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# Best Interests of the Child--Scrutinizing California's Use of Minors As Police Informants in Drug Cases, The

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**“The Best Interests of the Child”—Scrutinizing California’s Use of Minors as Police Informants in Drug Cases**

Michael R. Santiago\*

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\* J.D., University of the Pacific, McGeorge School of Law, to be conferred 2000; B.S., Psychology, University of California, Davis, 1997. I would like to thank my mother, Erlinda Santiago, father, Franklin Santiago, and Ate “Vi” for their enduring love, support and patience. Thanks also to my friends who have been with me through it all—especially JSP, RP and KG. (*Maraming Salamat Sa Inyong Lahat.*)

January 2, 1998, marked the beginning of the end for seventeen-year-old Chad MacDonald. After being pulled over for a traffic violation, police found eleven grams of methamphetamines in his car.<sup>1</sup> Chad was arrested, taken to the police station, and given a choice: either face a prison sentence and a criminal record, or work for the police department as a drug informant in return for a clean slate.<sup>2</sup> Reluctantly, Chad and his mother chose the latter option, unaware that a third alternative was available for first time offenders like Chad—enrollment in a drug rehabilitation program.<sup>3</sup>

For almost two months, Chad assisted California's Brea Police Department by wearing a wire while making undercover drug buys.<sup>4</sup> Although his efforts led to several arrests, he was not able to score any of the bigger drug busts.<sup>5</sup> Even though police officials were aware that Chad had a reputation on the streets for using and dealing drugs, they allowed him to continue working for them.<sup>6</sup> On February 19, 1998, Chad was dropped as an undercover operative when police discovered he was again in possession of methamphetamines, but the damage was already done.<sup>7</sup> Word circulated on the streets that Chad was working for the police as a "narc."<sup>8</sup> In the following days, he received numerous death threats, and was even attacked after discovering that his car was vandalized.<sup>9</sup> On March 1, 1998, Chad headed for a reputed drug house in Norwalk, California, in an effort to obtain that elusive "big" drug bust for Brea police detectives.<sup>10</sup> It was at this house that Chad was strip-searched by three individuals who accused him of being a "narc."<sup>11</sup> Two days later—a week before his eighteenth birthday—Chad's tortured and battered body was found in an alley.<sup>12</sup>

## I. INTRODUCTION

Abuse among minors of legal drugs such as tobacco and alcohol, as well as illegal drugs such as cocaine and other narcotics, has risen steadily since the early

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1. Deborah Hastings, *Teen's Tragic Death Uncovers the Dark Side of His Life*, SAN DIEGO UNION-TRIB., Apr. 11, 1998, at A3.

2. Scott Martelle & Bonnie Hayes, *Chad MacDonald's Short, Tragic Life*, L.A. TIMES, Apr. 5, 1998, at A1.

3. *Id.*; cf. Michael G. Wagner & Davan Maharaj, *California and the West, Scrutiny Grows over Use of Young Informants*, L.A. TIMES, Mar. 26, 1998, at A3 (reporting that first-time offenders in the juvenile justice system usually receive "light punishment").

4. Martelle & Hayes, *supra* note 2, at A1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Dateline* (NBC Television broadcast, Oct. 12, 1998).

10. Martelle & Hayes, *supra* note 2, at A1.

11. *Id.*

12. *Id.*

1990s.<sup>13</sup> In an effort to apprehend those who supply minors with drugs, law enforcement agencies have employed minors as informants.<sup>14</sup>

An “informant” is a person who collects and relays information to a law enforcement agency.<sup>15</sup> Although informants are not government-trained undercover law enforcement agents,<sup>16</sup> informants usually do more than just supply information—they also engage in undercover “sting” operations.<sup>17</sup> Informants may be financially remunerated for their services; more often than not, however, they are given leniency or immunity regarding any outstanding charges against them, in exchange for information.<sup>18</sup> Of all the possible motives that a minor may have for becoming a police informant,<sup>19</sup> avoiding punishment for a past offense is the primary reason minors assist law enforcement agencies in alcohol, tobacco and drug related cases—as evidenced by the case of seventeen-year-old Chad MacDonald.<sup>20</sup>

Arguably, the dangers involved with using minor informants in alcohol and tobacco trafficking cases are relatively low as compared to using minors in illegal drug trafficking cases, which involve an inherently higher risk of both physical and mental harm.<sup>21</sup>

Some argue that using minors as informants in drug cases is a “necessary evil.”<sup>22</sup> However, considering the detrimental effects such employment has on

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13. See Lee Sinclair & David L. Herbert, *The Use of Minors in Law Enforcement Undercover Operations*, 24 OHIO N.U. L. REV. 31, 31-32 (1998) (noting that studies conducted by the U.S. Bureau of Justice report an increasing trend in minors’ use of alcohol, tobacco products, and illegal drugs).

14. *Id.*

15. Evan Haglund, *Impeaching the Underworld Informant*, 63 S. CAL. L. REV. 1405, 1408 (1990); see also Thomas A. Mauet, *Informant Disclosure and Production: A Second Look at Paid Informants*, 37 ARIZ. L. REV. 563, 563 n.1 (1995) (defining an informant as one “who voluntarily furnish[es] information of violations of the law to law enforcement officials”).

16. See Sinclair & Herbert, *supra* note 13, at 34 (stating that “an informant is not a law enforcement officer, but rather an individual used to gain information and access into certain criminal groups”).

17. See *id.* at 32-34 (noting that minor informants have been used in undercover “sting” operations to apprehend merchants selling tobacco and alcohol products to children).

18. See MALACHI L. HARNEY & JOHN C. CROSS, *THE INFORMER IN LAW ENFORCEMENT* 52-53 (1960) (observing that police officers can promise informants that their actions will be brought to the attention of the prosecutor or the court); Wagner & Maharaj, *supra* note 3, at A3 (noting that informants are compensated either with money or by receiving a lighter sentence for a recent arrest).

