# COERCION AND MANIPULATION: ABUSIVE PRACTICES IN THE RECRUITMENT AND USE OF AMERICA'S YOUTH AS CONFIDENTIAL INFORMANTS

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## Abstract

*Over the past several decades, there have been an alarming number of instances where young Americans have had their lives ruined due to their involvement as confidential informants in law enforcement narcotics investigations. These tragedies have garnered national attention and inspired attempts at reform several times. Yet, the reckless use of the nation's youth as tools in the war on drugs has continued with little meaningful change. This comment recommends a new approach to reform by analyzing the substance of past efforts, the circumstances under which they took place, and how they can be improved.*

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## I) INTRODUCTION

In 2015, *BuzzFeed* released an article reporting the extreme abuse of an anonymous eighteen year-old Mississippian – whom the article refers to as Andy – by the Lafayette County Metro Narcotics Unit.[2] The article described Andy's experience becoming involved with the unit and how the unit manipulated and took advantage of the young college freshman.[3] After being caught by police purchasing less than half an ounce of marijuana and taken to the Oxford city jail, Andy was placed in a small room across from two agents of the Lafayette Metro Narcotics Unit. They told him, "You will go to jail and you will have a felony and you will never have a job. But if you don't want all of this shit to happen, all you have to do is this and nobody will ever find out."[4] Andy agreed to do ten undercover "buys," involving wearing a camera and microphone while buying drugs from other college students in the area, in exchange for "all of this shit" not to happen.[5]

Andy held up his end of the bargain and completed the ten buys, but Metro Narcotics told him they had additional evidence against him and threatened to bring charges if he did not do twenty additional undercover buys.[6] Andy agreed; however, after months of intense pressure from the agents and an incident where he was assaulted by an acquaintance who had discovered his identity, he refused to continue acting as an informant and was subsequently arrested.[7] Andy pled guilty and was sentenced to probation and drug court, outcomes that would have likely occurred if Andy had refused to cooperate with the unit in the first place.[8] As a result of his experience, Andy developed severe depression and anxiety.[9] At the time the BuzzFeed article was released, Andy still had three years of probation left.[10] His life was ruined over a handful of marijuana.

The article detailing Andy's experience gained widespread media attention, leading to a segment on *60 Minutes* highlighting the situation and criticizing the use of college students as confidential drug informants.[11] The city of Oxford and The University of Mississippi, whose involvement and support for the program was highlighted in the *BuzzFeed* article, faced significant public scrutiny and pressure to investigate the matter following the televised segment.[12] This national criticism of the University's complicity with the program, alongside its lack of oversight, resulted only in a statement by Metro Narcotics committing to "start allowing college students to

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[2] Albert Samaha & Alex Campbell, *Mississippi Cops Are Using College Kids as Drug Informants*, BUZZFEED (Apr. 20, 2015, 7:04 PM), https://www.buzzfeednews.com/article/albertsamaha/mississippi-cops-are-using-college-kids-as-drug-informants.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] Molly Minta, *College Board OK's University of Mississippi Funding Controversial Drug Unit For Another Year*, MISS. TODAY (Nov. 18, 2021), https://mississippitoday.org/2021/11/18/ole-miss-drug-unit/.
[12] *A Look at The Controversial Use of College Students as Informants*, CBS NEWS (Dec. 7, 2015), https://www.youtube.com/watch?v=VBiXcfrP_4s&ab_channel=CBSNews.

call their parents to discuss if they should become informants."[13] The University continued to fund the program.[14] The Metro Narcotics Unit faced no repercussions, and neither the University nor the city of Oxford implemented any safeguards to prevent further abuses,.[15] a clear shortfall of meaningful change.

Several years before the *BuzzFeed* article shed light on the coercive practices taking place in Oxford, a far more tragic incident took place in Tallahassee, Florida. In 2008, Rachel Hoffman, a twenty-three year-old woman who had recently graduated from Florida State University, was killed while carrying out one of these "buys" as a confidential informant for the Tallahassee Police Department.[16] Several weeks before her death, police found illegal substances in Rachel's home.[17] The officer in charge of the search of Rachel's home told her that "she might be able to help herself if she provided 'substantial assistance' to the city's narcotics team."[18] Believing that cooperating with authorities could reduce or drop her charges, Rachel agreed to act as a police informant and conduct an undercover purchase of two and a half ounces of cocaine, 1,500 ecstasy pills, and a handgun from two convicted felons.[19] In the course of the operation, the police lost track of Rachel[20] until two days later, when her body was discovered riddled with gunshot wounds.[21]

Rachel's tragic death sparked widespread public outrage and prompted Florida lawmakers to initiate a lobbying campaign for legislative reform regarding the use of confidential informants.[22] The campaign resulted in the passage of Rachel's Law in 2009, one of the few pieces of landmark legislation ever passed in the United States providing protections for confidential informants.[23] Unfortunately, political pressure led to several key provisions of the original legislation being stripped from the bill, negating many of the protections the law would have afforded confidential informants.[24]

Andy and Rachel's stories are just two of many instances in which the commonplace law enforcement practice of recklessly using confidential informants has had life-altering or life-ending repercussions for young Americans. This practice will continue to ruin or end more young lives if broad, overarching reform is not implemented to regulate the use of confidential informants.

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[13] Minta, *supra* note 11.
[14] *Id*.
[15] *See* CBS NEWS, *supra* note 12.
[16] Jennifer Portman & Karl Etters, *A Decade Later, Rachel Hoffman's Death Helps to Make Police Informants Safer,* TALLAHASSEE DEMOCRAT (May 6, 2018, 8:00 PM), https://www.tallahassee.com/story/news/2018/05/06/10-years-later-rachel-hoffmans-death-makes-police-informants-safer/580595002/.
[17] Sarah Stillman, *The Throwaways*, THE NEW YORKER (Aug. 27, 2012), https://www.newyorker.com/magazine/2012/09/03/the-throwaways.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] Ian Leson, *Toward Efficiency and Equity in Law Enforcement: "Rachel's Law" and the Protection of Drug Informants*, 32 B.C. J. L. & SOC. JUST. 391, 392 (2012).
[23] *Id.*
[24] *Id.* at 393.

