Jailhouse Informants, Part I: Problems with their Use

Christopher Sherrin*

Jailhouse informants are a relatively unstudied, but potentially problematic phenomenon of the Canadian criminal justice system. It is clear that such informants play a role in the prosecution of criminal offences in Canada, yet it is not clear whether they advance the interests of justice and fair play. This is because there is cause to believe that their evidence may be unreliable and their actions unacceptable. This article is the first of two which will attempt to analyze the issues relating to jailhouse informants. The focus in this article will be to survey the potential problems with the use of informants. A subsequent article to be published in this journal will analyze how we might reform our criminal justice system in order to respond to those problems. Given the current state of knowledge of the jailhouse informant phenomenon in Canada, any conclusions must necessarily be somewhat tentative. But what is clear is that the phenomenon warrants further study by all participants in the justice system in order to ensure that accused persons are not being unjustly or unfairly convicted.

Definitions

To begin, it is necessary to define what I mean by “jailhouse informant”. In general, an informant is someone who provides information to a law enforcement agency. There are numerous different types of such informants. For example, there are citizen informants, who are law-abiding individuals who provide confidential information to police authorities, and there are criminal informants, who provide information based upon their close association with the criminal underworld. Jailhouse informants are a special sub-category of the latter group. Although numerous definitions have been used in the literature, probably the most helpful one is the simplest: “a jailhouse informant is an inmate, usually awaiting trial or sentencing, who claims to have heard another prisoner make an admission about his case.”

Jailhouse informants usually advise the authorities of what they have heard in exchange for some benefit (such as leniency with respect to their own charges), but receive a benefit is not a necessary precondition to being a jailhouse informant.

The above definition does not include undercover police officers posing as inmates. Such “informants” raise a number of unique issues, and are beyond the scope of this article.

The Problems with Jailhouse Informants

Informants of all types have been a part of the criminal justice system for centuries. As early as the 13th century, the “Approver System” existed in English common law wherein a person charged with a capital offence would obtain a pardon upon formally accusing another (or others) of felonies. Should the accusation prove successful (in the sense that a conviction of the other person was obtained), the approver would be granted his freedom. Should the accusation fail, the approver would be put to death.

Problems with the approver system were apparent almost immediately. Zimmerman writes:

The prisoners who took appeals as approvers were viewed as manipulative, abusive and desperate. Questions existed as to the credibility of the approver who stood to profit from the accusations. Further, approvers could blackmail innocent people with threats to pursue “trumped up” charges. The abuses even extended beyond the persons who initially

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3. He would, however, be required to leave the country.
5. Ibid., at pp. 155-6 (citations omitted).

* Of Cooper, Sandler & West, Toronto. This article is based on a paper originally prepared for the Commission of Inquiry into Proceedings Involving Guy Paul Martin in December, 1996. It has been slightly modified for the purposes of publication. The views expressed in it remain exclusively those of the author.
stood accused. Sheriffs, jailers and prison keepers would compel prisoners to become approvers and accuse innocent persons to extort ransoms.

The famous legal historian Matthew Hale noted that “more mischief hath come to good men by these kinds of approvers by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders.” 6 Despite these problems and criticisms, the use of jailhouse (and other) informants continues to this day. 7 Moreover, the criticisms of and problems associated with their use similarly continue.

Courts in numerous jurisdictions have commented on the dangers associated with the use of jailhouse informants. In 1993, the 9th Circuit United States Court of Appeals had this to say about informants as a whole: 8

The use of informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril. . . . By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom. As Justice Jackson said forty years ago, “The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility.” . . . A prosecutor who does not appreciate the perils of

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8. In one year alone the U.S. Federal Bureau of Investigation reported using 2,800 informants (of all types); Haglund, supra, note 1, at p. 141. I also came across some information concerning the United States. This is obviously an important issue, since it may impact on the seriousness of any problems associated with the use of jailhouse informants and the viability of any proposed reform.

came forward that they were seeking a "deal" in exchange for their evidence against the appellants.

The courts have not been alone in their concern over the dangers of informant testimony. Numerous commentators have also added their own voices to the fray. Adding their concerns to those of the courts, one comes up with the following list.

(1) Concerns over Reliability

By far, the most frequent concern expressed about jailhouse informants is that their evidence is unreliable and untrustworthy. This is said to arise from a number of causes.

(a) The Incentives to Fabricate

Jailhouse informants generally (or frequently) only provide evidence against other inmates when they are either promised or hope to receive some reward for so doing. Information from the United States indicates that informants receive a wide variety of rewards for their co-operation. These include jailhouse privileges, monetary payments, benefits to third parties, early parole, reductions in sentence and the dismissal of pending charges. Generalized information about the Canadian situation was unavailable, however, the case-law does contain occasional references to the fact that similar rewards are offered in this country. To the extent that this is true, the following comments will apply.

It is generally acknowledged that the prospect of receiving such rewards provides informants with a very strong motivation to lie deliberately, or at the very least provide inaccurate


17. The Los Angeles Times, April 16, 1989, p. 1, col. 1. This was stated by Leslie White, the informant who broke the L.A. jailhouse informant scandal. See, infra, text accompanying footnote 24.

18. United States v. Cervantes-Pacheco, 826 F.2d 310 (9th Cir., 1987) at p. 315.


20. Haglund, supra, footnote 1, at p. 1413.

21. Zimmerman, supra, footnote 4, at p. 139. Some of these latter motivations strike me as somewhat questionable. For example, I presume that fear is supposed to motivate a prisoner in a situation where he wants to be moved to a different jail in order to get away from threatening inmates at his current institution. However, an inmate might put himself in greater danger from other inmates by becoming a "stool pigeon": see, infra, text accompanying footnote 32. At the same time, the suggested motivations do not
Obviously the strength of any motivation to fabricate evidence will vary with the conditions in which an informant lives. But even the nicest jail is still a jail, and I think it is trite to say that there are very few prisoners who would not actually desire an improvement of their living conditions, especially if it involved their release from custody. It is also true that basic human integrity and decency should act as deterrents to the intentional incrimination of an innocent individual, but one may seriously question the extent to which such moral qualms actually constrain the actions of informants. By definition, such individuals are currently in conflict with the law (which is why they are in prison), and many have been so in the past. As such, their character is open to question, if not obviously unsavoury. One might legitimately surmise that their willingness to put their own needs ahead of others on the "outside" (in committing the criminal conduct which led them to be incarcerated) will translate into a willingness to subjugate the needs of others on the "inside" (to receive a fair trial) to their own desires for improved living conditions, monetary rewards and he like. As the Grand Jury has stated, the "unwillingness to follow societal rules extends to [a] willingness to defile an oath". At the same time, it is far from certain that informants will always consider their conduct as morally wrong. The persons who the informants are falsely incriminating are often of dubious character themselves, and have normally been charged with or convicted of criminal offences; this is why they are in prison. In such a situation, it would hardly be surprising for an informant to take the view that he is simply helping to convict a guilty person.

Irrespective of the flaws in the logical argument above, here is some direct evidence available that informants do fabricate evidence and perjure themselves in court. In the late 1980s, a prisoner named Leslie White came forward with the "confession" that he had repeatedly fabricated confessions of fellow inmates, and had testified to those fabricated confes-

26. Leslie White had previously demonstrated to the District Attorney's Office in 1988 how he had obtained the necessary information to be able to falsify the confessions of a dozen criminal defendants: Grand Jury Report, ibid., at pp. 99-102; Zimmerman, supra, footnote 4, at p. 95, note 58. His exploits were documented in a number of newspaper articles in the late 1980s.
and indeed have demonstrated, the astonishing ability to discover information about crime in order to concoct a confession by another inmate. Informants would gather the relevant information from law enforcement officials, the media, and the defendant himself (by coercion and bribery, if necessary). They would steal relevant documents (such as preliminary hearing transcripts) from the defendant’s cell, and send friends and relatives to the defendant’s court hearings. They would also impersonate public officials in telephone calls in order to obtain the information from legitimate officials. To further establish the credibility of their claims, they would sometimes arrange to be in the same place at the same time as the defendant in order to create a record of contact with the alleged confessors. One informant, for example, demonstrated how he would arrange to be on the same bus as a defendant. He would learn when the defendant was scheduled to appear in court and then call up a local prosecutor and tell him he had important information to convey. The prosecutor would then arrange for the informant to be transported to the local courthouse on the same day as the defendant.

It is true that there exists at least one obvious motivation which would act as deterrent to fabricated informant testimony: a prisoner who testifies against another may place his life and safety in jeopardy from ostracism within the prison community and retaliation from the “injured” defendant. However, it is far from obvious that this motivation would only deter false confessions. Whether he is lying or not, a prisoner who becomes a tattletale also becomes a despised member of the criminal sub-culture, and a confessing inmate whose real confidences are actually betrayed has a real interest in exacting revenge or preventing the “stool-pigeon” from testifying. If it is true that some inmates are willing to bear these risks (and it is apparent that some are), are the risks that much greater with respect to a false confession that no inmate would bear them in exchange for some of the coveted rewards?