19. See Gregory D. Lee, *Drug Informants: Motives, Methods, and Management*, F.B.I. LAW ENFORCEMENT BULLETIN, Sept. 1993, at 10-11 (listing the following reasons for becoming an informant: (1) fear of punishment for one’s past criminal acts; (2) fear that one’s criminal associates are “out to get [him or her]”; (3) revenge against one’s enemies; (4) monetary compensation; and (5) repentance).

20. Martelle & Hayes, *supra* note 2, at A1.

21. See HARNEY & CROSS, *supra* note 18, at 54 (noting that special risks are involved with informants in narcotics cases; the informant may be addicted to drugs and continue using them during times of cooperation with law enforcement agencies, and law enforcement agencies may be contributing to an informant’s drug habits by giving an informant drugs for a “buy”); Sinclair & Herbert, *supra* note 13, at 35 (inspecting the risk factors involved in the use of minor informants in drug cases, as opposed to their use in tobacco or alcohol cases); Tini Tran & Bonnie Hayes, *Son’s Work as Informant Led to Death Crime*, L.A. TIMES, Mar. 23, 1998, at A1 (stating that narcotics investigations, by their very nature, are inherently dangerous).

22. Mark Curriden, *Making Crime Pay*, 77 A.B.A. J. 42, 44 (1991).

minors,<sup>23</sup> coupled with the fact that alternative methods of apprehending drug traffickers exist,<sup>24</sup> law enforcement agencies should be convinced that children should not be placed in any type of danger in order to fight the war against drugs.<sup>25</sup> Police officers and other members of law enforcement must remember that they have a fundamental duty not only to serve humankind, but also to safeguard lives.<sup>26</sup> This unquestionably includes a duty to protect the lives of children.<sup>27</sup>

In recognition of the policy to protect children and prevent such incidents as the tragic death of Chad MacDonald, California has recently enacted legislation that attempts to control the practice of using minors as informants.<sup>28</sup> Part II of this Comment will examine the effectiveness of this new law<sup>29</sup> and Part III will explore the potential problems that this recently enacted legislation fails to address.<sup>30</sup> This Comment concludes in Part IV that the practice of using minors as informants in drug cases should be abolished.<sup>31</sup> In light of the inherent dangers in this type of work, public policy directs not only society, but also law enforcement officials, to protect children and avoid exposing them to potentially life-threatening situations.<sup>32</sup>

## II. THE USE OF MINOR INFORMANTS IN CALIFORNIA

Chad MacDonald's death attracted the attention of not only the public and the media, but also of the California Legislature. California's AB 2816 was proposed

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23. See James Blair, *Ethics of Using Juvenile Informants*, CHRISTIAN SCI. MONITOR, Apr. 14, 1998, at 3 (endorsing a ban on using minors as informants because minors are at risk of serious, physical injury, and being an informant teaches children that winning someone's trust and then betraying it is an acceptable practice); Wagner & Maharaj, *supra* note 3, at A3 (noting that using minors as informants not only physically endangers children, but is also detrimental to rehabilitating minors who have substance abuse problems).

24. See GERALD M. CAPLAN, *ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT* 139-40 (1983) (listing the following alternatives to obtaining evidence in certain crimes such as drug trafficking: utilizing visual and electronic surveillance, obtaining search warrants, using testimony of co-conspirators, and apprehending criminal defendants in the act).

25. See Andrew N. Sacher, Note, *Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield*, 19 CARDOZO L. REV. 1149, 1149 (1997) (stating that "America's 'War on Drugs' commenced in 1982").

26. See RICHARD KOBETZ, *THE POLICE ROLE AND JUVENILE DELINQUENCY* 225 (1971) (noting that the International Association of Chiefs of Police Law Enforcement Code of Ethics states that police officers have the "fundamental duty to serve mankind . . . [and] to safeguard lives"); JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 245 (1993) (observing that the following statement can be found in almost every police department's manual: "The primary job of the police is to protect life").

27. See Stuart Pfeifer & Martin Wiskol, *Legislature OK's Limit On Informants*, ORANGE COUNTY REG., Aug. 29, 1998, at B1 (quoting Assemblyperson Scott Baugh, who declared that children should not be put "in harm's way to fight our war on drugs").

28. 1998 Cal. Legis. Serv. ch. 833, sec. 1-2, at 4273 (enacting CAL. PENAL CODE § 701.5).

29. See *infra* Part II (analyzing California's Chapter 833).

30. See *infra* Part III (discussing how law enforcement officials are essentially engaging in unlawful activities when utilizing minors as informants).

31. See *infra* Part IV (concluding that minors should not be used as drug informants).

32. See *infra* Part IV (arguing that the use of minors as drug informants is contrary to the state's interest in protecting children).

in direct response to Chad's death and was eventually codified in California's Penal Code.<sup>33</sup> Although this new law addresses the issue of when a minor may be used as an informant, it does nothing to protect the minors who actually become informants, sent out to associate with drug dealers and users in drug-infested environments.<sup>34</sup>

### A. Chapter 833

In an effort to protect minor informants from the tragic fate that befell Chad MacDonald, California recently enacted Chapter 833.<sup>35</sup> This Chapter amends California law by establishing guidelines and restrictions relating to the use of minor informants.<sup>36</sup> Peace officers and their agents<sup>37</sup> are prohibited from using any minor under twelve years of age as an informant,<sup>38</sup> and are strictly limited in using minors between the ages of thirteen and seventeen. Additionally, a court order granting authorization is required before any minor may be used as an informant.<sup>39</sup>

The factors that the court is to consider before granting such authorization include the following: (1) the age and maturity of the minor; (2) the gravity of the minor's alleged offense; (3) the safety of the public; and (4) the interests of justice, which includes considerations as to whether the agreement to act as a minor informant is made voluntarily, knowingly, and intelligently.<sup>40</sup> Furthermore, before the court grants such authorization to obtain consent from the minor's parent or guardian, the court is also required to inform and advise the minor about the benefits of cooperating with law enforcement officials, and the mandatory minimum and maximum sentences for his or her offense.<sup>41</sup>

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33. CAL. PENAL CODE § 701.5 (West Supp. 1999).

