

Informants, Rats, and Tattletales

Loyalty, Fear, and the Constitution

Gordon Mehler

1997

Police officers and prosecutors do more than solve crime: they destroy loyalty. To obtain evidence, they pressure business partners, life-long friends, and even family members to “rat” on each other by betraying secrets. In doing so, they routinely break apart the bonds that make people trustworthy. They also disregard a taboo.

We learn as children that it is wrong to tell on Johnny when he puts a pile of chalk dust on the teacher’s seat. As adults we understand that tattling undermines loyalty. General MacArthur recounts in his memoirs how he was almost thrown out of West Point after he refused to finger fellow cadets involved in a hazing incident. “My father and mother had taught me those two immutable principles,” he wrote, “never to lie, never to tattle.”

Crime is not chalk dust, but somehow the stigma of treachery hangs over any informant, from the cowardly quisling to the brave whistleblower. Even David Kaczynski, who furnished information in the Unabomber case that led to the arrest of his brother, was not universally hailed. Family loyalty was seen by some as a more important consideration than putting a serial bombing suspect out of commission.

The value we assign to loyalty places law enforcement in the anomalous position of sanctioning disloyalty and rewarding betrayal. Besides ruining specific relationships, cultivating informants arguably impairs a larger sense of societal trust. As U.S. District Judge Jack B. Weinstein put it: “[T]here seems to be a deep-seated need for strong personal ties and loyalties... [D]estroying these ties (through overuse of informers) creates grave problems for a society that can lose all sense of its humanity because its members lose much of their feelings for those near to them.”

Disloyalty inflames our strongest feelings because it threatens our deepest attachments: a spouse, a friend, a country, a cause, an ideal. We give our loyalty to things that matter most, and when two-timing or double-crossing threatens to unravel that to which we are devoted, the reaction is usually furious. Why then must law enforcement exploit such nasty instincts in pursuit of justice? Indeed, why does law enforcement seem so dependent on informants?

* * *

Part of the reason informants are necessary is that it is difficult to find witnesses willing to speak up on their own. Fear, rather than loyalty, is often the primary reason people choose to say nothing when they know a crime has been committed.

In the old days, a corpse with a canary stuffed in its mouth was a way of planting fear in city shopkeepers, shaken down by protection rackets, who thought of going to the police. Today, as the urban poor step on crack vials that litter their hallways and debilitate their already fragile communities, it still takes unusual courage for them to turn in their drug-dealing neighbors because the same type of fear races through them.

Fear of informing involves more than the threat of bodily harm, and extends beyond the criminal justice system. Take the West Point honor code, which says, “A cadet will not lie, cheat or steal, nor tolerate those who do.” The non-toleration rule mandates

informing on other cadets, but a special commission appointed by the army found that, like MacArthur, cadets routinely violate the rule. Loyalty provides a partial excuse, but it is also fear — fear of the abuse they will encounter and fear of being judged by those they may have to rely on some day in combat. Soldiers are no different in this regard from police officers themselves, who often form a “blue wall of silence” when it comes to reporting corrupt colleagues.

Providing an anonymous tip on a fugitive spotted at a shopping center by calling variants of the America’s Most Wanted hotline is now a socially accepted method of informing. It is popular because it is not intimidating. Contrast this with the caller who agrees to identify a defendant in a lineup and meet that defendant’s gaze from the witness stand, and informing is suddenly transformed into a lonely and difficult act.

Apart from the fear that prevents some witnesses from coming forward, and the loyalty that impedes others, the Constitution furnishes a third — and perhaps the most important — reason law enforcement frequently relies on informants. To safeguard our freedoms, the Constitution has erected barriers between the people who work to uncover crime and the evidence they seek. The police cannot search homes on a mere hunch of criminality or arrest suspects and interrogate them at will. These are formidable restrictions. In virtually every other context, people are required to justify their behavior and are penalized if they refuse to do so. When cashiers will not account for missing money, they are fired. Under our criminal laws, however, the defendant is cloaked with a presumption of innocence and a right to remain silent. Because the truth cannot be extracted from defendants themselves, it often must be extracted from informants who know them. Constitutional liberties have their costs, and one of them is that law enforcement must develop informants to help gather evidence, though personal loyalties may be dismantled in the process.

American courts have little patience for personal loyalties when they conflict with the needs of law enforcement. They take a different view from Sophocles who, in his play *Antigone*, resolved a woman’s conflict between her duty to the Greek state and her loyalty to her brother in favor of her brother. Starting from the principle that a court is entitled to the benefit of every person’s evidence because the pursuit of truth in legal proceedings is a paramount public concern, American courts in effect have subordinated personal loyalty and created a duty to inform. When witnesses are subpoenaed to testify, they must take the stand and tell all, or risk being held in contempt of court. Even First Amendment claims based on religious scruples against informing are not honored.