It is obviously difficult to transplant, *holus bolus*, information from other jurisdictions to our own. The situation in Canada may be significantly different from that in the United States. However, I would suggest that the American evidence must give rise to a concern that similar problems exist in this country. At the very least, it warrants study of the Canadian situation and an examination of possible avenues of reform.

(b) Voluntariness

A concern has also been expressed that even when an informant accurately reports a confession by another inmate, that confession may be unreliable because it was coerced or induced. This is, in some respects, the flip-side of the concern related in the previous section of this article.

Numerous writers have recognized the inherently coercive atmosphere of prison, and the vulnerable position in which many inmates find themselves. By definition, prisons are largely populated with individuals who have demonstrated a willingness to disregard society’s rules of conduct. Some of them will be repeat offenders. Some will have resorted to violence to resolve disputes and fulfill their desires. At the same time, others will be new to the system, or be of frail dispositions, or suffer from particular vulnerabilities. This will create a power imbalance wherein some inmates will be able to dominate others. This may be particularly true in the context of detention centres, where all manner of defendants (from those accused of committing minor infractions to those charged with heinous crimes) are housed together.

In this context, it hardly seems plausible that some prisoners might try to take advantage of other, weaker inmates in order to obtain the benefits of informant testimony. Through tactics of fear and intimidation, informants may force other

In a recent case, the British Columbia Court of Appeal cited this factor as a principal reason to assume the reliability of an informant’s evidence: *R. v. Teneycke* (1996), 108 C.C.C. (3d) 53 at pp. 59-60, 126 W.A.C. 138.


34. Ganong, *ibid.*
inmates to trade untruthful incriminating statements for material benefits or protection from other inmates (including the informant). Given the vulnerability and desperation of some inmates, even "the smallest material comfort may seem priceless and 'protection' in any form may appear indispensable". On the other hand, some inmates may also react to their vulnerability by volunteering false stories of past criminal behaviour to other inmates. They may feel that such fabrications are necessary in order to boost their standing within the prison community and reduce the threats to their personal safety.

The validity of these concerns will obviously depend upon the extent to which informants are able to deliver on favours or act on threats. These individuals will obviously be under some restraint while inside the jail and I have not done any specific criminological research into the realities of prison sub-culture. However, common sense would suggest that the authorities cannot control all the actions of all the inmates all the time. In this situation, the concerns over the reliability of actual confessions must be considered serious.

(2) Concerns over Believability

The concerns expressed in the previous sections over the reliability of jailhouse confessions would obviously have little weight if it could be shown that triers of fact failed to attribute any (or much) significance to the testimony of informants. Unfortunately, that would not appear to be the case. There are numerous examples in the literature and the case-law of accused persons being convicted either solely or substantially on the basis of informant testimony. In the case of R. v. Bevan, for example, the Supreme Court of Canada described the evidence of two jailhouse informants as "crucial to the Crown's case". In the case of R. v. Clarke, the evidence of a jailhouse informant was acknowledged by the Crown to be "the strongest piece of evidence we have". In the United States, one author has noted that from 1980-1990 the Los Angeles District Attorney's Office used jailhouse informants to obtain convictions in at least 120 criminal cases.

There are, in fact, a number of good reasons why an informant's testimony may be accepted by a trier of fact, particularly a jury. First of all, the trier is likely to associate the informant with the prosecution. Since prosecutors are supposed to be non-partisan and only interested in seeking the truth, the trier may identify the informant with the same characteristics, or at least assume that the prosecution would only call the witness in order to seek the truth.

Second, some informants may be very good witnesses. They may have experience testifying as a defendant and/or an informant in a number of cases in the past, and they may have few scruples about perjuring themselves. They are also highly motivated to testify well, given the potential rewards for so doing. As we have seen, they are also able to gather information about the defendant and his case that can make their evidence seem plausible and possibly convincing.

Third, triers of fact, particularly juries, may not be able to assess properly the information relevant to the credibility of the evidence of informants. The triers are often comprised of individuals who are unfamiliar with the workings of the jail and criminal justice systems. They may find it hard to accept that an informant could gather so much information about a defendant or his alleged crime from some means other than a conversation with him. They may not appreciate the pressures inherent in a jail setting, and the resulting vulnerability of cer-

35. Ganong, ibid., at p. 929. The reality of this type of persuasion was demonstrated in the American case of Arizona v. Fulminante, 111 S. Ct. 1246 (1991). Mr Fulminante was in jail after a conviction for possession of a firearm. Another inmate named Sarivola, posing as an organized crime figure, befriended Fulminante and mentioned that he (Fulminante) was a suspect in the murder of his step-daughter. Fulminante maintained his innocence until Sarivola told him that he was in danger because other inmates suspected him of the murder. Sarivola offered him protection, and given Fulminante's weaker dispositions, Fulminante accepted the offer and confessed to the murder. I know of no proof that this confession was false, but this is obviously a concern with respect to any coerced confession.

36. White, supra, footnote 15, at p. 122.
37. Ganong, supra, footnote 15, at p. 928.
38. Supra, footnote 11, at p. 327 C.C.C.
39. Supra, footnote 10, at p. 238 C.C.C.
40. Winograd, supra, footnote 2, at p. 756.
41. Zimmerman, supra, footnote 4, at p. 105; Grand Jury Report, supra, footnote 7, at p. 146.
42. Haglund, supra, footnote 1, at pp. 1441-2.
43. White, supra, footnote 15, at pp. 131 and 136.
44. Even experienced trial judges may not fully understand the workings of the jail system.
tain inmates. As one experienced informant testified before the Los Angeles Grand Jury:

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\ldots \text{the jury not knowing the system or how it works, is going to believe [me] when I get up there with all these details and facts, that this guy sat in the jail cell, or he sat on the bus, or he sat in the holding tank somewhere, or told me through a door or something, they're gonna believe me.}
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The last reason why triers of fact might accept the testimony of informants as true is that it will often be very difficult for the defendant to refute. The interaction (or interactions) in question will often take place in secret, under conditions known only to the two parties involved. The defendant will therefore be denied the opportunity to corroborate his denial of the confession, and the trier will be left to decide the issue on the basis of a swearing contest between the two prisoners. It is true that the informant will often be a person of disreputable character, but the defendant may often also be a person of ill repute (if for no other reason than because he is charged with the crime at bar). The trier may therefore look to other factors to decide the issue of credibility, such as testimonial demeanour or consistency of the testimony with other evidence. But here again the defendant may be at a disadvantage. As discussed above, the informant may be a practiced witness with access to information which enables him to concoct a believable story.

None of this is to say that juries will inevitably accept the evidence of informants, or prefer it over that of the accused. It does point out, however, that the danger of unreliable informant testimony is a real one, and not simply an imaginary ghost.

(3) Informant Abuses

Critics have also been concerned that in the face of highly desirable rewards, jailhouse informants will abuse other inmates and the criminal justice system in order to obtain incriminating information. This problem is really a subset of the problems outlined above under the heading “Voluntari-

ness”, however, it relates not to a concern over the veracity of the confessions, but rather to the concerns that accused persons be treated humanely and the criminal justice system maintain its good repute.

Obviously any attempt by one individual to undermine the free will or bodily integrity of another is not something that the state should tolerate, much less encourage. Yet with respect to jailhouse informants, the state may be doing both. As stated above, prisons are environments where some inmates may be able to take advantage of others. Informants may engage in violence, threaten it, encourage it or even just tolerate it, all in an effort to extract confessions or other information from other inmates. By establishing the incentives which reward such activity, and setting up the conditions in which such activity can take place (and possibly go unpunished), the state may be encouraging the inhumane and illegal treatment of accused persons.

In the same manner, the state may also be allowing and even encouraging informants to engage in other types of illegal activity. The mere threat of a false accusation may allow informants to extort rewards from other inmates. At the same time, the attempt to obtain incriminating statements or information may encourage informants to engage in drug trafficking (to bribe inmates), theft (to obtain information about an inmate’s case), and personation (also to obtain information), not to mention perjury.

(4) Miscellaneous

A couple of other “miscellaneous” dangers may arise from the jailhouse informant system. First of all, it may inhibit an accused person’s ability to properly prepare for trial. Criminal defence attorneys testified before the Los Angeles Grand Jury that they were sometimes afraid to leave case materials with their incarcerated clients for fear that informants might obtain the material and use the information contained therein to falsify a confession. Refusing to leave the material with the accused, however, often had the effect of undermining the attorney-client relationship, as the client began to mistrust the

47. White, supra, footnote 15, at p. 129; Roser, supra, footnote 45, at p. 46.
48. See generally, Zimmerman, supra, footnote 4, at pp. 116-21.
lawyer and feel that he was losing control over his defence.\textsuperscript{31} I have no information on the extent to which this problem exists (if at all) in the Canadian system, but it is an interesting phenomenon which deserves to be explored.