34. See *infra* Part II.B (noting the limited extent to which this law protects minors who become informants).

35. 1998 Cal. Legis. Serv. ch. 833, sec. 1-2, at 4273 (enacting CAL. PENAL CODE § 701.5); see SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2816, at 6 (Aug. 25, 1998) (stating that the primary purpose of this bill is "to ensure that minors are no longer placed in a position of danger by being used as informants").

36. See CAL. PENAL CODE § 701.5(e) (West Supp. 1999) (defining a minor informant as: a minor who participates, on behalf of a law enforcement agency, in a prearranged transaction or series of prearranged transactions with direct face-to-face contact with any party, when the minor's participation in the transaction is for the purpose of obtaining or attempting to obtain evidence of illegal activity by a third party and where the minor is participating in the transaction for the purpose of reducing or dismissing a pending juvenile petition against the minor).

37. See CAL. PENAL CODE § 830.1 (West Supp. 1999) (listing those who are considered peace officers).

38. CAL. PENAL CODE § 701.5(a) (West Supp. 1999).

39. *Id.* § 701.5(b). A minor between the ages of 13 and 17 may be used as an informant pursuant to California Business and Professions Code section 22950, the "Stop Tobacco Access to Kids Enforcement Act," when peace officers utilize minors to apprehend retailers illegally selling tobacco products to minors. *Id.*

40. *Id.* § 701.5(c).

41. *Id.* § 701.5(d).

B. *Opposition to Chapter 833*

Opponents of Chapter 833 argue that this Chapter actually exposes minors to even more danger because drug dealers, knowing that using any minor under twelve as an informant would be illegal, would actively seek out minors under the age of twelve to participate in illegal drug activities.<sup>42</sup> Opponents also argue that this Chapter eliminates an important resource in the fight against not only drugs, but other crimes as well.<sup>43</sup> Furthermore, under Chapter 833, minors who freely agree to engage in the practice of informing<sup>44</sup> would no longer receive the benefits police informants typically receive—immunity, favorable treatment from other governmental agencies, and leniency in arrest and booking procedures, the filing of charges, the reduction of charges, and sentencing.<sup>45</sup>

Lastly, opponents of Chapter 833 argue that even if this Chapter were in effect at the time Chad MacDonald agreed to become an informant, the protection it provides would not have saved his life.<sup>46</sup> The consent agreement he and his mother signed indicated that his undercover work was to be authorized and supervised by the police department.<sup>47</sup> On the day he was killed, Chad apparently had neither supervision nor authorization from the Brea Police Department.<sup>48</sup> Thus, because Chapter 833 deals primarily with the decisions a minor must consider in order to

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42. See, e.g., ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2816, at 9 (June 30, 1998) (noting that the San Diego County District Attorney's Office stands in opposition to AB 2816); see also, e.g., Heather Lourie, *O.C. Police Officials Back Bill*, ORANGE COUNTY REG., July 8, 1998, at A4 (noting one of the "unintended" consequences of AB 2816—drug dealers actively seeking out informant-immune minors to execute drug deals); Letter from Greg Thompson, Assistant District Attorney, Office of the District Attorney, County of San Diego, to Assembly Member Scott Baugh (June 3, 1998) (on file with the *McGeorge Law Review*) (indicating the San Diego District Attorney's Office's opposition to AB 2816).

43. See, e.g., Letter from Alva S. Cooper, Legislative Advocate, California State Sheriff's Association, to Assembly Member Scott Baugh (April 23, 1998) (on file with the *McGeorge Law Review*) (advocating the California State Sheriff's Association's opposition to AB 2816).

44. See Stuart Pfeifer & Tony Saavedra, *Baugh: No More Juvenile Agents*, ORANGE COUNTY REG., Mar. 25, 1998, at A1 (explaining that juvenile confidential informants are not recruited, but rather end up cooperating with law enforcement agencies because a prior or current arrest has brought them in contact with the agencies).

45. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2816, at 3 (June 30, 1998).

46. See *id.* at 6 (suggesting that even if AB 2816 were in effect at the time Chad MacDonald agreed to become an informant, it would not have prevented his death). The Brea Police Department argues that because no police officers were present when Chad was killed, he was not working under the direct supervision of an officer of the Brea Police Department, and he therefore violated the supervision requirement in his signed consent agreement. *Id.*

47. See Kim Christensen & Stuart Pfeifer, *Saga Starts with Expired Car Tag, Ends in Tragedy*, ORANGE COUNTY REG., Apr. 2, 1998, at B6 (replicating a copy of the consent form Chad and his mother signed).

48. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2816, at 6 (June 30, 1998) (noting that "MacDonald did not appear to be working with any member of the Brea Police Department the day he was killed"); see also *Teen-Age Informants*, ORANGE COUNTY REG., Sept. 21, 1998, at B8 (recognizing that Brea Police Chief Bill Lentini stressed that before the day of Chad's death, the Brea Police Department "severed [its] relationship" with him); *Minors as Informants*, ORANGE COUNTY REG., July 7, 1998, at B6 [hereinafter *Minors as Informants*] (reporting that Chad was not "working for the cops the day . . . he went to an alleged drug house in Norwalk and was beaten and killed").

become an informant, Chapter 833 does nothing to protect a minor informant who engages in some form of drug-investigatory activities absent authorization and supervision from law enforcement officials.<sup>49</sup> Therefore, a minor acting outside the confines of his or her cooperation agreement, but with the intent to assist law enforcement officials, would not be protected from harm under Chapter 833.