The only people excused are those who can claim a legally-sanctioned privilege to withhold testimony, such as the Fifth Amendment privilege against self-incrimination. Witnesses can invoke the Fifth Amendment just as defendants can, but prosecutors can overcome this privilege. If the witnesses whose testimony is sought will not be charged or already have been convicted, the prosecution can grant them immunity. Once witnesses receive immunity from prosecution, the protection of the Fifth Amend-

ment disappears. Then a judge can order them to talk or go to jail until they are ready to talk.

Spouses, lawyers, doctors, psychotherapists, members of the clergy, and journalists can have privileges, too, which prevent disclosure of confidential information imparted to them in a professional capacity. The idea behind these privileges is that the protection of certain relationships is so important that it transcends the imperative of truth-seeking. To facilitate sound advice and treatment, we want people to confide freely in their lawyers and doctors. We are concerned about loyalty in marriage, and so we exempt spouses from giving testimony against one another. But courts take a hard line on privileges. In the words of the Supreme Court, “[t]hey are not lightly created nor expansively construed for they are in derogation of the search for truth.” Thus, parents, children, and siblings must inform on each other if ordered to do so.

In reality, upsetting the loyalty of family members by compelling them to testify against each other is quite rare and, in line with the policy of most prosecutors’ offices, requires extraordinary circumstances. But the fact that courts have not established parent-child or sibling privileges partly reflects their evaluation of loyalty. It suggests that loyalty can be misguided, that it can foster harm if directed to evil ends. Mafia members place allegiance to their crime “family” above their allegiance to the law. Concerted criminal activity is especially ominous when cemented by strong personal bonds.

The destruction of loyalty is perhaps the most interesting problem engendered by the use of informants, but it is hardly the only one. An equally serious problem is that prosecutors must strike bargains with informants of all stripes, from the bounty hunter who responds to a wanted poster at the police station to the ex-girlfriend for whom a trip to the grand jury is the best revenge. Virtually all informants are welcome because law enforcement cannot afford to be picky in developing leads that will ferret out crime.

Most informants are criminals themselves because, frequently, they are the only eyewitnesses to criminal activity. One of the most effective ways to infiltrate underworld organizations is to give their members incentives to squeal on each other. Informants who are accomplices to a crime assist the prosecution out of a shifting, uncertain blend of self-interest and remorse. Like the bounty hunter, they want rewards for their cooperation, usually in the form of leniency. This, in turn, provides the impetus not only to betray others but also to exaggerate or even fabricate testimony.

But accomplices make problematic trial witnesses even when their testimony is corroborated. Defense lawyers eagerly exploit the public’s inbred hostility toward those whose crimes are compounded by opportunistic disloyalty. “The prosecutor,” goes their standard argument to the jury, “is desperate to use any morsel of proof, no matter how rotten, to convict my client. Why else would she make a sweet deal with a skunk like this, someone who would frame his own mother for thirty pieces of silver?”

Generally, there is little choice. “Crimes are not committed in heaven,” prosecutors are wont to say in rebuttal, “and so our witnesses are not angels.” The prosecution must

recruit rogues as informants for reasons alluded to previously: choir boys are rarely invited to gangland get-togethers; the Constitution forbids compulsory self-incrimination; and innocent bystanders, if there are any, are often too afraid or too loyal to report what they see and hear.

Nevertheless, if making people betray each other is an unpleasant but inescapable reality of criminal justice, it is not always excusable. Informing takes on a different twist, for example, in an unjust regime. Using informants to turn dissidents over to Saddam Hussein does not promote justice; it perpetuates tyranny. During the communist witch-hunts of the 1950's, the House Un-american Activities Committee used informants in a similar manner: to oppress an unpopular minority under the guise of law enforcement, which is not the same as using them to aid a legitimate criminal investigation. Thus, just as the almost reflexive sense of revulsion that informing generates obscures the divergent objectives that loyalty serves, it also overlooks the different sets of circumstances under which informants can be employed.

Obviously, the importance and reliability of the information, the seriousness of the crime and the incentive offered to cooperate are primary considerations in assessing potential informants. But the danger of reprisal and the impact of subverting personal loyalties must also be factored into the decision. Compelling a man to give up his sister for driving with a suspended license while out on bail is different from requiring that he turn her in before she repeats an act of terrorism. Striking the right balance on informants is a judgment call, but then justice depends on good judgment.

Gordon Mehler is Chief of Special Prosecutions at the United States Attorney's Office for the Eastern District of New York. The opinions expressed in this article are his own and do not necessarily reflect the policies or views of the United States Department of Justice.