Second, the use of jailhouse informants "cuts into the very fabric of interpersonal relationships by assuming that we should question and suspect those whom we naturally trust".\textsuperscript{32} Courts in both Canada and the United States have often expressed the view that if accused persons choose to speak to other inmates about their crimes, they bear the risk that those inmates will divulge their confidences to the authorities.\textsuperscript{33} However, such an approach ignores (or considers insufficiently important) the psychological impact of prison on a person. As Michelle Fuerst has noted, "the psychological impact of confinement is such that [inmates] inevitably will speak about that which weighs most heavily on their minds, namely, the charges against them."\textsuperscript{34} The question must be asked whether the jailhouse informant system encourages the forced isolation of the accused, and at what cost.

(5) Violating the Rights of the Accused

The final concern with the use of jailhouse informants expressed in the literature is that their use may lead to violations of the rights of the accused. The rights most frequently mentioned are the rights to counsel and against self-incrimination.\textsuperscript{35} In general, the concern is that an accused will make an incriminating statement, outside the presence or knowledge of counsel, in circumstances where he would not expect (or want) it to be used against him. Related to this is a concern over the voluntariness of jailhouse confessions: are they being received from accused in circumstances which negate the choice of whether or not to speak to the authorities?

In truth, the literature is often vague as to the exact nature of the problem here. It is clear that it extends beyond the simple issue of whether the confessions are reliable and relates to whether they were obtained in a manner which was somehow unfair to the accused. The difficulty is that it not always clear how this concern relates to jailhouse confessions and informant testimony, as opposed to confessions in general. Obviously jailhouse confessions received in violation of an accused's constitutional rights are unfairly obtained, but they are open to the same scrutiny as confessions received in other circumstances. Charter breaches are not a problem peculiar to jailhouse confessions.

In my opinion, the real concern here must be that the state not be able to obtain statements indirectly in a manner in which it could not obtain them directly because of a situation that is of its own making. I will attempt to elucidate.\textsuperscript{36}

The argument begins with the premise that prison is an inherently coercive atmosphere. As discussed above, it permits the strong to manipulate the weak, and leaves the weak to their own defences. This, in turn, sometimes allows jailhouse informants to obtain confessions (false or otherwise) from other inmates. At the same time, the state incites informants to prey on the weak by offering generous rewards for the confessional evidence.\textsuperscript{37} What is important to note is that the situation is not one which exists independently of the state. On the contrary, it is created and even encouraged by the state. The state places an accused person in a state institution, sets up a situation whereby he is made vulnerable, and invites others to abuse that vulnerability. The state then benefits from that abuse, through the testimony of informants, by disassociating itself from the abuse until after the damage is done (i.e., until after the accused has been "forced" to confess). It is suggested that this is fundamentally unfair and violative of the accused's right to remain silent.

\textsuperscript{51} Grand Jury Report, supra, footnote 7, at pp. 41-2.
\textsuperscript{55} See, e.g., Ganong, supra, footnote 15, at p. 920.
\textsuperscript{56} The following analysis was derived from the articles written by Zimmerman, supra, footnote 4, and Ganong, supra, footnote 15. However, as stated in the text, this is my interpretation of the concerns underlying the comments of those writers.
\textsuperscript{57} See, supra, text accompanying footnotes 33-37.
Take the situation of informants A and B, for example. A is an inmate hired as a police informer, whereas B is just a regular prisoner in a jail. Both are interested in obtaining incriminating evidence from C because both know the potential rewards for the evidence. If A misbehaves, however, the state will not be able to benefit from the statement adduced (induced?) from the accused because A acts as the state’s agent. On the other hand, if B misbehaves the state still gets to reap the benefits of his acts. Yet both A and B are acting in the same state-sponsored situation and because of the same state-sponsored incentives. The only difference is that the state became directly involved with A before he obtained the confession, whereas it only became directly involved with B after he obtained the confession.

Conclusion

It seems clear that jailhouse informants are an entrenched aspect of our criminal justice system. What is also clear, however, is that a number of serious problems are potentially associated with their use. Informant testimony may be quite often unreliable, yet quite readily believed by the triers of fact. Informants may abuse both the system and their fellow inmates, yet it may be the justice system which incites them to do so. Even when informants testify to real and truthful confessions, the confessions may have been unfairly obtained. These problems might lead one to question the advisability of continuing to use informants. At the very least, however, they must force us to ask how we can reform the system in order to minimize the risks that an innocent person will be convicted and/or the integrity of the system undermined.

Book Reviews

The Criminal Jury Trial in Canada, 2nd ed. by Christopher Granger (Scarborough, Ontario: Carswell, 1996, xxxii and 358 pp., hardcover, $85)

The right to trial by jury is considered to be one of the cornerstones of our legal system. This aspect of Canadian legal culture is now canonized in s. 11(f) of the Canadian Charter of Rights and Freedoms, which guarantees the right of an accused to be tried by a jury when facing a potential penalty of five years or more. Yet, despite its venerable status, participants in the criminal justice system view the jury with some scepticism. This attitude is not surprising when some of the realities of trial by jury are considered.

Juries are comprised of lay persons, randomly selected from the community, with no specialized knowledge of the law. They are asked to put their lives on hold for a period of time, sometimes months, while they sit in the unfamiliar environs of a courtroom listening to evidence which, in many cases, may be quite disturbing. At the end of the trial, they are subjected to the diatribes of at least two lawyers and then receive instruction on certain aspects of criminal law, some of which may be highly complicated and technical. They are then expected to come to a unanimous decision as to the culpability of a person accused of very serious criminal charges. When they render their ominous decision, they are not required (or permitted) to give reasons. Afterwards, they are dispatched back to their lives, prohibited, under threat of penalty, from discussing a good part of their ordeal. Many have wondered whether there are better ways of enforcing the criminal law.

Perhaps as a response to some of these enigmatic features of the jury, the law has developed many formal rules and prac-

nexus, and then a determination of what comes down to a balancing between the effect of exclusion versus the effect of admission on the repute of the administration of justice. The three categories previously mentioned in the jurisprudence would be part of the balancing process here but not every kind of unfairness would justify exclusion, no matter how trivial. L'Heureux-Dubé J. and Gonthier J. disagreed somewhat with respect to this in that they found that s. 7 was involved, but that the only situation where exclusion would have a better effect on repute than admission would be in cases of actual conscription.

Although it is likely that this judgment will be superseded when cases of DNA seizures under warrant reach the Supreme Court, the decision contains much of value which is not tied to the facts of a warrantless seizure of DNA samples. The form of analysis to be applied to evidence said to result from or to be derived from breaches of Charter rights is not confined to DNA cases. Of greatest importance, perhaps, is the idea that derivative evidence is not to be automatically excluded on the “fruit of the poison tree” doctrine, but is to be subjected to the further step of “discoverability” analysis.

Paul L. Moreau*

Jailhouse Informants in the Canadian Criminal Justice System, Part II: Options for Reform

Christopher Sherrin*

Introduction

In Part I of this article I addressed the potential problems associated with the use of jailhouse informants. In brief, I concluded that informant testimony may be unreliable, informants may be abusive, and accused persons may be treated unfairly. I now turn to an analysis of the various options for reform. There are a number of options available, and I will consider the merits and potential problems* of each in turn. The one option I will not consider, however, is that of no reform. I assume that the previous discussion has demonstrated the need to at least consider the options for change, and if the reader is still not convinced I have nothing else to add to change his or her mind.

(1) Eliminating Jailhouse Informant Testimony

The first and most obvious option for reform is to eliminate completely the use of jailhouse informants at trial. One will never get rid of jailhouse informants, of course, but one may preclude them from testifying for either the defence or the prosecution at trial. By abolishing their use, one would hope to

* Of Cooper, Sandler & West, Toronto.
Part I of this article is to be found at (1997). 40 C.L.Q. 106.
58. I stress that the comments that follow will only address the potential problems that may arise. I fully recognize that solutions to some or many of these problems will exist. But it is not my task to resolve all the issues; I simply outline them for consideration by others.
eviscerate the system surrounding them and many of the ills associated with it.

In my opinion, the foregoing discussion has certainly demonstrated the need for concern over the use of jailhouse informants. They may not only help to convict the innocent, but they can expose the criminal justice system as a whole to disrepute. However, I think that one would be hard-pressed to deny that they may at times assist in the pursuit of justice and the successful prosecution of criminals. One might conclude that the risk of injustice associated with their use outweighs this benefit, but I find it interesting to note that I have yet to come across any court or commentator who advocates the total elimination of jailhouse informants from the system.60 On the contrary, courts have at times explicitly endorsed the continued use of informants (jailhouse and otherwise). Mr Justice Cory of the Supreme Court of Canada had this to say about the use of informers in a recent case: 61

The value of informers to police investigations has long been recognized. As long as crimes have been committed, certainly as long as they have been prosecuted, informers have played an important role in their investigation. It may well be true that some informers act for compensation or for self serving purposes. Whatever their motives, the position of the informer is always precarious and their role is fraught with danger.