### C. Support for Chapter 833

Proponents of Chapter 833 argue that the restrictions the new law places on the use of minors as informants are necessary to protect minors from harmful situations.<sup>50</sup> Chapter 833's aim is to ensure the safety of minors, as evidenced by the many factors a court is to consider before allowing a minor to become a police informant.<sup>51</sup> Because many police departments do not currently utilize minors as informants, proponents argue that this Chapter does not prevent police departments from doing their jobs.<sup>52</sup> The new law's focus pertains only to police use of minors as informants, and does not affect other police methods of apprehending drug traffickers.<sup>53</sup> Therefore, Chapter 833 is a "step in the right direction" in the war against drugs.<sup>54</sup>

By requiring the consent of both the court and the minor's parent or guardian, Chapter 833 makes an admirable attempt to prevent the deaths of minors placed in the position that Chad MacDonald once occupied.<sup>55</sup> However, even with Chapter

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49. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2816, at 6 (June 30, 1998) (explaining that minor informants who act without police authorization or supervision are not protected by this new law).

50. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2816, at 3-4 (July 21, 1998) (emphasizing that teenagers should not be put "in harm's way to compensate for society's failure to interdict drug trafficking . . . We should not use minors in situations where they can be harmed or killed"); *Orange County Perspective: Limits for Juvenile Informants*, L.A. TIMES, Oct. 4, 1998, at B6 [hereinafter *Orange County Perspective*] (noting that AB 2816 "will spare at least some youngsters unnecessary risks"); Letter from Conni Barker, Director of Government Relations, California Psychiatric Association, to Assembly Member Scott Baugh (Aug. 4, 1998) (on file with the *McGeorge Law Review*) (identifying the physical and mental danger with using "minors as informants in any kind of criminal investigation other than alcohol and cigarette purchases").

51. See CAL. PENAL CODE § 701.5(c) (West Supp. 1999) (setting forth the factors that a court is to consider before granting police departments authorization to use a minor as a police informant).

52. See *Lourie*, *supra* note 42, at A4 (setting forth the Huntington Beach Police Department's view that AB 2816 will not hinder police officers' "ability to do what they need to do"); *Orange County Perspective*, *supra* note 50, at B6 (recognizing that because a number of police departments in Orange and Los Angeles counties have not used minors as informants, AB 2816 would "not impose overly harsh restrictions on law enforcement"); see also SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2816, at 4 (July 21, 1998) ("[T]his bill does not ban the use of all teenage informants but requires judicial oversight for their use.").

53. CAL. PENAL CODE § 701.5 (West Supp. 1999).

54. *Minors as Informants*, *supra* note 48, at B6; see Eric Bailey, *Law Signed Limiting Use of Youth Informants*, L.A. TIMES, Sept. 26, 1998, at B4 (quoting Assembly member Baugh as saying, "There's absolutely no need to fight the war on drugs with children").

55. See *supra* notes 50-54 and accompanying text (providing support for the promulgation and enactment of Chapter 833).



833 in effect, the safety and legality of using minors as informants is still questionable.<sup>56</sup>

### III. ADDRESSING THE PROBLEMS WITH CHAPTER 833 AND USING MINORS AS POLICE INFORMANTS

Law enforcement officials and agencies that utilize minors as informants agree that use of juvenile informants can be an effective tool in combating the war against drugs.<sup>57</sup> However, these officials and agencies must also realize that by using minors as informants, they are violating California statutes pertaining to contributing to the delinquency of a minor and sending minors to immoral places.<sup>58</sup> Furthermore, the possibility exists that law enforcement informant employment contracts with minors will be held unenforceable on the basis of California's labor and employment statutes, and for violating public policy.<sup>59</sup>

#### A. *Contributing to the Delinquency of a Minor*

##### 1. *Mens Rea Is Not Required*

Some of the nation's first "contributing to the delinquency of a minor" statutes (contributing statutes) were enacted during the early 1900s.<sup>60</sup> The stated purposes of these statutes ranged from preventing juvenile delinquency<sup>61</sup> to providing safeguards for minors who were deemed "immature" in regards to mental and physical capabilities.<sup>62</sup> Because "contributing to the delinquency of a minor" is an extremely broad concept, contributing statutes vary from jurisdiction to jurisdiction.<sup>63</sup> In California, section 272 of the Penal Code<sup>64</sup> makes contributing to the delinquency of a minor—a person under the age of eighteen years—a

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56. See *infra* Part III (discussing the safety and legal issues of the continued use of minors as police informants irrespective of Chapter 833's passage).

57. Curriden, *supra* note 22, at 44.

58. See *infra* Part III.A-B (explaining how the use of minors as informants violates California's statutes prohibiting these activities).

59. See *infra* Part III.C.2 (addressing the illegality of employing minors as drug informants).

60. Gilbert Geis, *Contributing to Delinquency*, 8 ST. LOUIS U. L.J. 59, 59-66 (1963).

61. Derryck H. Dittman, *Contributing to Delinquency Statutes—An Ounce of Prevention?*, 5 WILLAMETTE L.J. 104 (1968).

62. Geis, *supra* note 60, at 62.

63. See *id.* at 65 (defining the broad phrase of "contributing to delinquency" as involving "conduct towards a child in an unlimited variety of ways which tends to produce or to encourage or to continue conduct of the child which would amount to delinquent conduct").