A) Confidential Informants: Background and Context

Informants have been used by governing regimes around the world for centuries.[25] For example, in the thirteenth century, the British began using informants in their "approver system," where a person accused of a crime could provide information on other accused persons in exchange for a pardon.[26] In modern times, confidential informants are an admittedly valuable tool in law enforcement efforts and are used in a significant number of criminal prosecutions.[27] The crime fighting value of confidential informants has been vehemently recognized by the judicial system. Courts have even gone so far to say that "our criminal justice system could not adequately function without information provided by informants" and "without informants, law enforcement authorities would be unable to penetrate and destroy organized crime syndicates, drug trafficking cartels, bank frauds, telephone solicitation scams, public corruption, terrorist gangs, money launderers, espionage rings, and the likes."[28] The use of confidential informants has become even more pervasive in the United States justice system, particularly in narcotics investigations, since the initiation of the "War on Drugs" in the 1980s.[29]

The use of confidential informants makes the jobs of law enforcement easier and less costly, allowing them to avoid the need for time-consuming procedures like obtaining court authorization for investigative tools such as search warrants and wire taps, and focus their efforts on stopping crime.[30] However, these supposed benefits come at a cost, not only to informants but also to the public .

The confidential nature of informants in criminal investigations, which allows law enforcement to bypass procedural safeguards, also enables them to dodge judicial scrutiny for their actions and conduct investigations with reduced public accountability.[31] Additionally, the mishandling and misuse of informants often result in more direct harms to the public, such as prosecutions based on informant perjury, false arrests due to unreliable informants, and informants committing additional crimes with the assent of law enforcement and prosecutors.[32] For example, in 2020, it was uncovered that officers of the Mount Vernon, New York police department "allowed favored drug dealers to sell with impunity, get deliveries, and control territory."[33] In exchange, "the dealers, serving as confidential informants, gave police information leading to the arrests of

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[25] *Id.* at 395.
[26] *Id*.
[27] Michael L. Rich, *Coerced Informants and Thirteenth Amendment Limitations on the Police-Informant Relationship*, 50 SANTA CLARA L. REV. 681, 688 (2010).
[28] United States v. Bernal-Obeso, 989 F.2d 331, 334-35 (9th Cir. 1993).
[29] ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 132 (2d ed. 2022).
[30] *Id.*
[31] *Id.*
[32] Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 83 (1994).
[33] George Joseph, *The Mount Vernon Police Tapes: In Secretly Recorded Calls, Officer Says Some Drug Dealers Operate with 'Free Reign'*, THE GOTHAMIST (June 18, 2020), https://gothamist.com/news/mount-vernon-police-tapes-officer-says-some-drug-dealers-operate-with-free-reign.

their own low-level clients."[34] In another instance in Portland, Oregon, the FBI allowed a ring of thieves to continue stealing retail merchandise from local stores in an effort to collect evidence against second-hand sellers.[35] The thieves were "given immunity from prosecution and were permitted to keep hundreds of thousands of dollars in proceeds from the goods they stole."[36] Despite the utilitarian value of using confidential informants, the negative effects the practice has on both informants and the public make it evident that using civilians as a crime-fighting tool is a significantly flawed and dangerous practice.

A confidential informant can be broadly defined as "any civilian who provides information to police," usually in exchange for prosecutorial benefit.[37] However, informants differ in their roles and are driven by diverse motivations to cooperate with law enforcement.[38] Individuals may agree to serve as informants in exchange for monetary compensation from the government,[39] but more often they engage in these cooperative relationships in exchange for a reduced punishment for criminal charges, or to avoid charges altogether.[40] In his article discussing the implications of the Thirteenth Amendment in the use of confidential informants, Professor Michael Rich specifically categorizes these types of informants as "coerced informants."[41] These individuals are coerced into acting as informants because the government claims to have sufficient evidence to convict them of a crime, and they believe that doing so will allow them to avoid legal consequences.[42] This category of informant is particularly relevant to the discussion in this article, as it concerns the dangers of coercion to individuals who are particularly vulnerable or susceptible to such government tactics.

Informants also have varying duties in law enforcement investigations.[43] Some informants may supply law enforcement with information they obtain regarding a targeted suspect or crime, while others serve as witnesses in court for the prosecution.[44] In Rachel Hoffman's instance, she was tasked with engaging with suspects face-to-face to gather incriminating evidence.[45] Professor Rich refers to these individuals as "active informants," and the methods by which law enforcement

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[34] *Id.*

[35] NATAPOFF, *supra* note 29, at 126.

[36] *Id.*

[37] Rich, *supra* note 27, at 689.

[38] *See id.* at 690.

[39] NATAPOFF, *supra* note 29, at 128 ("In one year alone, the federal government paid nearly $100 million to its confidential informants. Over five years, the DEA and ATF together paid nearly $240 million to their informants. Forfeiture statutes authorize paying informants a percentage of the value of assets seized on the basis of their information. DEA 'super snitch' Andrew Chambers earned as much as $4 million over the course of his work for various federal agencies, notwithstanding a lengthy rap sheet of his own").

[40] *Id.*

[41] Rich, *supra* note 27, at 691-92.

[42] *Id*. at 692.

[43] *See id*. at 691.

[44] *See id.*; Laura Carlson, *The Juvenile Judas—They Know Not What They Do: Neuroscience and the Juvenile Informant*, 65 ARIZ. L. REV. 777, 785 (2023); NATAPOFF, *supra* note 29, at 160.

[45] Leson, *supra* note 22, at 399.

direct them to obtain evidence may include activities such as introducing undercover officers to narcotics dealers or participating in controlled "drug buys" while equipped with hidden recording devices.[46] Regardless of the scope of their responsibilities, informants are inherently subject to significant risk of physical harm or death arising from the possibility of being discovered by those they are tasked with collecting evidence against.[47] Such was the fate of informants like Rachel Hoffman and Chad McDonald, a seventeen-year-old boy who was tortured and murdered after gang members against whom he was informing discovered his role as a confidential informant.[48]

### B) Approaching Reform

The objective of this article is to advocate for legal reform regulating the use of confidential informants by law enforcement and prosecutors, specifically for young informants who are more susceptible to coercion by the police.[49] There have been several instances in the past few decades, which are discussed throughout this article, where young people have entered such relationships with the police and have paid for it with their lives. As a result of these tragedies, there have been attempts at legislative reform in several states.[50] These efforts faced significant barriers in the political process due to opposing law enforcement interests, and even reform laws that have been passed – such as Florida's Rachel's Law – have had their most important provisions removed because of political pressures. This article takes a narrower approach, proposing reform applicable only to the use of young, impressionable people, rather than restrictions that would apply to all confidential informants. Ideally, this approach will be viewed as less threatening to law enforcement interests, thereby reducing the likelihood that reform efforts will be weakened as Rachel's Law was.