Commentators have likewise acknowledged the social utility of informants. Ganong, for example, has written that “a police jailhouse informant provides a valuable tool for the effective apprehension of violent criminals”. 61

59. I am sure that there are people who do advocate such a position, but the fact that I have yet to come across any in the literature suggests that they are clearly in the minority. Haglund suggests that in one case former U.S. Supreme Court Chief Justice Warren advocated their total elimination, but I do not interpret his comments so broadly: Haglund, supra, footnote 1, at p. 1423.


Of particular interest in this regard is the history of the use of informants. As stated above, jailhouse and other types of informants have been around for centuries. 62 Throughout that time, various attempts have been made to eliminate them from the criminal justice system. All of these attempts have failed. As Zimmerman writes, 63

The history of informant use, dating from early English common law, shows informants as an omnipresent element of the developing criminal justice system... In cyclical fashion, informants were embraced, touted and utilized. Then, at the opposite end of the cycle, they were chastised, vilified, and restrained only to be embraced once again.

I would suggest that this indicates that informants are here to stay. If history is any guide, any attempt to eliminate them from the system will likely be unsuccessful in the long run. For whatever reason, society considers them to be too valuable, or at least valuable enough to keep around. Accordingly, it would probably be wiser to spend one’s time and effort reforming the system, rather than trying to abolish it.

Before I leave this topic, I should point out that at least one attempt has seemingly been made in recent years to convince a court to reject the use of jailhouse informants. In 1991, in the case of R. v. Johnston, the Ontario Court of Appeal was faced with the submission that the use of “disreputable people” like the jailhouse informant in question brought the administration of justice into disrepute. The court did not really address the merits of the argument head-on, but it clearly did not accept it. Its response was to ask what the public’s perception of the administration of justice would be if the informant’s evidence of a confession had been excluded and the accused had been acquitted. 64

62. See (1997), 40 C.L.Q. 107 (Part I of the article), text accompanying footnotes 3-4.


(2) Requiring Corroboration

A frequently discussed option for reform is to require corroboration of the evidence of jailhouse informants. Thus, for example, the Canada Evidence Act could be amended to require that any evidence of a statement made by an accused person while in custody be corroborated in some material particular. This corroboration could either be a precondition to the admissibility of the evidence, or a direction to the trier of fact as to when any use can be made of it.

This option would theoretically assist in ensuring the reliability of the evidence of jailhouse confessions, but it comes with many practical problems of definition and application. For instance, what sort of evidence will suffice to satisfy the corroboration requirement? The classic answer to this question is found in the 1916 English case of *R. v. Baskerville*: "it must be evidence which implicates [the accused], that is, which confirms in some material particular not only that the crime has been committed, but also that the prisoner committed it." 65 This is the type of corroboration required for confessional evidence in Scotland66 and in some American states.67 In many other American states, however, it is sufficient that the corrobative evidence simply show that a crime has occurred, without connecting the accused to the offence.68 U.S. federal courts apply an even less rigorous (or more nebulous) standard, that which requires independent evidence to show that the confession is trustworthy.69

There are some obvious problems with these standards in the context of jailhouse confessions (as well as in general). First of all, the weaker the standard one applies, the easier it will be to corroborate a jailhouse confession, and the less secure one will be in the reliability of the evidence. Even applying the most rigorous standard of *Baskerville*, however, one might seriously question the extent to which the corrobative evidence will assist the trier of fact. Independent evidence which shows that a crime has been committed will be available in most prosecutions, and in any event, why is the reliability of a confession enhanced by the fact that the accused confessed to a real crime rather than a fictitious one?70 Whether an informant forces a false confession out of an inmate or surreptitiously learns of the details of his charges, the informant’s evidence is likely to relate to a real crime. Indeed, it seems unlikely that an informant who simply makes up a confession out of the blue will be given much credence unless the authorities can obtain some confirmation of a wrong having been committed. This, in turn, would certainly diminish the incentive to fabricate a confession to an imaginary crime, since the likelihood of receiving a reward would be substantially reduced.

Adding a requirement that the corroboration implicate the accused will also act as only a minor safeguard against fabricated informant evidence. I would imagine that such evidence will most often relate to "confessions" made by an inmate with respect to the charges which he is currently facing. As such, independent evidence will already exist linking him to the crime. In any event, the evidence of a jailhouse informant would again be unlikely to be given much credence if the authorities could not find such evidence. In short, the corroboration rule as defined in *Baskerville* ignores the reality that most jailhouse confessions of concern will occur after the accused is already in the vulnerable position of having been charged with a criminal offence (and after the informant can take advantage of that vulnerability).

Over and above the aforementioned problems with the *Baskerville* rule is the problem that rule does not require corrobative evidence of the making of the confession, yet this is the issue that will more frequently arise in the context of jailhouse confessions. As discussed above, an accused will rarely be in a position to argue that apart from his alleged confession

69. Imwinkelried, *ibid.*
there is no evidence that a crime was committed or that he was connected to it. Much more often he will be in the position of facing some evidence of his involvement (whether it is obtained before or after the jailhouse informant comes forward), but denying that he confessed to the crime. Given the abilities of jailhouse informants to fabricate a story of a confession convincingly, it is with respect to the issue of whether the accused really gave the confession that a measure of security may be required.

The High Court of Australia has recognized the significance of this issue in the context of police evidence of a confession and has enacted the rule that whenever the making of the confession is not reliably corroborated a trial judge should warn the jury of the danger of convicting on the basis of that evidence alone. Mandatory warnings of this type will be discussed in the following section of this article, but the Australian experience does raise another option for reform: to require corroboration of the making of the confession. This would certainly seem to address a more central issue in the context of jailhouse confessions, and provide greater security than the Baskerville rule, but it does have some practical difficulties of its own.

Probably the most significant difficulty with this proposal is the reality that the required corroborative evidence often will be available only from another inmate. An accused who wants to confess to his crime would generally want to minimize the risks of doing so. As such, he would normally confess in secret, away from the eyes and ears of the authorities. This means that the only witnesses to the confession (if any) would be other inmates. But if we have to enact a rule requiring corroboration because informants too often (and too easily) fabricate confessions, can we safely rely upon the evidence of other informants to corroborate the making of the confession? Surely that might just encourage conspiracy or co-operation amongst lying informants. Either two informants can plan to corroborate each other’s story, or a single informant can falsify a confession knowing that another informant will realize the rewards of co-operation and come forward to corroborate the story. This is not to say that the conspiracy/co-operation will never be exposed or will always exist. It is to say, however, that we must recognize the prospect and discount the value of the corroboration rule accordingly. The Australians have gone so far as to suggest that corroboration can never come from another inmate, but the question may be legitimately asked whether this unduly restricts the ability of the authorities to use informant evidence, given the likelihood that another inmate will be the only person able to provide the corroboration.

Another difficulty with requiring corroboration of the making of a confession is that it may just encourage the creation of false confessions through force and intimidation. An informant, recognizing the need for corroboration, will see benefit in just coercing a confession out of another inmate than in surreptitiously obtaining the necessary information to convincingly fabricate one. This is obviously not a situation which should be encouraged.

The rule may also have the unintended effect of actually reinforcing the reliability of false confessions. If a jury is told that it must find corroboration for the making of the confession, and it finds the necessary corroboration (sometimes from the accused, who may have to acknowledge that he gave the confession while trying to explain why it was a lie), the jury may feel safe to rely upon the confession. By setting up a minimum threshold for reliability, in other words, we may encourage a jury to find reliability once that minimum is met.

In defence of a corroboration requirement, one might point to the “special knowledge” principle applied by the Scottish courts. This is the principle that a confession can only be cor-

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72. Once one informant comes forward, it may be an easy thing for others to come forward to corroborate since they do not have to go through the trouble of discovering the information about the crime themselves.
73. See the comments of McHugh J. in Polit v. The Queen (1992), 174 C.L.R. 558 (Aust. H. C.) at p. 617.
75. Roser, ibid., referring to the concerns of Deane and McHugh JJ. in Polit, supra, footnote 73.
76. Choo, supra, footnote 67, at p. 873.
roborated by facts which were mentioned by the accused in the course of the confession and which could have been known only to the authorities and perpetrator of the crime. The theory is that the informant could not know of such facts unless he learned of them from the accused. Such evidence would theoretically support both the fact that a crime has been committed and that the accused was involved. The difficulty is that the principle's premise may have been undermined (at least until further study is done in Canada) by the finding of the Los Angeles Grand Jury that informants demonstrated an "astonishing" ability to gather sometimes publicly unavailable information about a charge from the authorities. Using this ability, the informant is likely to tailor his story to fit the other (hereafter corrobative) evidence. The corrobative facts may indeed enhance the reliability of a particular confession in the circumstances where they were known only to the accused (and no one else) at the time the informant came forward with his evidence, but that principle may come at an unacceptable cost. As we have seen, informants (may) have the ability to force or bribe information out of other inmates. They are likely to use that ability to obtain the required "special knowledge" from real but involuntary and unfair confessions. One must ask whether this would really bring about an improvement to the criminal justice system.

