public safety, including children’s safety. Ideally, however, agencies would be motivated by limitations on using underage informants to develop less harmful investigative and prosecutorial strategies that shield children to the fullest extent possible. This likely will not be an easy endeavor, but it will be worthwhile. The resulting effects hopefully will be less crime, better investigations and prosecutions, maintenance of individual and communal confidence in law enforcement and prosecutors, and improved child safety.