## II) CURRENT LAW AND PAST EXAMPLES OF REFORM

The government's use of confidential informants , with some exceptions, is a largely unregulated practice.[51] There are overarching rules and procedures at the federal level placing restrictions on law enforcement's treatment and use of informants, such as guidelines set in place by the Department of Justice and *The Attorney General's Guidelines Regarding the Use of*

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[46] Rich, *supra* note 27, at 691.

[47] *See supra* notes 14-21, 35 and accompanying text.

[48] *See* Leson, *supra* note 22, at 394 ("In 1998, seventeen-year-old Chad MacDonald was pulled over for speeding by California police and the officers found methamphetamines. After arresting him, they gave him a choice between prosecution and working as an informant. The day before MacDonald's birthday, after two months of police informant work, the police recovered a 'tortured and battered body' identified as MacDonald."); NATAPOFF, *supra* note 29, at 130.

[49] *See infra* section III(A) of this article discussing brain development in relation to decision making capacity.

[50] *See* Carlson, *supra* note 44, at 797; Leson, *supra* note 22, at 395; NATAPOFF, *supra* note 29, at 131, 190, 191.

[51] NATAPOFF, *supra* note 29, at 4.

*Confidential Informants*.[52] However, these rules apply only to federal law enforcement agencies and do not bind law enforcement or prosecutors at the state or local levels.[53] This is problematic because the vulnerable informants that this article covers are not white-collar criminals or high-ranking members of organized crime operations, who are the usual subjects of federal investigations.[54] Rather, they are young individuals accused of minor crimes coerced into cooperative agreements by law enforcement entities that are not bound by federal rules.[55] State and local law enforcement agencies, unlike their federal counterparts, are regulated only by legislation in their respective states.[56] Thus, if a state has not passed legislation regulating the use of confidential informants, state and local police are free to use them as they see fit.[57] Because most states have not passed legislation regarding the use of confidential informants (California, Florida, and North Dakota being the major exceptions),[58] there is "an enormous unregulated market in which the government is authorized to pressure and reward anyone it chooses to, in almost any way it pleases, in exchange for almost anything it wants."[59] Although the practice is generally unregulated, there have been notable state-level reforms providing protections for vulnerable informants. The most significant examples of such reform are Rachel's Law, Andrew's Law, and Chad's Law, which are discussed in the following sections.

A) Rachel's Law

In 2009, following the tragic events surrounding Rachel Hoffman's death and the public attention that her story garnered, a Florida state senator introduced "Rachel's Law."[60] In its original form, Rachel's Law included significant provisions that would serve to protect the rights and well-being of potential informants.[61] Most notably, the legislation would have required that "each person who is solicited to act as a confidential informant must be given the opportunity to consult with legal counsel before entering into a substantial assistance agreement."[62] If the person was not represented by legal counsel at the time of the solicitation, the law enforcement agency would have to advise the person of his or her right to consult with legal counsel before entering into the agreement.[63] Additionally, the law would have prohibited individuals participating in a court-ordered substance abuse program from entering assistance agreements without the consent of a supervising judge.[64] Finally, the law would have required that law enforcement consider the

[52] *Id.* at 51; Leson, *supra* note 22, at 404.
[53] Leson, *supra* note 22, at 404.
[54] NATAPOFF, *supra* note 29, at 28.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] Carlson, *supra* note 44, at 794.
[59] NATAPOFF, *supra* note 30, at 4.
[60] Stillman, *supra* note 17.
[61] *See* Leson, *supra* note 22, at 407.
[62] *Id.*
[63] FLA. STAT. § 914.28 (2009).
[64] *Id.*

propensity of the target offender for violence before sending a non-violent informant to conduct a drug buy.[65]

Unfortunately, due to political pressure from the state's law enforcement officials and their proponents, the original version of the bill was drastically altered before being passed into law.[66] Of the three provisions, two were altered in their final versions to be significantly less demanding of law enforcement, and one was omitted entirely from the statute.[67] The provision mandating that informants be given the opportunity to consult with legal counsel before entering into a cooperation agreement was altered so that this opportunity would only be required if explicitly requested by the informant.[68] The provision requiring judicial approval for the use of informants participating in court-ordered substance abuse programs was replaced with a provision requiring law enforcement agencies to merely "establish policies and procedures to assess the suitability of using a person as a confidential informant."[69] However, under this provision, the authority to determine an informant's fitness remains with law enforcement, rather than the courts.[70] The provision protecting non-violent informants from interacting with known violent felons was stripped from the bill altogether.[71]

While the final version of Rachel's Law provides *some* meaningful protections for informants– a sure improvement compared to the complete lack of regulation that was in place before its passage– the law was stripped of its most significant components by the legislative process.[72] The evolution of Rachel's Law illustrates the difficulties that accompany such broad reform. Such political barriers necessitate a different approach to reform that is narrower in scope, but which still provides protections for the vulnerable groups that are often targeted by law enforcement. This could be achieved through legislation similar in substance to the original version of Rachel's law but applied only to a limited group of vulnerable young people, rather than to all confidential informants. Reducing the impact that restrictions would have on law enforcement activities may increase the likelihood of success for such legislation while still providing sufficient protection for those who need it most.