(3) Mandatory Warnings

Another option for reform is to require trial judges to instruct the triers of fact in any case involving jailhouse informants of the dangers involved in relying upon informant testimony. This could take the form of an unqualified warning that it is dangerous or unsafe to rely upon informant testimony (because they are untrustworthy), or a qualified warning of the dangers of relying upon such evidence in the absence of corroboration. This is an option that has been adopted by the state of California where the Penal Code requires courts to give cautionary instructions upon either party's request.

There would appear to be some merit to this option. We have previously examined the potential difficulties faced by juries (and some judges) in assessing the credibility and reliability of jailhouse informant testimony. A clear and complete explanation (or reminder) of the problems with this type of evidence may help the triers of fact resolve the issues in a reasoned and educated way. Such an explanation would sometimes have to include detailed information about the legal and prison systems surrounding informant testimony, but the precise amount of detail necessary could be tailored to each particular fact situation. For instance, in a case where an accused does not deny making a confession, but alleges that it was only made as a result of fear and intimidation, the trial judge need not provide any explanation as to the abilities of informants to learn surreptitiously details about an accused's case.

Aside from the problem of the time required to give the mandatory warning, there are three major difficulties with this option for reform. The first difficulty is that it runs counter to the current policy of the law. In 1982, the Supreme Court of Canada officially abandoned the special warning rule for accomplice evidence in favour of a discretionary rule which allows the trial judge to give warnings in appropriate cases. Former Chief Justice Dickson discussed numerous criticisms of the rule, and many of them had apparent merit. I will not debate those criticisms here (save one), but I will pause to note that the available evidence would tend to support the proposition that informant testimony as a whole is unreliable. As such, it may undermine Justice Dickson's arguably central point (as applied to jailhouse informants) that there is nothing inherent in the evidence of an accomplice which renders it untrustworthy. In any event, one must recognize that for the past decade and a half, Canadian law has explicitly adopted a policy of endeavoring the trial judge with greater discretion as to when a

77. See, supra, the Report of the 1989-1990 Los Angeles Grand Jury: Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County (June 26, 1990), and the text accompanying footnotes 28-31 of Part I of this article (hereafter "Grand Jury Report").
79. California Penal Code, s. 11274(b)
81. Ibid., at pp. 9-11 C.C.C.
special warning should be given. As such, any proposal for reform that removes the discretion may meet with resistance.

Before I turn to the next difficulty with this option for reform, I must point out that the trend towards greater discretion has not been universal. In at least two recent cases, appeal courts have held that trial judges erred in failing to give a special warning concerning the evidence of a jailhouse informant. These decisions would seem to imply that the trial judge does not have an absolute discretion in this regard, and that there are circumstances when a warning must be given. It is possible, therefore, that the policy of the law may be changing, at least with respect to the category of jailhouse informants.

The second difficulty with mandatory warnings is that they may have the unintended effect of actually reinforcing the reliability of jailhouse confessions. As Dickson J. [as he then was] pointed out in Vetrovec, in giving a warning a trial judge will (often) be required to draw the attention of the triers of fact to the evidence which supports the reliability of the informant (in order to give a balanced instruction on his testimony). “Cogent prejudicial testimony is thus repeated and highlighted.” This is not something which an accused will readily appreciate. Some experimental research also appears to confirm that warnings may be counter-productive. Given the fact that the warning would be given theoretically to protect an accused from false accusation, any indication that it may bolster the credibility of an informant’s testimony is cause for serious concern.

The last difficulty with the option of mandatory warnings is that trial judges may not be able to provide juries with sufficient information to assist them effectively in their task. The phenomenon of jailhouse informants is still relatively unstudied. There is an especially egregious paucity of information on the subject in Canadian legal writing. Therefore, we may not currently be able to provide trial judges with adequate information to assess informant testimony properly, never mind educate others on the subject. This is simply a call for more research, of course, but until that research is completed a special warning requirement may do more harm than good.

(4) Full Disclosure and Cross-examination

Another option for reform is to ensure that defence counsel have access to all relevant information concerning a jailhouse informant, and a wide ability to use that information at trial. To some extent, of course, the law currently provides the defence with both of these things, but the issue is whether we should expand the content of an accused’s rights, as well as his ability to exercise them. The proposals for reform under this category are really a hodge-podge of other reforms. However, all of them have as an underlying concern that the defence not be unduly restricted in its ability to expose the potential frailties of jailhouse informant testimony.

A primary concern is that the defence be told of all the incentives or rewards which the jailhouse informant is being offered or given in the accused’s case. Such information is obviously crucial to a realistic assessment of and challenge to the informant’s testimony. Since the defence is clearly entitled to this under current Canadian law, I will not discuss the principle further. What is important is that the right to disclosure of this information be securely protected. This means that any and all consideration given for an informant’s testimony must be disclosed before trial.

The Grand Jury Report in Los Angeles expressed concern that some informants were obtaining new benefits for their testimony in a case after the case had finished. Indeed, it pointed out that clever informants will not even ask for benefits until after trial. That way, at trial they can appear to be testifying

83. Supra, footnote 80, at p. 7 C.C.C.
84. Choo, supra, footnote 67, at p. 876, note 50.
85. Although I cannot claim that my search was exhaustive, I found very little on the subject in Canadian legal literature. Reference to associated disciplines, such as criminology, would be advised.
87. Grand Jury Report, ibid., at p. 84.
as concerned citizens in search of justice and not personal reward. At the same time, they can remain confident that the authorities will ultimately provide them with benefits in the future as the continued viability of the informant system depends on informants feeling secure that they will receive such benefits. The Grand Jury heard of a disturbing number of instances where prosecutors had initially refused to reward informants for their testimony, only to provide such rewards after the informants had testified.

The lesson from all this is that it is imperative that all rewards given to informants be clearly spelled out in advance of trial, and that no further rewards be provided afterwards. California has enacted a law requiring the prosecution to file with the court at the time a jailhouse informant testifies a statement setting out all the consideration promised to, or received by, the informant. Consideration might be given to the enactment of a similar rule here, but with the added prohibition of any further rewards being given to the informant in the future (or at least absent judicial approval for such rewards).

It has been suggested that a second prong of disclosure should be information concerning all of the informant's prior dealings with the authorities as an informant. This would include information concerning the number of times the informant has testified for the prosecution, the rewards given, the circumstances surrounding the testimony, the details of it, and so forth. Such information could show that the informant has a settled expectation of benefit for testifying, a prior history of perjury, a propensity to come forward with information at opportune moments, etc. As far as I can tell, the law in Ontario largely supports the defence's right to receive such information, so this aspect of the proposal may not be a contentious one. But the question must be asked whether the defence can effectively exercise the right. The Los Angeles Grand Jury was concerned that a complete and proper inventory of information concerning informants was not being maintained by the authorities. As such, the defence was unable to receive complete information about an informant's background. Although it is apparent that at least some police forces in Canada maintain files on informants, research should probably be done on such issues as how accessible these files are, what sort of cross-jurisdictional and inter-agency co-operation exists, how complete the information is, etc. Consideration might also be given to the creation of a central informant database.

A third prong of disclosure would relate to information concerning the informant's actions while in custody. Haglund has pointed out that for cross-examination of an informant to be effective the defence must be able to demonstrate (or raise a doubt about) both the informant's motive and opportunity to lie. While a trier of fact may easily understand the incentive for an informant to fabricate, they may not so easily understand how an informant could concoct a convincing lie (one full of details and confidential information). We have seen above that informants seem to have "astonishing" abilities to discover information about a defendant's case, and it is important that the defendants be made aware of those abilities, and the opportunities of informants to use them. At a minimum, this would entail disclosure of all information provided to the informant by the authorities. It would likely also entail disclosure of all jail records concerning the informant (where he was, how he got there, who was he with, etc.), records tracing the disclosure of confidential case information to third parties (anyone who might furnish the informant with information or

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88. Grand Jury Report, ibid., at pp. 76-84.
89. California Penal Code, s. 1127a(c).
90. This eventuality is not provided for in the California legislation: Grand Jury Report, supra, footnote 77, at p. 144.
92. In R. v. Frumusa (1996), 112 C.C.C. (3d) 211, 95 O.A.C. 337, the Ontario Court of Appeal concluded that such information, if it had been known at trial, might reasonably be expected to have affected the outcome.
94. I note, however, that the language of the two decisions cited above does imply that there are limits on the defence's right to access this information.
95. This was the recommendation of the Grand Jury: supra, footnote 77, at p. 149 (see also pp. 111-22, 146-7).
96. Haglund, supra, footnote 61, at pp. 1424-5.
whom the informant might impersonate), and other similar records. Research into whether and to what extent such records exist or can be created would be well advised.