64. California Penal Code section 272 was formerly located in California's Welfare and Institutions Code under section 702. 1961 Cal. Legis. Serv. ch. 1616, sec. 1, at 3459 (amending CAL. WELF. & INST. CODE § 702).

misdemeanor.<sup>65</sup> This section applies to any person who commits an act which causes or tends to cause a minor to come within certain provisions of the Welfare and Institutions Code dealing with minors who are adjudged "wards of the court."<sup>66</sup>

In interpreting section 272 of the Penal Code, California courts have recognized that when the morals and welfare of a minor are at stake, public policy demands deviation from the general rule<sup>67</sup> which requires mens rea as an element essential in the conviction of a person of a crime. Thus, no mens rea requirement exists for contributing to the delinquency of a minor.<sup>68</sup> By adopting this policy, California adheres to the majority view that conviction of any person for contributing to the delinquency of a minor does not require a showing that the minor actually became a delinquent.<sup>69</sup> California courts state that because the main purpose of juvenile law is to prevent the delinquency of children,<sup>70</sup> evidence of acts or omissions by a

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65. See CAL. PENAL CODE § 272 (West 1988) (stating that the statute applies to any person who commits an act which

causes or tends to cause or encourage any person under the age of 18 years to come within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code or . . . induces or endeavors to induce any person under the age of 18 years . . . to do or perform any act or to follow any course of conduct or to so live as would cause or manifestly tend to cause such person to become or to remain a person within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code).

66. *Id.*; see CAL. WELF. & INST. CODE § 300 (West Supp. 1999) (describing situations wherein a minor becomes a "ward of the court": when the minor has suffered or risks suffering physical injury either: (a) inflicted non-accidentally upon the minor by the parent or guardian; or (b) resulting from his or her parent's or guardian's failure to adequately supervise or protect the minor); *id.* § 601 (West 1988) (acknowledging the fact that minors who are habitually disobedient or truant are "within the jurisdiction of the juvenile court which may adjudge the minor to be a ward of the court"); *id.* § 602 (West 1988) (declaring that any minor who violates any law or ordinance "is within the jurisdiction of the juvenile court, which may adjudge the person to be a ward of the court").

67. See James N. Kourie, Annotation, *Mens Rea or Guilty Intent as Necessary Element of Offense of Contributing to Delinquency or Dependency of Minor*, 31 A.L.R. 3D 848, 853 (1971) (noting that some courts "evinced an uneasy conscience with regard to" deviation from the traditional view that mens rea is required).

68. See *People v. Farley*, 33 Cal. App. 3d Supp. 1, 6 (1973) (stating that in "public welfare offenses," such as contributing to the delinquency of a minor, California courts have not required a showing of criminal intent to find a conviction, even though the person "may not have had any moral culpability in respect to the consequences"); *People v. Perkins*, 305 P.2d 932, 934 (Cal. Dist. Ct. App. 1957) (holding that "[p]roof of . . . specific intent is not necessary to establish the commission of the offense commonly called contributing to the delinquency of a minor"); see also *People v. Dillon*, 248 P. 230, 232 (Cal. 1926) (noting that it is unnecessary to show criminal intent unless the language of a statute itself requires such intent). See generally *State v. Harris*, 141 S.E. 637, 639 (W. Va. 1928) (finding that even though intent generally must be shown before liability is attached, if the conduct of the defendant is so offensive to the "spirit and purpose" of the contributing statute—to prevent delinquency in children under 18—then criminal intent will not be required as a necessary element of the offense of contributing to the delinquency of a minor).

69. J.A. Bock, Annotation, *Criminal Liability for Contributing to Delinquency of Minor as Affected by the Fact that Minor Has Not Become a Delinquent*, 18 A.L.R. 3D 824, 827 (1968).

70. See *People v. Calkins*, 119 P.2d 142, 144 (Cal. Dist. Ct. App. 1941) (noting that "[i]t is the purpose of the statute to safeguard children from those influences which would tend to cause them to become delinquent. It is not necessary . . . to establish that [the] defendant's acts or omissions resulted in the minor's actual entry upon an idle or immoral course of conduct."); *People v. Kinser*, 279 P. 488, 490 (Cal. Dist. Ct. App. 1929) ("The purpose of the juvenile law as now framed . . . is to protect the youth of our state from those evil and designing persons who would lead them astray." (quoting *People v. Cohen*, 217 P. 78, 80 (Cal. Dist. Ct. App. 1923))).

defendant “which tend to cause or encourage minors to lead an idle, dissolute, lewd, or immoral life” establish a case for contributing to the delinquency of a minor.<sup>71</sup> This viewpoint is supported by the rationale that the focus is on the act, omission, or behavior which could possibly affect the minor, and not on what actually happened to the minor.<sup>72</sup> Several California appellate courts have specifically stated that a person accused of contributing to the delinquency of a minor may not assert the defense that the minor was already leading a dissolute or immoral life before he or she encountered the minor.<sup>73</sup>

## 2. An “Immoral” Life

In defining what acts would tend to cause a minor to lead an “immoral life,” the California Supreme Court declared that the term “immoral” is not exclusively confined to matters of a sexual nature.<sup>74</sup> The court announced that a person’s actions causing or encouraging a minor to act against the welfare of the public or contrary to good morals violates the statute.<sup>75</sup> Again, the focus here is not on what happened to the minor because of the actions of a defendant; rather, the inquiry is grounded in reviewing what the defendant did to the minor and how the act *could have* debased the minor in some manner.<sup>76</sup>

Thus, when law enforcement officials allow minors to buy or sell drugs in undercover sting operations, they are allowing minors to associate with persons

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71. *People v. Deibert*, 256 P.2d 355, 358 (Cal. Dist. Ct. App. 1953); *People v. Lew*, 177 P.2d 60, 62-63 (Cal. Dist. Ct. App. 1947); *In re James P.*, 115 Cal. App. 3d 681, 685 (1981).

72. *See People v. Mitchell*, 307 P.2d 411, 412 (Cal. Dist. Ct. App. 1957) (noting that it is not necessary to show that a defendant’s actions actually led a minor to lead a “dissolute, lewd, or immoral life”—only that the defendant’s actions tended to cause or encourage a minor to lead a “dissolute, lewd, or immoral life”); *see also Geis*, *supra* note 60, at 66 (reporting that “[i]t is not what the behavior did to [a] particular child, but what it might conceivably do to most children, or perhaps to some children, that makes [the defendant’s conduct] punishable”).