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[65] *Id.*
[66] Leson, *supra* note 22, at 409.
[67] *See id.*
[68] *See id.* at 408.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*

B) Andrew's Law

Andrew Sadek, a student at North Dakota State College of Science, was arrested for selling marijuana on the school's campus in 2013.[73] In fact, his arrest was the result of selling marijuana to another student acting as a confidential informant.[74] Facing a maximum sentence of forty-one years in prison, Andrew agreed to become a confidential informant for the Southeast Multi-County Agency Drug Task Force in exchange for leniency for his alleged crime.[75] Sadly and predictably, in June 2014, Andrew's body was retrieved from Red River, with a gunshot wound to the head, and his backpack filled with rocks.[76] Despite the circumstances surrounding Andrew's death, police determined his cause of death to be inconclusive.[77]

Although Andrew's death was not officially found to have occurred as a result of his cooperation with the Task Force, his story brought attention to the use of young low-level offenders as confidential informants and resulted in North Dakota's state legislature passing Andrew's Law in 2017.[78] Andrew's Law incorporates some of the strengths of the original version of the aforementioned Rachel's Law and also adds other significant protections for confidential informants.[79]

Andrew's Law requires law enforcement officers to be trained on the proper use of confidential informants, for informant agreements to be put in writing, and for the agreements to explicitly state the informant's rights as well as the risks involved in aiding police.[80] Additionally, the law bans the use of informants under the age of sixteen, restricts the use of informants between the ages of sixteen and eighteen, and prohibits college police from using students enrolled at institutions under the state board of higher education as informants.[81] Andrew's Law is the most significant and robust piece of legislation in the area of reform on the use of confidential informants to date in any state.[82]

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[73] *See Suit Tossed Over Death of North Dakota Man Turned Informant*, MINN. STAR TRIB. (May 22, 2019), https://www.startribune.com/suit-tossed-over-death-of-north-dakota-man-turned-informant/510263932; Carlson, *supra* note 44, at 797.
[74] Alix Larsen, *Andrew Sadek's Case in ND Supreme Court, Wrongful Death Suit*, VALLEY NEWS LIVE, https://www.valleynewslive.com/2022/10/05/andrew-sadeks-case-nd-supreme-court-wrongful-death-suit/ (last visited Feb. 29, 2025).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Carlson, *supra* note 46, at 797-98.
[80] *Id*.
[81] *See* NATAPOFF, *supra* note 29, at 189; N.D. CENT. CODE ANN. §29-29.5-02 (West 2017) (1. A law enforcement agency may not use a juvenile fifteen years of age or younger as a confidential informant.; 2. A juvenile over the age of fifteen, but under the age of eighteen, may not be used as a confidential informant unless: a. The juvenile is married, b. The Juvenile is emancipated, c. The juvenile is serving in the active duty armed forces, or d. The juvenile is subject to criminal charges and there are no other reasonable avenues to obtain evidence); *Id.*, at 03 (A law enforcement officer employed under section 15-10-17 may not enter an informant agreement with a student enrolled in an institution under the control of the state board of higher education.).
[82] See generally, Carlson, *supra* note 46, at 797-98.

C) Chad's Law

In January of 1998, Chad MacDonald – a seventeen-year-old boy from Yorba Linda, California – was pulled over by an officer with the Brea, California Police Department and arrested for possession of methamphetamines.[83] After being brought to jail, Chad agreed to act as a confidential informant for the police department under Detective James Griffin in exchange for prosecutorial leniency on his possession charges.[84] The next week, police outfitted Chad with a hidden microphone and sent him to a house in Anaheim, California, to purchase methamphetamines from a known dealer.[85] Chad's undercover buy prompted police to raid the house; however, no drugs were found, and the dealer was not arrested.[86] Two months later, when Chad returned to the house to buy more methamphetamines, a woman who recognized him from the transaction that led to the raid identified him as a "snitch."[87] Chad denied his involvement with the police and left the house, but was reported missing a few days later.[88] He was later found dead in an alley in South Los Angeles, murdered by two gang members associated with the dealer Chad "snitched" on.[89]

Following the brutal murder, California enacted Chad's Law, which set out significant restrictions on the use of minors– those under the age of eighteen– as confidential informants.[90] The law completely banned law enforcement from using children under the age of thirteen as informants and imposed restrictions on the use of informants aged thirteen to seventeen.[91] Under Chad's Law, minors between the ages of thirteen and seventeen can serve as informants in exchange for prosecutorial leniency for an alleged crime only if authorized by court order or if allowed under another California statute.[92] For a minor to be authorized to serve as an informant, the court must find that the minor is entering the informant agreement voluntarily, knowingly, and intelligently under consideration of four factors: the minor's maturity, the gravity of the minor's alleged offense, the safety of the public, and the interests of justice.[93] The court must also find probable cause that the minor committed the alleged offense for which prosecutorial leniency is being extended, advise the minor of the mandatory minimum and maximum sentence for their alleged offense, disclose the benefit the minor may obtain by cooperating with the police, and obtain consent to the cooperation agreement from the minor's parent or guardian.[94] The key

[83] Scott Martelle & Bonnie Hayes, *Chad MacDonald's Short, Tragic Life*, L. A. TIMES (Apr. 5, 1998), https://www.latimes.com/archives/la-xpm-1998-apr-05-mn-36322-story.html.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Carlson, *supra* note 44, at 795.
[91] *Id.*
[92] CAL. PENAL CODE § 701.5 (West 1998).
[93] *Id.*
[94] *Id.*

provisions of Rachel's Law, Andrew's Law, and Chad's Law are the primary model for the statutory provisions proposed below.

## III) Redefining Minor Informants: Protections for Informants Under the Age of Twenty-Five, Rather Than Eighteen

Chad's Law was the first piece of landmark legislation providing significant protections for minor confidential informants.[95] By requiring government accountability and transparency, the legislation ensures that vulnerable minors can make an informed, well-reasoned decision when confronted with the decision to cooperate with police.[96] In doing so, the law greatly reduces the possibility of government abuse and coercion in cooperation agreements with minors; however, this approach is under-inclusive as it does not account for the vulnerability of young people above the age of eighteen. While this less restrictive approach to reform may face less adversity in the political process, the tragic deaths of young adults above the age of eighteen who died in the course of their informant activities– like Rachel Hoffman and Andrew Sadek– are evidence that protections only for informants under eighteen-years-old are not sufficient. The need to allocate protections to informants under the age of twenty-five, rather than eighteen, is substantiated both by scientific research into brain development, as well as other areas of law that impose age-based restrictions on people older than eighteen.