All the disclosure in the world, of course, will not assist the defence if it cannot effectively utilize the disclosed information at trial. Accused persons currently have fairly broad rights of cross-examination, and it would appear as though that extends at least to questions concerning prior rewards received by, and prior false testimony given by, jailhouse informants. However, it would also appear there are limits. In one case, the B.C. Court of Appeal held that the defence was not entitled to ask questions concerning all prior instances in which an informant had previously provided information to the authorities. Such evidence, however, might be relevant to whether the informant has a history of seeking rewards, has been considered untrustworthy in the past, or has been used by the authorities to target certain accused.

There are numerous areas of cross-examination which might be re-evaluated in light of the evidence which casts doubt on the reliability of jailhouse confessions. There is the obvious area of police informer privilege: should the restrictions on disclosure of a police informer's identity be reconsidered in the context of jailhouse informants? One might also analyze the right of the accused to cross-examine informants on prior criminal charges which ended in acquittal; given that the acquittals may have resulted from the informant's prior co-operation with the police (and the Crown's ensuing decision not to call any evidence), evidence of the informant's prior (criminal) conduct may remain relevant to credibility. The strictures of the collateral facts rule might also be relaxed in order to allow the defence to lead more evidence impugning the informant's reliability and credibility.

(5) Limiting Permissible Incentives

Up until now we have been discussing reforms which focus on restructuring the trial system so as to provide safeguards against unreliable informant testimony. We have discussed setting up barriers to the use of such testimony, and providing the accused with the power to challenge it. But there are a number of options for reform which focus on a different issue: altering the relationship between the informant and the state. It is that relationship, after all, which creates the problems in the first place. The state establishes a system wherein informants have incentives to fabricate and the opportunities to do so (not to mention the opportunities to commit other abuses). It is possible, therefore, that reforms to the state-informant relationship may go more directly to the heart of the problem.

Given that the abuses of jailhouse informants stem (at least theoretically) from the reward system, one possibly fruitful option for reform is to limit the types of rewards which may be offered to informants. If the potential rewards become less desirable, informants may have less incentive to fabricate confessions; it may no longer be worthwhile for the informant to go to the trouble of coercing a confession or surreptitiously learning about another inmate's case. At the same time, so the theory goes, informants with evidence of true confessions will still come forward in order to receive the remaining rewards and satisfy their own sense of justice.

The courts in Canada have thus far been relatively loath to rule out any particular reward as being overly inductive to perjury. In one 1994 case, the Ontario Court of Appeal held that a contingent fee arrangement wherein an informant's payment was conditional on charges being laid against certain suspects was permissible. In another 1994 case, the same court held that an arrangement in which the informant could receive extra money if previously unidentified suspects were charged was equally permissible. The only appellate decision in which a contingent fee arrangement has been ruled impermissible is a 1991 decision of the Quebec Court of Appeal; in that case, a

witness was promised money provided that the accused was convicted.\textsuperscript{104}

In my opinion, the option of limiting the available rewards for informant testimony is a sound one. It strikes at the root cause of jailhouse informant abuse, and provides a potentially effective means of controlling that abuse from the start. However, as with all other options, this one is not without its problems.

The main problem is how to define what are acceptable rewards for informant testimony. One author has gone so far as to suggest that all tangible rewards should be eliminated, so that only the intangible rewards of promoting justice and seeking revenge remain.\textsuperscript{105} This option has the obvious merit of avoiding tough calls as to what are appropriate and inappropriate rewards, but it may also dry up the well of reliable informant testimony. Another author has taken a slightly more cautious approach and advocated the elimination of all “exorbitant” rewards, such as the dismissal of charges, the substantial reduction of prison time, or large cash payments made on a contingent fee basis. Such rewards would only be permitted if the government could establish that the informant’s testimony is trustworthy (through corroboration, good character evidence, etc.).\textsuperscript{106} This probably strikes a more reasonable balance between the goals of law enforcement and accurate fact-finding, but it does involve drawing fine distinctions.

Although the courts are somewhat experienced in making difficult distinctions, the issue here may be complicated by some unusual factors. First, it may be hard for trial judges to appreciate accurately the significance of various types of incentives. In the especially unpleasant and often dangerous conditions of prison, even the smallest comforts may seem priceless.\textsuperscript{107} As such, what may seem trivial to those on the outside, may still act as an invitation to perjury to those on the inside. On the other hand, there are also some disincentives to providing informant testimony. The informant may place his status within the prison community in jeopardy, not to mention his physical safety. One might legitimately ask how even an experienced trial judge can intelligently balance that consideration against the desire for reward.

A problem of a different order is that the authorities have an inherent self-interest in ignoring the restrictions on informant rewards.\textsuperscript{108} Although presumably most state agents would conduct themselves with the utmost propriety, one cannot ignore the possibility that in the heat of a trial or investigation someone might overstep the boundaries. Indeed, such an act need not even be intentional. Given that the line between proper and improper rewards will be fact-sensitive, the authorities will necessarily be guessing to some extent when they decide upon the available rewards. Faced with the evidence of a confession to a serious crime, a court may be loath to exclude testimony on the basis of a small and inadvertent error by the Crown.\textsuperscript{109}

Despite these difficulties of application, I still think that this option for reform is viable. The courts will always have to make tough judgment calls, and the authorities will always be tempted to push the envelope. At the same time, innovative mechanisms can be devised to overcome some of these problems. For instance, the government can legislate precisely what rewards are acceptable, and centralized expert agencies can be set up to handle jailhouse informants.

\section{(6) Providing Disincentives to Fabrication}

The flip-side of the previous option for reform is to provide disincentives to fabrication. Two such disincentives might be an active policy to prosecute lying jailhouse informants for perjury and to eliminate informants from the available pool once they have been even informally deemed unreliable in a particular case.

The Los Angeles Grand Jury was concerned that despite the evidence before it of a large number of apparent instances of

\textsuperscript{104} R. v. Xenor (1991), 70 C.C.C. (3d) 362, 43 O.A.C. 212 (C.A.). At one point the American courts frowned upon contingent fee arrangements, but that is no longer the case: Haglund, supra, footnote 61, at pp. 1417-19.

\textsuperscript{105} Ganong, supra, footnote 61, at p. 934.

\textsuperscript{106} White, supra, footnote 101, at pp. 139-41.

\textsuperscript{107} White, ibid., at pp. 122-3.

\textsuperscript{108} Zimmerman, supra, footnote 63, at pp. 143-6.

\textsuperscript{109} Zimmerman, ibid., at pp. 131-2.
Given the potential difficulties of proof involved, a more realistic and productive option for reform may be an internal Crown policy not to use an informant in any future prosecution once his reliability has been undermined in any past prosecution or investigation. A determination of unreliability may come from a finding by a trial court that the informant was unreliable, or even an informal decision by a Crown or law enforcement officer that the informant could not be trusted in a particular case. Such a system depends on the honesty and integrity of state officials, of course, and would only be workable if a central (and open) informant database was created (as suggested above). I would hope, however, that these are not serious obstacles to the proposal. The main objection to it will probably come from the concern that prohibiting future use of previously unreliable informants may deprive the state of their testimony in instances where it may actually be reliable. Since one can never know for certain whether an informant’s testimony is reliable, I question whether this possibility should be overly troubling. To the extent that possibility is a real one, one must simply ask whether this is an acceptable price to pay in order to protect the innocent from conviction.

A related option for reform is an active and overt policy of prosecuting inmates for illegal behaviour in jail. Given that some informants may use fear, intimidation, bribery and other similar tactics, to coerce or induce confessions, such a policy might lessen the risk that vulnerable inmates will be forced to falsely confess.

(7) Limiting the Types of Available Informants

An option for reform similar to, and associated with, the option of limiting the types of permissible incentives is the option of restricting the types of individuals who can testify as informants. The idea would be to restrict acceptable jailhouse informants to those who do not have so much to gain, and who have more to lose, by fabricating confessions. It is hoped that

111. Grand Jury Report, ibid., at p. 150.
112. See ss. 13, 133, 136 and 137 of the Criminal Code.
113. See, supra, the text accompanying footnotes 75-77.
114. See, supra, the text accompanying footnote 95. The database would have to be open to accused persons, at least to the extent that they could confirm in any particular case whether an informant is on the prohibited list.
such individuals would be less likely to yield to the temptation to implicate others falsely (either through subterfuge or coercion) in order to reap the available rewards.