73. *See People v. Hanford*, 171 P. 112 (Cal. Dist. Ct. App. 1918) (emphasizing that in light of the contributing statute’s “clear purpose and intent . . . to reclaim the fallen as well as protect the virtuous,” a defendant charged with violating the statute may not use the defense that his or her actions did not contribute to the minor’s delinquency because the minor was previously leading an “immoral life”); *see also Lew*, 177 P.2d at 62-63 (citing affirmatively to the *Hanford* case).

74. *See People v. Bernstein*, 335 P.2d 669, 671-72 (Cal. 1959) (citing to *People v. Deibert*, 256 P.2d 355 (Cal. Dist. Ct. App. 1953), for the proposition that the phrase “‘immoral life’ is not confined to sexual matters but is something that is inimical to good order, against the welfare of the general public and contrary to good morals”); *People v. Deibert*, 256 P.2d 355, 361 (Cal. Dist. Ct. App. 1953) (noting that the “term [i]mmorality has not been confined to sexual matters”); *see also Geis*, *supra* note 60, at 75 (stating that most cases regarding contributing statutes usually involve sexual offenses).

75. *Bernstein*, 335 P.2d at 671-72 (equating an “immoral life” with something that is “against the welfare of the general public and contrary to good morals”).

76. *See KOBETZ*, *supra* note 26, at 121 (explaining that in matters involving juvenile delinquency, the emphasis “is placed upon the alleged offenders and not upon the victim or society at large”).

who openly violate laws against using or dealing illegal drugs.<sup>77</sup> The fact that a minor is associating with persons involved with illegal drugs is enough to have a profound effect on a minor. Studies have shown that “[w]hen juveniles see others committing crimes[,] . . . they are then more likely to break the law themselves.”<sup>78</sup> According to this idea, social influence shapes a person’s values, and may lead a minor who is surrounded by persons who find criminal behavior innocuous or even desirable, to adopt that belief.<sup>79</sup>

Any person encouraging a minor to associate with drug dealers, regardless of what the purpose may be, encourages the minor to act against the “welfare of the general public,”<sup>80</sup> because it is in the public’s best interest to keep children away from illegal drugs and out of the criminal justice system.<sup>81</sup> Thus, when law enforcement officials instruct minors to engage in relations with drug dealers and buyers, they are acting contrary to the purpose of the contributing statute and juvenile court law.<sup>82</sup> Their actions can be classified not only as tending “to cause or contribute to” the minor informant to lead an “immoral life,” but also as actions that *could have* the effect of contributing to the minor’s delinquency.<sup>83</sup>

Additionally, in *People v. Bernstein*,<sup>84</sup> the California Supreme Court found that only actions that directly affect a minor are within the scope of the contributing

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77. See Bonnie Hayes, *Brea Police Probe Teen’s Slaying as Defense for Possible Lawsuit*, L.A. TIMES, Mar. 27, 1998, at B1 (noting that in the case of Chad MacDonald, police officers essentially tossed him further into the world of drugs).

78. See Charles J. Aron & Michele S.C. Hurley, *Juvenile Justice at the Crossroads*, CHAMPION, June 1998, at 10, 63 (explaining that if minors acquiesce to the environments in which they are placed, and if criminals are present in those environments, the minors likely will “develop the mindset and behavior characteristics” of those criminals); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 357-58 (1997) (indicating that juveniles who are surrounded by others engaging in criminal behavior are likely to engage in the same behavior).

79. Kahan, *supra* note 78, at 359; see Blair, *supra* note 23, at 3 (arguing that being an informant teaches a young person “to become a betrayer, to become a seducer, to become a traitor to the trust of other people”); *Juvenile Informants*, ORANGE COUNTY REG., Mar. 31, 1998, at B6 (indicating that teenagers working as informants may find themselves being “pulled into . . . more dangerous activities” than smoking, drinking or doing drugs); see also Gary T. Marx, *Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work*, in POLICE FOUNDATION, *ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT* 78 (Gerald M. Caplan ed., 1983) (quoting Kurt Vonnegut’s *Mother Knight* as stating “[w]e are what we pretend to be, so we must be careful about what we pretend to be”).

80. *Bernstein*, 335 P.2d at 671-72.

81. See Tracey L. Mearns, *It’s a Question of Connections*, 31 VAL. U. L. REV. 579, 579 (1997) (detailing the rise in illicit drug use by minors). Media reports also indicate that because of this increase in illegal drug use, an increase has been seen in the number of teenagers “involved in the criminal justice system due to drug related offenses.” *Id.*

82. See *People v. Deibert*, 256 P.2d 355, 358 (Cal. 1953) (“The main purpose of the Juvenile Court Law is to prevent the delinquency of children.”); *supra* note 70 and accompanying text (commenting on the purpose of California’s contributing statute).

83. See *supra* notes 74-76 and accompanying text (expanding upon the offense of contributing to the delinquency of a minor).

84. 335 P.2d 669 (Cal. 1959).

statute.<sup>85</sup> As such, law enforcement officials who send minors into known drug-infested neighborhoods with established drug dealers and users place the minors “at risk of” direct physical harm. One of the foreseeable risks to the minor informant is the “possibility of retaliatory harm” against the informant.<sup>86</sup> This is exactly what happened to Chad MacDonald and several other minors who worked for police agencies as drug informants.<sup>87</sup> Placing minor informants in these circumstances and environments, where there is a possibility of physical harm, should be enough for any court to find law enforcement officials in violation of the contributing statute.<sup>88</sup>

### 3. *Protection of the Children*

California’s dedication to protecting children<sup>89</sup> is, in many respects, similar to the concept of *parens patriae* (parent for the country),<sup>90</sup> which is derived from English traditions and court systems.<sup>91</sup> This concept allows for state intervention to protect the rights of a child,<sup>92</sup> and to “save a child from becoming a criminal.”<sup>93</sup> Arguably, the *parens patriae* philosophy supports the view that minors should not be used as informants because the “best interests” of children require that they not

85. *Id.* at 672; *People v. Bergotini*, 158 P. 198, 200 (Cal. 1916) (Angellotti, C.J., concurring) (acknowledging that a person’s act is categorized as tending “to cause, encourage or contribute” to a minor’s delinquency when it directly affects the child, and not when it is “done solely with relation to somebody else, [and] in no way directly affect[s] the child”).