### A) Brain Development and Decision-Making Capability

The frontal lobe, specifically the prefrontal cortex, is the area of the human brain responsible for logical decision-making, allowing us to weigh the pros and cons of a given decision before choosing how to act.[97] Research into brain development has shown that this area of the brain generally does not fully mature until the age of twenty-five.[98] Before this area of the brain– responsible for logical reasoning and decision making– is fully developed, humans are more likely to rely on the amygdala, a region of the brain controlling immediate reactions based on emotions such as fear or aggression, when choosing how to act. [99] Thus, before the age of twenty-five, when the frontal cortex is not fully matured, decision-making is more heavily guided by emotional impulse rather than logical reasoning.[100]

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[95] Carlson, *supra* note 44, at 794.
[96] *See id.*; CAL. PENAL CODE § 701.5 (West 1998).
[97] *When Does the Brain Reach Maturity? It's Later Than You Think*, Missouri Dept. Higher Edu. & Workforce Dev. (Oct. 3, 2022), https://journeytocollege.mo.gov/when-does-the-brain-reach-maturity-its-later-than-you-think/.
[98] *Id.*
[99] *Teen Brain: Behavior, Problem Solving, and Decision Making*, American Academy Child & Adolescent Psych. (Sep. 2017), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/The-Teen-Brain-Behavior-Problem-Solving-and-Decision-Making-095.aspx.
[100] *See* note 97.

The choice to engage in a confidential informant relationship with law enforcement is a serious decision that can lead to dire consequences.[101] When negotiating with potential informants, "the most powerful motivational tool available to the police or prosecutors is the fear of criminal charges and a long prison sentence."[102] Considering the science of brain function and development, the tactic of using fear to encourage informant cooperation would have a heightened coercive effect on people under the age of twenty-five, who are more likely to make decisions based on emotional responses like fear. Because of the seriousness of such a decision and their heightened vulnerability to coercion, additional protections should be provided for those whose cognitive decision-making functions have not yet fully developed.

B) Areas of Law Recognizing a Higher Age of Majority

The age of majority in the United States is generally considered to be eighteen.[103] However, this age is an arbitrary number as there are several areas of law in the United States that differentiate between children and adults based on an age higher than eighteen, like the minimum drinking age.[104] Under 23 USCS § 158, the federal government requires states to set the minimum drinking age by conditioning federal highway funding on state cooperation with the law.[105] The National Library of Medicine published an article substantiating the logic behind increasing the minimum drinking age from eighteen to twenty-one, stating:

> Different activities have different ages of initiation: "A person can drive at age 16, vote in elections and serve in the military at age 18, and serve as President at age 35. These restrictions are based on the requirements of the specific activities (e.g., motor skills, capacity for judgment, and experience) and take into account the risks and benefits of participation at different ages. For example, research shows that at a given blood alcohol concentration, youth are more likely to be impaired than adults. Underage drinking is strongly related to serious public health problems, including injuries and death resulting from motor vehicle crashes, homicide, assault, and recreational injury. Consequently, policymakers and researchers have come to believe that risk both to youth and to society in general can be reduced by restricting people below age 21 from drinking.[106]

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[101] Leson, *supra* note 22, at 19
[102] *Id.*
[103] FLA. STAT. § 743.07 (1973); VA. CODE ANN. § 1-204 (West 2005); LA. CIV. CODE ANN. art. 29 (1988) (examples of state laws setting age of majority at eighteen years old); USCS Const. Amend. 26 (age to vote set at eighteen in the 26th amendment to the constitution).
[104] 23 U.S.C.A. § 158.
[105] *See id.* (The Secretary shall withhold 10 per centum of the amount required to be apportioned to any State under each of sections 104(b)(1), 104(b)(2), 104(b)(5), and 104(b)(6) of this title on the first day of each fiscal year after the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.).
[106] Traci L Toomey et al., *The Minimum Legal Drinking Age*, 20 ALCOHOL HEALTH RES. WORLD 213, 217 (1996).

Like driving, voting, military service, and alcohol consumption, the age at which an individual may act as a police informant should also be based on the requirements of the specific activity– namely, the capacity to make logical and reasoned decisions in stressful situations, which is a requirement not met by those under the age of twenty-five.

## IV) PROPOSED REFORM

To safeguard confidential informants under the age of twenty-five, five requirements should be applied to cooperative relationships between law enforcement and confidential informants:

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|---|---|
| I. | Potential informants must receive legal advice on the benefits and risks of serving as a confidential informant before entering into a cooperative agreement. |
| II. | An informant's cooperation with law enforcement must be subject to a binding prosecutorial agreement. The agreement must (a) explicitly define the duties and risks undertaken by the informant, (b) explicitly define the benefit that the informant will receive if they fulfill those duties, and (c) be recorded and enforceable by a court of law. |
| III. | Before a potential informant may enter a cooperative agreement with the government, a court must (1) deem a potential informant suitable for police cooperation before they may enter a cooperative agreement, and (2) approve the specific use of the potential informant intended by law enforcement on a case-by-case basis. |
| IV. | Law enforcement shall not direct any informant under the age of twenty-five to engage in active informing. Active informing is any action that would require an informant to directly, physically, or personally engage with a targeted suspect. |
| V. | University and college police departments shall not use students enrolled at their respective institutions as confidential informants. |

### A) Legal Counsel

In a scenario where an individual is arrested, taken into custody, and formally charged with a crime, their constitutional right to receive *Miranda* warnings and be provided with legal counsel is triggered.[107] The Sixth Amendment to the Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right… to have the Assistance of Counsel for his

[107] NATAPOFF, *supra* note 29, at 49.

defense."[108] Although the Sixth Amendment's right to counsel has been repeatedly reinforced by the Supreme Court,[109] this right is not triggered and does not attach to a defendant "until the initiation of adversarial judicial criminal proceedings."[110] Similarly, police are not required to issue *Miranda* warnings to a suspect, notifying them of their Fifth and Sixth Amendment rights to refrain from speaking to police and to have the assistance of counsel unless "there has been a restriction on a person's freedom as to render him in custody."[111] Aware of these constitutional exceptions, police often initiate negotiations to secure cooperation from potential informants without formally arresting them or taking them into custody.[112] Because negotiations with potential informants may take place in a constitutional gray area where these protections are not triggered, police can legally "confront, threaten, and negotiate with potential informants without the presence of defense counsel or other witnesses," subjecting informants to intense coercion to cooperate.[113]