The types of acceptable informants could be restricted in a number of ways. First and foremost, they could be restricted to those charged with less serious offenses. Such individuals presumably face the prospect of more minor jail terms or other forms of punishment upon conviction and thus have less to gain by acting as informants. At the same time, they may also have more to lose from a conviction for perjury or a similar offense; a person already facing a lengthy jail term may not be overly disturbed by the prospect of additional time from a perjury conviction, whereas such a conviction could add significantly to the time spent in custody for someone facing a more minor offense. Second, acceptable informants could be limited to those with less serious or numerous criminal antecedents, as this again has a significant bearing on the type of punishment which they may face. In the context of informants who are not currently facing charges but have already been sentenced to a custodial term, one might restrict the range of acceptable informants to those who are closer to receiving parole, or who have already been classified to a more desirable custodial facility.

The potential difficulties with this proposal are very similar to those discussed under the option of limiting permissible incentives.15 Placing limits on the types of acceptable informants necessarily involves drawing difficult distinctions and making tough judgment calls. This option for reform may not provide clear boundaries between acceptable and unacceptable inmates. Evaluating when an informant may have too much to gain by fabricating evidence will also be a difficult task. Any defense lawyer can tell you that for some clients the prospect of even a short stay in jail may be absolutely unacceptable, whereas for other clients the prospect of even a penitentiary term may not be so disagreeable. The task will be made even more difficult when one tries to factor in the effect of the disincentives to “snitch” on other inmates. A weak-willed criminal, even if he is facing a lengthy jail term, may not fabricate a confession if he knows that the accused may try to exact retribution. Eliminating this informant based solely on the sentence which he faces may deprive the state of reliable evidence.

A further complication that is somewhat unique to this option for reform is that the context in which the distinction (between acceptable and unacceptable informants) must be drawn will generally not be known with any precision at the time the distinction is made. Sentencing is hardly an exact science, and it may be somewhat difficult to predict with any degree of certainty what type of penalty a particular informant is facing in any particular situation. An inquiry into the issue may involve the court (or other body assigned with the task) in a lengthy inquiry into the particular facts of the informant’s charges and background. If the informant intends to plead not guilty to his charges, the court would then have to evaluate and factor in the likelihood of conviction as well (at least to some degree). Similar sorts of problems may also arise with respect to evaluations of an informant’s chances of parole.

A related, and perhaps somewhat more simplistic option for reform would be to limit acceptable informants to those who have not been informants before (or too many times before). Such individuals may be less adept at perjuring themselves in court, at manipulating the system to fabricate a confession convincingly, or at manipulating another inmate in order to coerce or induce a confession. This will not always be true, of course; some people learn fast or have an inmate talent for these sorts of activities. But to the extent that experience counts, relying exclusively or more heavily on seasoned informants may increase the reliability of their testimony.

(8) Limiting the Role of the Informant

Another option for reform is to limit the types of activities in which informants can engage in the pursuit of jailhouse confessions. Proposals of this vein generally suggest that informants be restricted to a more passive role.16 This can mean anything from prohibiting them from engaging in criminal or

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115. See, supra, the text accompanying footnotes 105-09.

116. See, e.g., Ganong, supra, footnote 61, at p. 934.
violent activity, to prohibiting them from doing anything to elicit the confession.

This option is obviously related to and inspired by concerns over protecting the constitutional rights of accused. The active/passive dichotomy permeates the decisions under the right to silence and distinguishes between acceptable and unacceptable conduct by state agents. Jailhouse informants acting outside the authority of the state, however, are perfectly entitled to actively elicit a confession. Proponents of this option for reform see this as problematic in its own right. However, the option may also address concerns over reliability. The theory is that a passive informant will enable the accused to make a free and uncoerced decision whether to confess. Should he decide to do so, his decision will not be affected by the acts of the informant, and thus his confession will be more likely to be true.

This option for reform has some apparent merit. Its major difficulty, however, is that informants have systemic incentives to overstep the bounds of acceptable conduct and their conduct will be very difficult to police. As has been reiterated many times in this article, jailhouse confessions (real or coerced) by their very nature often take place in secret. As such, the only witnesses to the interaction(s) leading up to the alleged confession will be the accused, the informant and possibly other inmates. The informant may very well use this privacy to employ whatever means are necessary to obtain a confession, including threats and bribery, and then lie about the means that he used. The authorities, in turn, will have to rely on the informant’s integrity in this matter, or at best the integrity of other inmates (informants) who witness the critical interactions. Such evidence is unlikely to provide great assurance of the informant’s good conduct.

State authorities also have an incentive to permit transgressions by informants in obtaining jailhouse confessions. Faced with the prospect of losing valuable evidence of a serious crime, they may see little benefit in maintaining a constant vigil over the activities of informants, or in investigating allegations of impropriety. Many state authorities will obviously conduct themselves with the utmost integrity, and better training on how to deal with informants can provide some assistance, but one cannot fail to recognize the built-in incentive to “pass the buck” and assume that someone else will watch over an informant.

A further difficulty with this option for reform is that it fails to address the phenomenon of the surreptitious informant. Such an informant need never even speak to an accused in order to come up with a convincing story of a confession. As described above, he may obtain the necessary information from other sources, and then simply arrange to be with the accused at the same place and the same time. Such an informant can simply fabricate a brief encounter with the accused (when the accused allegedly relieved his conscience) and there will be no evidence to show that the informant conducted the encounter improperly, because he did not. This option for reform, therefore, must be seen as an incomplete (if well-intentioned) one. By focusing solely on the relationship between the accused and the informant, it neglects the relationship between the informant and the system.

9) Endowing the Trial Judge with a Discretion to Exclude Unreliable Evidence

A ninth option for reform is to give trial judges the authority to exclude evidence which they consider (too) unreliable. This sort of determination can take place in a pre-trial motion, during which a trial judge can assess all of the potential reasons for questioning the reliability of the jailhouse informant’s testimony. For the evidence to be admissible, the judge would have to make some sort of preliminary determination that the evidence had sufficient indicia of reliability to overcome the


See, e.g., Ganong, supra, footnote 61.

See Zimmerman, supra, footnote 63, at pp. 143-5.

Zimmerman, ibid., at pp. 143-4.

Zimmerman, ibid., at pp. 144-6.

Zimmerman, supra, the text accompanying footnotes 26-31.
risk that the triers of fact will place too much confidence in it (probably something similar to the determination that trial judges currently make with respect to hearsay evidence).\footnote{124}

It will be immediately apparent that this option is really just a more generalized version of the preceding four. Each one of those options is a particularized safeguard against the creation and admission of unreliable informant evidence, and the preceding discussion has largely assumed that it is the courts which will enforce those safeguards. The option under consideration here, however, would endow the court with a broader and more inclusive authority to prevent the admission of unreliable or prejudicial evidence. The court could consider all of the aforementioned factors (and more), and assign to each the weight that it deemed appropriate. This would obviously add some uncertainty to the law and endow trial judges with a discretion which they may not always wisely exercise. But it would also provide the greatest flexibility in the application of the appropriate legal principles, and permit judges to take in account the greatest number of variables.

The main difficulty with this option is that it has been specifically rejected by a Canadian appellate court. In the recent case of \textit{R. v. Buric},\footnote{125} the Ontario Court of Appeal was confronted with the situation where, in order to convince an accused person to turn state's evidence, the police showed the person large parts of the evidence implicating him and his co-accused. The trial judge found that the provision of so much information to the accused before he ever gave a statement tainted his evidence to the extent that he should not be allowed to testify. On appeal by the Crown, the Court of Appeal unanimously held that a trial judge has no power to exclude relevant evidence on the basis of its perceived unreliability. Mr Justice Laskin wrote: “Manifest unreliability, standing by itself, is not a sufficient reason to keep evidence from the jury.”\footnote{126}

One might also contend that this option for reform runs contrary to the spirit and development of our legal system. As the common law system has developed in England and Canada, the rules of evidence have generally adapted to allow more and more evidence to go to the jury.\footnote{127} This, in turn, has reflected a greater trust in the ability of juries to intelligently assess the evidence and come to the correct conclusion. Witness the comments of former Chief Justice Dickson in the context of a discussion about the exclusion of evidence of prior criminal convictions:\footnote{128}

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In my view, it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense. The jury is, of course, bound to follow the law as it is explained by the trial judge. Jury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to law. We should regard with grave suspicion arguments which assert that depriving the jury of all relevant information is preferable to giving them everything, with a careful explanation as to any limitations on the use to which they may put that information. So long as the jury is given a clear instruction as to how it may and how it may not use evidence of prior convictions put to an accused on cross-examination, it can be argued that the risk of improper use is outweighed by the much more serious risk of error should the jury be forced to decide the issue in the dark.
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There are those who may question this faith in the jury sys-

\footnotesize{126.} Ibid., at p. 123 C.C.C. Laskin J.A. was actually in dissent, but his comment cited in the text most succinctly reflects the court's position. For the basis of Laskin J.'s dissent, see infra text accompanying footnotes 155-37.