86. *Williamson v. City of Virginia Beach*, 786 F. Supp. 1238, 1253 (E.D. Va. 1992); *see also* Greg Cagle, *Confidential Informants: A Matter of Public Record? Discussed in Light of Bodin v. State*, 19 T. MARSHALL L. REV. 145, 161 (1993) (concluding that, should an informant’s identity become publicly known, there will arise a possibility of retaliation against that informant).

87. *See* Stuart Pfeifer et al., *O.C. Teen Informer Case Has Parallels*, ORANGE COUNTY REG., Mar. 29, 1998, at A1 (profiling several minor informants killed because of their work for the police: 15-year-old Gregory Erickson from Iowa; 16-year-old Cecil Calloway from Virginia; 17-year-old Robbie Williamson from Virginia; and 17-year-old Chad MacDonald from California.)

88. *See* Blair, *supra* note 23, at 3 (emphasizing the physical risks to minors who work as drug informants); *see also* Curriden, *supra* note 22, at 45 (observing that “law officers acknowledge that many informants are risking their lives by working undercover”); *cf.* Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 339 (1989) (arguing that strict liability statutes originated in the United States in the context of “‘morals’ offenses relating to sex, liquor, and the upbringing of minors”).

89. California courts have continually stressed the fact that the purpose of juvenile court law, and more specifically the contributing statute, is to protect minors. *See, e.g.*, *People v. Deibert*, 256 P.2d 355, 358 (Cal. 1953); *People v. Calkins*, 119 P.2d 142, 144 (Cal. Dist. Ct. App. 1941); *People v. Kinsler*, 279 P. 488, 490 (Cal. Dist. Ct. App. 1929); *People v. Hanford*, 171 P. 112, 112 (Cal. Dist. Ct. App. 1918); *In re James P.*, 115 Cal. App. 3d 681, 685 (1981); *Ronald M. v. White*, 112 Cal. App. 3d 473, 478 (1980).

90. BLACK’S LAW DICTIONARY 1114 (6th ed. 1990).

91. LAMAR T. EMPEY, *AMERICAN DELINQUENCY: ITS MEANING AND CONSTRUCTION* 83 (1978).

92. *Id.*; *see* Claudia Worrell, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the Parens Patriae Doctrine*, 95 YALE L.J. 174, 176 (1985) (observing that, under the theory of *parens patriae*, the State is to provide “guidance and rehabilitation” for children as well as “protection for society”).

93. KOBETZ, *supra* note 26, at 84-85.

be exposed to the very same activities that put them at risk of engaging in drug-related and other crimes in their futures.<sup>94</sup>

Although the concept of protecting children at all costs because they are socially and psychologically immature may be contrary to modern trends,<sup>95</sup> contributing to the delinquency of a minor is still an offense capable of rendering a person guilty of a misdemeanor.<sup>96</sup> Arguably, children must be protected in order to ensure the survival of society.<sup>97</sup> In order to accomplish this, children need to be shielded from the detrimental effects of becoming drug informants.<sup>98</sup>

Regardless of the possible abuse and misuse of contributing statutes by applying them to even the most innocent or mundane activities,<sup>99</sup> sending a minor to a drug-infested environment with known drug addicts with the intention of obtaining a drug arrest cannot be viewed as an “innocent” everyday activity.<sup>100</sup> Furthermore, despite the silence of the U.S. Supreme Court regarding the constitutionality of contributing statutes,<sup>101</sup> California has upheld its contributing statute against charges of vagueness or indefiniteness.<sup>102</sup> This illustrates the importance California places on protecting youth today.

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94. See Aron & Hurley, *supra* note 78, at 12 (recognizing that as early as 1974, people believed that the rehabilitation of delinquent minors was “in the ‘best interest’ of the juvenile offender and a valuable deterrent from the commission of future offenses”).

95. See EMPEY, *supra* note 91, at 573 (establishing that more people today accept the assumption that children are not “qualitatively different from adults”); *id.* at 584 (declaring that society “no longer assume[s] that because [children] are immature, they are not fully responsible for their acts”); see also Aron & Hurley, *supra* note 78, at 10 (recognizing that the “legal emphasis has shifted from protecting and reforming children to ‘protecting’ society from young people prematurely deemed incapable of rehabilitation”).

96. See CAL. PENAL CODE § 272 (West Supp. 1999) (indicating that the punishment for contributing to the delinquency of a minor is a fine of up to \$2,500, imprisonment in a county jail for up to one year, or both).

97. See KOBETZ, *supra* note 26, at 179 (noting that “today’s children will be tomorrow’s [adult] citizens”).

98. See *supra* notes 21-23 and accompanying text (identifying the harmful effects associated with a minor becoming an informant).

99. See Dittman, *supra* note 61, at 112 (noting that courts may find that acts considered “innocent of themselves” actually tend to cause delinquency); Geis, *supra* note 60, at 79 (warning of the danger of extending contributing statutes to a wide variety of behavior that may be rather harmless).

100. See Geis, *supra* note 60, at 63 (quoting one of Colorado’s former judges as explaining of the 1903 enactment of Colorado’s contributing statute, “[I]f a child merely enters, patronizes, or visits certain places, no matter how innocent the purpose of the child may be, any person who directed the child to go to such place, or even sent it there upon an errand or with a message, contributes to its delinquency”); Tini Tran & Bonnie Hayes, *Son’s Work as Informant Led to Death Crime*, L.A. TIMES, Mar. 23, 1998, at A1 (noting that “narcotics investigations, by their very nature, are inherently dangerous”).