Without legal advice, potential informants likely are not able to understand the degree of evidence that police have against them when confronted with an ultimatum to become an informant, and therefore cannot make an informed decision as to whether engaging in such a relationship with police is in their best interest.[114] Informants are often coerced into entering cooperative agreements with police even when there is insufficient evidence to convict them of a crime.[115] Additionally, in cases where law enforcement is not "bluffing"– where the government likely has sufficient evidence to convict the potential informant of a crime– agreeing to cooperate may not be worth the attendant risks, especially for minor or first-time offenses. Courts often offer pretrial diversion programs to first-time offenders or offenders who have committed minor crimes.[116] Under such programs, offenders– especially those who are young or otherwise vulnerable– may have their charges reduced or dismissed if they meet certain criteria and fulfill requirements set by prosecutors and courts.[117] Without legal counsel, potential informants unfamiliar with the criminal justice system may enter cooperation agreements unaware of alternative options to reduce their legal consequences. Providing legal counsel to potential informants would ensure they are informed of the pros and cons of all legal options and would

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[108] U.S. CONST. amend. VI.
[109] *See* Gideon v. Wainwright, 83 U.S. 792 (1963); Massiah v. United States, 84 U.S. 1199 (1964); Montejo v. Louisiana, 129 U.S. 2079 (2009).
[110] Rich, *supra* note 27, at 702.
[111] Stansbury v. California, 511 U.S. 318, 320 (1994).
[112] NATAPOFF, *supra* note 29, at 50 ("When an officer first confronts a potential informant, prior to an arrest or formal criminal charge, there are very few legal constraints. For example, a suspect's right to receive Miranda warnings is triggered only if they are in custody, so if the suspect has not yet been taken into custody or arrested, their unwarned statements to police can potentially be used against them.").
[113] *Id.* at 49.
[114] Leson, *supra* note 22, at 401.
[115] *Id.*
[116] NATAPOFF, *supra* note 29, at 156; United States Attorney's Manual § 9-22.010 (Apr. 2011) ("The U.S. Attorney, in his/her discretion and with delegation to supervisory prosecutors as may be warranted, may divert certain individuals against whom a prosecutable case exists.").
[117] United States Attorney's Manual § 9-22.010 (Apr. 2011) ("In identifying individuals for diversion, the U.S. Attorney, in his/her discretion, may formally or informally prioritize young offenders, those with substance abuse or mental health challenges, veterans, and others.").

negate the government's superior bargaining power in negotiating cooperation agreements, greatly reducing the coercive nature of informant recruitment.

A further justification for requiring the provision of legal counsel to potential confidential informants stems from the Department of Justice guidelines for the use of confidential informants by federal law enforcement agencies, which require prosecutors to inform suspects of their the right to speak with an attorney before agreeing to cooperate as an informant.[118] Unlike the prosecution of federal white-collar crimes, which are subject to thorough regulations, the procedures for the prosecution of drug-related crimes are inconsistent on the local, state, and federal levels.[119] Due to this inconsistency, there are no overarching requirements that individuals suspected of drug-related crimes have the opportunity to consult with legal counsel before agreeing to cooperate with law enforcement.[120] As a matter of public policy, it is difficult to justify that white-collar criminals– who are more likely to have access to legal resources[121]– be afforded the right to an attorney when those suspected of drug offenses, who are often underprivileged and lack similar resources,[122] are not afforded the same opportunity.

B) Explicit Prosecutorial Agreements

Although law enforcement typically initiate cooperation negotiations with potential informants, the authority to confer any prosecutorial benefit or immunity lies solely with prosecutors, who have absolute discretion in deciding whether to bring charges against a suspect.[123] Once a potential informant is arrested and criminal proceedings are initiated, prosecutors may offer the suspect prosecutorial immunity through a written agreement promising not to pursue charges in exchange for their cooperation as an informant.[124] Agreements made between a prosecutor and informant are subject to and enforceable under contract law,[125]and are generally made after the initiation of criminal proceedings, where the informant's Sixth Amendment right to counsel is attached.[126] Under these circumstances, the threats of government coercion and abuse of an informant are greatly reduced because the agreement will be contractually enforceable and entered under the advice of legal counsel.

However, despite their lack of authority to confer prosecutorial benefits, police can still legally recruit informants without the involvement of prosecutors, under circumstances where no constitutional protections exist .[127] At the moment of initial confrontation with a potential informant, police may simply refrain from making an arrest, or omit incriminating information

[118] Leson, *supra* note 22, at 404.
[119] *Id.*
[120] *Id.*
[121] NATAPOFF, *supra* note 29, at 141.
[122] *Id.* at 43.
[123] *Id.*
[124] *Id.*
[125] Leson, *supra* note 22, at 402.
[126] Natapoff, *supra* note 29, at 52.
[127] *Id.* at 50.

from the description of the arrest, in exchange for their cooperation.[128] For example, in *United States v. White*, the arresting officer Mike Weaver "stated that if defendant cooperated with the questioning, Weaver would write the police report to reflect only a charge of possessing drug paraphernalia, a misdemeanor, and that if defendant did not cooperate, he would send the glass pipe containing methamphetamines to the crime lab and charge the defendant with felony drug possession."[129] After the defendant agreed, "Weaver wrote the report to reflect only a misdemeanor charge."[130]

At this moment of initial confrontation with police, the pressure on a potential informant to cooperate is at its greatest,[131] and the Sixth Amendment right to counsel is not attached.[132] Because law enforcement officers do not have the authority to make binding prosecutorial agreements with informants, agreements made solely between officers and informants are not formally recorded and are not contractually enforceable, unlike agreements made directly with prosecutors.[133] Additionally, due to their inherent nature– taking place at the moment of initial confrontation with the informant, without the advice of legal counsel, and without prosecutorial authority– cooperative agreements made directly with police are likely to be open-ended and lack specific terms, leaving informants vulnerable to significant coercion and abuse.[134] This is exactly what happened to Andy, the young man discussed in the viral *BuzzFeed* article and *60 Minutes* segment. After Andy completed the originally agreed-upon number of undercover buys for the Lafayette Metro Narcotics Unit, the Unit coerced Andy into undertaking additional buys under threat of further criminal charges, despite Andy fulfilling his end of the agreement.[135]