\footnotesize{127.} D.M. Paciero, “The Constitutional Right to Have Inherently Unreliable Evidence Excluded: Does It Exist?” in 	extit{Charter Principles and Proof in Criminal Cases} (1987), at 357-73. To take a simple example, persons who had an interest in the proceedings were historically considered incompetent to testify. This barrier has now been removed: see the Canada Evidence Act, R.S.C. 1985, c. C-35, s. 41.

and it may very well be appropriate to re-examine it in light of the evidence of the unreliability of jailhouse informants and the difficulties which juries have in assessing their testimony. However, this faith does currently permeate the Canadian justice system and any proposal for reform will have to appreciate that.

One may also have concerns about opening a Pandora's box should trial judges be empowered to exclude evidence of unreliable jailhouse confessions. There are several other areas of evidence, such as eyewitness identification, of which the courts have historically been highly suspicious. Courts may use their new-found powers to regulate the admission of such evidence absent detailed study as to the merits of so doing.

Other jurisdictions have granted courts some authority to exclude unreliable evidence. In the United States, for example, trial judges have the power to exclude unreliable eyewitness identification evidence in certain limited circumstances. Paciocco has analyzed these powers, however, and concluded that there is no general American constitutional right to the exclusion of inherently untrustworthy evidence. Britain, in turn, has statutorily empowered its trial judges to exclude confessional evidence which is rendered unreliable due to the actions of others, or when its admission would render the trial unfair. Although I have not found any specific authority on the point, it would appear as though both provisions may apply to jailhouse confessions.

In my opinion, serious consideration should be given to the option of granting trial judges some authority to exclude unreliable jailhouse confession evidence. Its advantages are clear, and it appears to be the only realistic means of supervising the creation and admission of such evidence. A separate government body might be established which has the power to oversee the handling of jailhouse informants, but unless it had the authority to control their use at trial, any directions that it gave could be ignored with impunity. Even if it did have such authority, it would be unfair to let the state have exclusive power to determine the use of jailhouse informants, and any proposal which allowed for input from accused would run the risk of being duplicative and overly time-consuming. This is not to say that such a body might not prove useful. It could act as a repository of information on jailhouse informants, as well as an agency which can educate state authorities on the handling of such informants. However, I doubt that it could effectively or efficiently control their abuses or ensure their reliability.

An argument worthy of consideration may be that suggested by Professor Paciocco and endorsed by Mr Justice Laskin in Buric. Paciocco examined numerous rules of evidence and determined that there is no general legal authority in Canada for the exclusion of unreliable evidence. The unreliability of the evidence is a factor considered under some rules, but it alone does not entirely explain the basis for any particular rule. The confession rule, for example, does not exclude all unreliable confessions, but only confessions that are the product of state action. What the rules of evidence (and the Charter) do countenance, however, is the exclusion of evidence the reliability of which the trial of fact is unlikely to be in a position to adequately assess. Paciocco calls this the "principle of protection", and suggests that it is a principle of fundamental justice.

The basis of Paciocco's argument is that a trial would be unfair "if it did not provide reasonable safeguards against the use of inaccurate evidence". If this is true, it may provide the basis for trial judges to adequately control the use of jailhouse informant testimony. Rules regulating the types of incentives offered to informants or the types of informants used at trial have as their goal the safeguard against the use of inaccurate

129. See, e.g., Mr Justice David Doherty, "Jury Instructions — Effective Communication or Elaborate Camouflage?" Summary, Tab B of the Criminal Lawyers' Association Education Programme (November, 1996).
131. White, supra, footnote 101, at pp. 133-5.
133. Police and Criminal Evidence Act, ss. 76(2)(b) and 78(1).
135. Paciocco, supra, footnote 127.
137. Ibid., at p. 358.
evidence. As such, trial judges may adopt those and other similar rules in order to ensure that the accused has a fair trial. The advisability of doing so, however, will depend on the evidence relating to the ability of the accused to assess jailhouse informant testimony adequately, and the ability of the accused to adduce evidence relevant to that assessment. This again raises the need for further review of those issues.

(10) Clothing Informants with a Presumption of State Action

The last option for reform which I will discuss is the idea of expanding the constitutional protections afforded accused persons by presuming jailhouse informants to be acting as agents of the state. As such, they would be subject to the same rules and restrictions which apply to more traditional agents.

This option is obviously born of the concerns mentioned above about the state being able indirectly to violate the rights of the accused, and to profit from the wrongdoing. It is premised on the idea that it is the state which places accused persons in a vulnerable position (in jail), the state which encourages jailhouse informants to abuse that position (by rewarding and enabling their behaviour), and the state which attempts to disassociate itself from such informants in order to evade the strictures of the Constitution and fair play. The argument is fully detailed above, and I will not repeat it here.134

The proposal would involve a redefinition of those who are considered to be state actors. Currently, jailhouse informants are not considered to be either state agents or persons in authority.139 The primary limits on state action, however, come from the law relating to state agents, undercover interrogation and the voluntary-confessions rule. Undercover state agents are currently restricted as to what they can and cannot do in order to obtain a statement from an accused; in particular, they are not permitted to actively elicit a statement from an accused.142 Jailhouse informants not acting under the cloak of state authority are not so constrained; they are free to use a much greater range of tactics to encourage an inmate to speak. Police officers and other persons in authority are not permitted to induce or coerce a confession.144 Jailhouse informants are permitted to offer such incentives to accused persons.142 This difference in treatment arises because no recognition is given to the fact that the factors leading to jailhouse confessions are the product of state action in the first place. Accordingly, any informant who obtained information from an accused in a state-regulated custodial facility should be presumed to be both a state agent and a person in authority, lest the safeguards against abuse imposed by the Constitution and the common law be rendered ineffective. The state should not be allowed to set up a system whereby it benefits from the activities of jailhouse informants, and even indirectly encourages their behaviour (through the reward system), yet disassociates itself from the informants until after the damage is done.

This proposal is the functional (if more limited) equivalent of the previous one; it aims to regulate the admission of informant evidence by empowering the courts with the authority to impose rules on the creation of the evidence (rules limiting informants to a passive and non-coercive role). As such, it benefits from many of the same advantages and suffers from many of the same problems. Chief amongst these problems is the fact that it does not reflect the current state of the law. As a general rule, a jailhouse informant is neither an agent of the state for the purposes of the Charter nor a person in authority for the purposes of the voluntariness rule.143 However, as far as I know, the courts have never seriously considered the premises upon which this option for reform is based,144 and

138. See Part I of this article at 40 C.L.Q. 106 at pp. 121-2, the paragraphs accompanying and following footnote 57.
140. Hebert, supra, footnote 117.
142. This may not always be true: e.g., R. v. Dementoff, [1964] 1 C.C.C. 118 (B.C.C.A.).
143. See the authorities cited, supra, in footnote 139. But see R. v. Dementoff, ibid.
144. This issue was litigated to some extent in Gray, supra, footnote 118.
there may be good reasons for them to do so. The premises underlying the option, to the extent that they are valid, would appear to support the proposition that informants only act as a result of and in accordance with state action. Does this not make them state agents? The evidence would also seem to show that jailhouse informants do have power over other inmates, both in the sense of physical power and in the sense of being able to influence the conduct of the prosecution (through their ability to fabricate evidence). To the extent that this power is the touchstone for defining persons in authority, a jailhouse informant might fit comfortably within the policy behind the voluntariness rule. I note further that both the United States and England seem to have recognized that any induced confession, however obtained, should be open to scrutiny; both have abandoned the "person in authority" requirement of the confessions rule. Further research into the validity of the premises underlying this option for reform, and the consequences of adopting it, is obviously warranted.

Conclusion

There are numerous options available for reforming the ways in which informants are used and dealt with in the criminal justice system. We could eliminate them entirely; we could set up obstacles to the admissibility or use of their evidence; we could endow accused persons with a greater ability to test their evidence; we could control the rewards they receive and the tactics they can employ. In this article I have not attempted to resolve the issue of how best to reform the system; our knowledge of the dangers of informant testimony,

145. Mr Justice Kaufman, Admissibility of Confessions in Criminal Matters, 3rd ed. (Toronto: Carswell, 1979), p. 81, posits that the true test for defining a person in authority is whether the accused truly believed, at the time he made the declaration, that the person he dealt with had some degree of power over him. This test includes the element of power, but is based upon the accused's subjective belief. As an accused may not realize the power which an informant has over him (see Rothman, supra, footnote 139), the test would have to be modified to include an objective element.


147. See, supra, footnote 143.

and the merits of the various options for reform, is still too rudimentary to come to definitive conclusions. I would suggest, however, that emphasis be placed upon reforms which attempt to control informants before they come to court. It is all too easy to focus upon the drama of the courtroom and the battle between lawyer and witness, and to forget that jailhouse informants are a product of the system in which they live and the incentives they are given.