Frank Anechiarico and James B. Jacobs, *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Effective*. (Chicago: The University of Chicago Press, 1996) xvii + 274 pp.

Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline*. (New York: HarperCollins, 1996) xiv + 382 pp.

Lena Dominelli, Lennie Jeffers, Graham Jones, Sakhile Sibanda, and Brian Williams, *Anti-Racist Probation Practice*. (Aldershot, England, 1995)

Donald Alexander Downs, *More Than Victims: Battered Women, The Syndrome Society, and The Law*. (Chicago: The University of Chicago Press, 1996) xi + 309 PP.

- Kevin E. Early (ed.), *Drug Treatment Behind Bars: Prison-Based Strategies for Change*. (Westport: Praeger Publishers, 1996) xviii + 176 pp.
- Catherine Z. Elgin, *Considered Judgment*. (Princeton: Princeton University Press, 1997) ix + 230 pp.
- Aleksandar Fatic, *Punishment and Restorative Crime-Handling: A Social Theory of Trust*. (Aldershot, England: Avebury, 1995) xi + 281 pp.
- William A. Geller and Hans Toch, *Police Violence: Understanding and Controlling Police Abuse of Force*. (New Haven: Yale University Press, 1996) x + 379 pp.
- Stephen J. Giannangelo, *The Psychopathology of Serial Murder: A Theory of Violence* (Westport: Praeger Publishers, 1996) x + 122 pp.
- J. F. Holden-Rhodes, *Sharing The Secrets: Open Source Intelligence and the War on Drugs*. (Westport: Praeger Publishings, 1997) xii + 235 pp.
- Michael D. Kelleher, *New Arenas for Violence: Homicide in the American Workplace*. (Westport: Praeger Publishers, 1996) xiii + 193 pp.
- John Kleinig (ed.), *Handled with Discretion: Ethical Issues in Police Decision Making*. (Lanham: Rowman & Littlefield, 1996) 220 pp.
- Jeffery M. Leving with Kenneth A. Dachman, *Fathers' Rights: Hard-Hitting and Fair Advice for Every Father Involved in a Custody Dispute*. (New York: Basic Books, 1997) xiii + 222 pp.
- Patrick Du Phuoc Long with Laura Ricard, *The Dream Shattered: Vietnamese Gangs In America*. (Boston: Northeastern University Press, 1996) xii + 250 pp.
- Avishai Margalit, *The Decent Society*. (Cambridge, MA: Harvard University Press, 1996) xi + 304pp.
- Peter Mass, *Underboss: Sammy the Bull Gravano's Story of Life in the Mafia*. (New York: Harper Collins Publishers, 1997) 301 pp.
- John B. Miner and Michael H. Capps, *How Honesty Testing Works*. (Westport: Quorum Books, 1996) viii + 190 pp.
- Ellen H. Moskowitz and Bruce Jennings, *Coerced Contraception? Moral and Policy Challenges of Long-Acting Birth Control*. (Washington, DC: Georgetown University Press, 1996) xii + 225 pp.
- Kathleen A. O'Shea and Beverly R. Fletcher, *Female Offenders: An Annotated Bibliography*. (Westport: Greenwood Press, 1997) xiv + 264 pp.
- Randall G. Rogan, Mitchell R. Hammer, and Clinton R. Van Zandt, *Dynamic Process of Crisis Negotiation: Theory, Research, and Practice*. (Westport: Praeger Publishing, 1997) xii + 200 pp.
- A. P. Simester and A. T. H. Smith, *Harm and Culpability*. (Oxford: Clarendon Press, 1996) viii + 280 pp.
- Thomas Szasz, *The Meaning of Mind: Language, Morality, and Neuroscience*. (Westport: Praeger Publishing, 1996) x + 182 pp.
- Henry Tam, *Punishment, Excuses and Moral Development*. (Aldershot: Avebury, 1996) x + 195 pp.

Susann Walens, *War Stories: An Oral History Of Life Behind Bars*. (Westport: Praeger Publishing, 1997) viii + 184 pp.

David Wagner, *The New Temperance: The American Obsession with Sin and Vice*. (Boulder CO: Westview Press, 1997) x + 226 pp.

Brian Williams, *Probation Values*. (Birmingham, England: Venture Press, 1995)

Vergil L. Williams, *Dictionary of American Penology: A Revised and Expanded Edition*. (Westport: Greenwood Press, 1996) xii + 488 pp.

The Ted K Archive

Gordon Mehler
Informants, Rats, and Tattletales
Loyalty, Fear, and the Constitution
1997

Criminal Justice Ethics, Volume 16, Issue 1, Pages 2, 57 & 58.
<doi.org/10.1080/0731129X.1997.9992022>
Institute for Criminal Justice Ethics, Gale, Cengage Learning.

www.thetedkarchive.com