To ensure that young informants are not coerced into abusive cooperation agreements, police should be barred from directly recruiting or negotiating with potential informants under the age of twenty-five. Rather, it should be required that cooperative relationships between the government and informants under twenty-five be established directly with prosecutors, under the advice of legal counsel. Additionally, these agreements should include specific terms– explicitly defining the responsibilities of the informant and the benefit they will receive in exchange for their cooperation– and should not be subject to modification after the agreement is made. Finally, these prosecutorial agreements should be filed with the criminal court, so that law enforcement and prosecutors are held accountable to the agreed-upon terms.

C) Informant Fitness and Suitability

Although Rachel's Law, Andrew's Law, and Chad's Law are great examples of reform that other states should follow, none of them require a determination of the suitability of potential

[128] *Id.*; Town of Castle Rock v. Gonzalez, 125 U.S. 2796, 2796 (2005).
[129] United States v. White, 2004 WL 2182188, at 4 (D. Kan. 2004).
[130] *Id.*
[131] Leson, *supra* note 22, at 402.
[132] *See supra* notes 113-116.
[133] *See* NATAPOFF, *supra* note 29, at 50.
[134] *See* Leson, *supra* note 22, at 401-405.
[135] Samaha & Campbell, *supra* note 2.

informants sufficient to ensure informant safety and effectiveness. The original version of Rachel's Law included provisions requiring consideration of the targeted suspect's propensity for violence and judge approval for the use of informants participating in court-ordered substance abuse programs.[136] These provisions undoubtedly would have provided beneficial protections for informant safety, but they did not account for other factors that may subject a potential informant to increased risk, such as age, mental health, LGBTQ status, and immigration status.[137] Depending on the circumstances of the particular investigation and the targeted criminal, members of these minority groups could face increased risk of violence or harmful effects resulting from their cooperation with police.[138] Before a potential informant may begin cooperation with law enforcement, that individual should be approved by a court under consideration of factors such as substance abuse issues, mental health, maturity, LGBTQ status, and immigration status.

However, these factors must be considered in the context of the specific circumstances under which the informant is expected to operate. There has been no legislation requiring a court to review and approve the specific circumstances under which law enforcement intends to use informants. Under certain circumstances, some of these proposed suitability factors may be more relevant than others. For example, an LGBTQ informant should not be required to provide information to police regarding suspects known to be violent against the LGBTQ community. Nor should a non-white informant be required to inform against suspects known to be violent against non-white minorities. Additionally, the degree of cooperation required of an informant with psychiatric or mental illness should be limited to a role that would not adversely affect their mental health or require them to go beyond their mental capacity to assist police.

The final version of Rachel's Law requires law enforcement agencies to "establish policies and procedures to assess the suitability of using a person as a confidential informant"[139] considering eight factors:

> (a) The person's age and maturity; (b) The risk the person poses to adversely affect a present or potential investigation or prosecution; (c) The effect upon agency efforts that the disclosure of the person's cooperation in the community may have; (d) Whether the person is a substance abuser or has a history of substance abuse or is in a court-supervised drug treatment program; (e) The risk of physical harm to the person, his or her immediate family, or close associates as a result of providing information or assistance, or upon the disclosure of the person's assistance to the community; (f) Whether the person has shown any indication of emotional instability, unreliability, or of furnishing false information; (g) The person's criminal history or prior criminal record; and (h) Whether the use of the person is important to or vital to the success of an investigation.[140]

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[136] *See* Leson, *supra* note 22, at 408-409.
[137] *See* NATAPOFF, *supra* note 29, at 188-191.
[138] *Id.*
[139] FLA. STAT. § 914.28 (2009).
[140] *Id.*

Although these factors are relevant to ensuring the proper use of informants, this provision is fundamentally flawed in leaving it to law enforcement agencies– rather than the courts– to establish and apply these factors to potential informants.[141] The status quo of allowing law enforcement and prosecutors to have free rein in determining who they use as informants and how they use them is irresponsible and dangerous. Implementing a system of court oversight to assess the suitability of informants and the dangers that they will be exposed to would both decrease the risk of harm to informants and increase the likelihood of success of informant operations.[142] This could be achieved by requiring that a court determine whether a potential informant is suitable for the task, rather than leaving that decision to law enforcement, whose interest in fighting crime may outweigh its concern for the informant's safety.

D) Prohibiting Active Informing

As discussed above, the human brain's ability to make logical, well-reasoned decisions is not yet fully developed until the age of twenty-five.[143] This lack of capacity for effective decision making is especially exaggerated under stressful situations,[144] like engaging in undercover drug buying operations, which have historically proven to be fatal.[145] Considering that a major objective of law enforcement in the area of narcotic investigations is to preserve public safety and protect the nation's youth, it is counterproductive to place the safety of young individuals at risk to achieve these goals.[146] One of the key components of the original version of Rachel's Law was the requirement that law enforcement consider "the propensity of the target offender for violence" before sending a non-violent informant to conduct an undercover drug buy.[147] This provision of Rachel's Law would have restricted law enforcement from directing non-violent informants to engage in what Professor Rich refers to as "active informing" on violent criminals.[148] Active informing, by its very nature, puts informants in greater danger than they would be subject to if they were merely providing police with information, as active informants are required to engage with targeted criminals face-to-face.[149] Although people under the age of twenty-six are not children, individuals in this age range are less capable of sound decision-making under stressful situations.[150]

Although the original version of Rachel's Law would have restricted active informing, it did not prohibit it entirely. This article takes a more hardline stance on the practice. To ensure the

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[141] *Id.*
[142] *See* Leson, *supra* note 22, at 410-16 (discussing the benefits that protections for confidential informants would have on law enforcement operations).
[143] *See supra* note 100-102.
[144] *Id.*
[145] *See supra* notes 2, 11, 12, 14, 15, 20, 35, and 45.
[146] *See* Carlson, *supra* note 44, at 780.
[147] Leson, *supra* note 24, at 408-09.
[148] *See id.* at 393.
[149] *See supra* note 49.
[150] *See supra* note 100.

safety of young informants, law enforcement should be banned from directing informants under the age of twenty-five to engage in "active" informing in any capacity, as the potential risks that this practice entails outweigh its benefits.

E) Prohibiting the Use of Student Informants

A unique aspect of Andrew's Law was its prohibition of college and university police from using students enrolled at institutions under the state board of higher education as informants.[151] Following the stories of Andrew Sadek and Andy– the Mississippi student discussed in the introduction of this article– both the North Dakota State College of Science and the University of Mississippi were subject to intense criticism for their complicity with local and university police who took advantage of students by coercing them into cooperative agreements.[152] Although Andy was not a student at the University of Mississippi, his story brought attention to the fact that not only was the University providing significant funding to the Lafayette Metro Narcotics Unit– of which the University of Mississippi Police Department was a part– but it was also aware of the Unit's practice of regularly recruiting its students as informants.[153] Even after this was brought to light, the University continued to fund the Unit to the tune of $150,000 per year.[154]

Although policing of university campuses is important to maintain student safety, police informing has been proven to be extremely dangerous– subjecting informants to risks of retaliatory violence, social ostracization, and significant mental and emotional burdens.[155] As a matter of public policy, students should not be put in danger by the institutions they pay to attend, which have a duty to prioritize their well-being. Thus, universities and university police departments should be barred from any involvement in law enforcement practices that use their students as confidential informants.

## V) How Reform Would Benefit Law Enforcement

Although law enforcement entities have opposed legislation that would restrict their use of confidential informants in the past, reform in this area may actually advance law enforcement goals.[156] Instances of informant abuse by law enforcement or the discovery of informant identities by targeted criminals may discourage future suspects from engaging in cooperative relationships with police, thereby reducing the number of informants law enforcement would have at their disposal.[157] The implementation of any of the requirements discussed above would ensure that informants are capable of safely and effectively carrying out the assignments designated to them

[151] *See supra* note 29, at 189.
[152] *See* Minta, *supra* note 11, at 2; Larsen, *supra* note 74.
[153] Minta, *supra* note 11, at 1.
[154] *Id.*
[155] *See supra* notes 49-50.
[156] *See* Leson, *supra* note 23, at 410-416.
[157] *Id.* at 413.

by law enforcement. This would benefit law enforcement by making it more likely informants obtain useful information and less likely that their identities are discovered by criminals.[158]

## VI) THE PATH TOWARDS ACHIEVING REFORM

Rachel's Law, Andrew's Law, and Chad's Law were all passed by their respective state legislatures *after* the deaths of the young informants the laws are named after. Although these laws provide meaningful protections for confidential informants and are welcome to those who advocate for reform, they have come too late. Because of this, it is imperative that other states enact similar laws before any more tragedies occur.

In our Federalist system of governance, it is up to the states to pass their own laws and regulations in most subject areas, as the United States Congress has the power to create federal laws that are binding on the fifty states only under its enumerated legislative powers.[159] Article I, Section 8 of the United States Constitution grants Congress the authority to pass laws relating to interstate commerce, taxation, and spending.[160] There is very little basis for an argument that law regarding the use of confidential informants would fall under one of Congress's enumerated legislative powers, meaning that reform legislation would have to be passed at the state level.

However, Congress has the authority under its spending power to withhold federal funding from the states on the condition that they pass certain laws.[161] A notable example of this power being used by Congress is 23 USCS § 158, the federal legislation that withholds federal highway funding from the states on the condition that they pass laws setting the minimum drinking age to twenty-one years old.[162] This approach could also be used to effectuate reform in the use of confidential informants: Congress could pass a bill withholding federal funding for state law enforcement on the condition that the states pass laws incorporating provisions like those discussed above that would regulate the use of and provide protections for confidential informants. This sort of federal legislation would be the most direct path to nationwide reform. Without such a push from the federal government, however, reform in most states is unlikely to occur at all without significant internal efforts and motivation. Furthermore, even if states did begin to pass such laws without the motivation of conditioned federal funding, there would likely be vast inconsistencies between the state laws, which is one of the existing problems in the use of informants.[163]

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[158] *Id.*
[159] *See* BRYAN L ADKINS ET AL., CONG. RSCH. SERV., R45323, FEDERALISM-BASED LIMITATIONS ON CONGRESSIONAL POWER: AN OVERVIEW (2023).
[160] *See id.*; U.S. CONST. art. I, § 8.
[161] *See* VICTORIA L. KILLION, CONG. RSCH. SERV., R46827, FUNDING CONDITIONS: CONSTITUTIONAL LIMITS ON CONGRESS'S SPENDING POWER (2021).
[162] *See supra* notes 107-108.
[163] *See* Leson, *supra* note 22.

## VII) CONCLUSION

Confidential informants are a valuable tool in law enforcement efforts to fight crime; however, the deaths of Rachel Hoffman, Chad MacDonald, Andrew Sadek– and others not discussed in this article– make it clear that reform is sorely needed in this area of law. Implementing any of the protective provisions discussed above for the use of confidential informants would benefit informants themselves, law enforcement interests, and the public good. Unlike some past examples of reform in this area, these proposals are tailored narrowly to apply to a smaller group of informants– those under the age of twenty-five– rather than to all confidential informants. This narrow approach is based on scientific research indicating that the human brain is not fully capable of making well-reasoned and logically sound decisions before this age– meaning that informants in this age group are more susceptible to the coercive pressures used by law enforcement to recruit informants, as well as the inherent risks involved in acting as an informant.

Because this approach would be less abrasive to law enforcement and government interests, it would be more likely to survive the political process than a broader reform approach, while still making strides towards achieving the necessary change. Achieving such reform on a nationwide scale is a lofty goal; however, it is necessary to end the abusive practices that have become commonplace in American law enforcement and to prevent further tragedies like those of Rachel Hoffman, Andrew Sadek, and Chad MacDonald.