101. Dittman, *supra* note 61, at 118.

102. See *Williams v. Garcetti*, 853 P.2d 507, 516-17 (Cal. 1993) (finding that California Penal Code section 272 in its current form is neither so vague nor so overbroad as to render it unconstitutional); *People v. Brown*, 88 Cal. Rptr. 801, 806 n.2 (Dist. Ct. App. 1970) (citing to the following cases rejecting the argument that section 272 is unconstitutionally vague: *People v. Smith*, 207 P. 518 (Cal. 1922); *People v. Miller*, 302 P.2d 603 (Cal. Dist. Ct. App. 1956); *People v. Deibert*, 256 P.2d 355 (Cal. Dist. Ct. App. 1953); and *People v. De Leon*, 170 P. 173 (Cal. Dist. Ct. App. 1917); see also Dittman, *supra* note 61, at 117 (“[T]he United States Supreme Court has never passed upon the constitutionality of a contributing statute on the ground of vagueness or otherwise. Only two state courts have found any want of constitutionality in their state’s contributing statutes.”).

Applying California's contributing statute so as to find law enforcement officials utilizing minors as informants in violation of these statutes comports with the State's public policy of protecting minors.<sup>103</sup> Contributing statutes such as California's that require neither the element of mens rea, nor a finding that the minor actually became delinquent from the defendant's acts or omissions, afford children the greatest amount of protection from the "necessary evils" of using minors as drug informants.<sup>104</sup>

### B. Sending Minors to Immoral Places

As early as 1891, California subscribed to the *parens patriae* theory when confronted with the safety and welfare of children.<sup>105</sup> As such, California Penal Code section 273f makes it a misdemeanor for any person, as an employer or otherwise, to "send, direct, or cause to be sent or directed[, a minor] to any saloon, gambling house, house of prostitution, or other immoral place."<sup>106</sup> Arguably, law enforcement officials sending minors such as Chad MacDonald to drug houses, schools, or public parks to participate in drug-sting operations, are violating this statute.

Although case law on this statute is limited, the California Court of Appeals in *Ex parte Meyers*<sup>107</sup> discussed when, if ever, a billiard hall or poolroom could be deemed an "immoral place" for purposes of section 273f.<sup>108</sup> The court held that although a billiard hall may not be immoral per se, "it may become such by the presence of the professional billiardist and gambler ready to fleece the unwary and to inculcate the gambling habit in the youth of the city."<sup>109</sup> The court focused not on the nature of the place in question (pool rooms), but on the presence of an individual who has the potential to interfere with a minor's safety and welfare.<sup>110</sup>

A school, a public park, or even a person's house may not appear to be an "immoral place" at first glance, but once a person starts selling drugs to minors in

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103. See *supra* note 89 (detailing California's adherence to the policy of protecting minors).

104. See Dennis G. Fitzgerald, *Inside the Informant File*, CHAMPION, May 1998, at 14 (reporting that "police managers view informants as a necessary evil"); Blair, *supra* note 23, at 3 (acknowledging the fact that using minor informants may be "the only entree into a world where only minors are trusted").

105. See *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 83 (Cal. 1994) (emphasizing the State's role as *parens patriae* in "maintain[ing] a paternalistic vigilance over this vulnerable segment of our society"); see also *Angie M. v. Superior Ct.*, 37 Cal. App. 4th 1217, 1225 (1995) (noting that "the Legislature has evidenced a long-standing and consistent history of specifically protecting minors from sexual exploitation and predation"). See generally *supra* notes 89-92 and accompanying text (discussing the theory of *parens patriae*).

106. CAL. PENAL CODE § 273f (West 1999).

107. 94 P. 870 (Cal. 1908).

108. *Id.* at 871.

109. *Id.* at 871; see also *Ex parte Murphy*, 97 P. 199, 201 (Cal. Ct. App. 1908) (noting that a billiard hall or poolroom may be subject to regulation or an absolute prohibition "by reason of its environment or conditions existing in some communities, [because it] constitute[s] a menace and danger to the morals and well-being of the citizens thereof").

110. *Ex parte Murphy*, 97 P. at 201.

that locale, such activity renders the home an immoral place. *Ex parte Meyers* involved a “professional billiardist and gambler” who attempted to inculcate a gambling habit in minors. Although Myers dealt with illegal gambling, a person selling drugs to a minor is no less dangerous. Like the professional gambler, the object of the drug dealer is to induce some sort of habit in a minor which will ensure repeat behavior.<sup>111</sup> Therefore, the presence of an individual dealing drugs to minors is the factor that makes a particular locale an “immoral place” for purposes of section 273f.

It follows that when police officers send minor informants to places where drugs are bought and sold, those officers violate section 273f because the statute includes within its scope “any person . . . as parent, guardian, employer, or otherwise.”<sup>112</sup> Admittedly, law enforcement officials may argue that the statute is inapplicable because places where drugs are bought or sold do not comport with traditional notions of what is moral or immoral.<sup>113</sup> However, courts in California recognize that the term “immoral” is not limited to matters involving improper sexual conduct.<sup>114</sup>

In dealing with this issue of what exactly constitutes an “immoral place” for purposes of section 273f, California courts have focused on both the presence of questionable individuals at the location and the effects on the surrounding community.<sup>115</sup> Note, however, that the difficulty with statutes such as this one is in the indeterminacy and broad range of criteria used to draw the line between what is moral and what is not.<sup>116</sup> Although people have a “natural moral sense” to guide them, there must be some rationality involved in the selection of the criteria used, for the sake of consistency.<sup>117</sup>

Labeling places and acts as moral or immoral is a feature of living in the American social environment, and can be an effective instrument in achieving social goals.<sup>118</sup> Protecting and safeguarding children is the social goal that is the focus of section 273f of the California Penal Code.<sup>119</sup> Although law enforcement officials may have the best of intentions when sending minors to places where drugs

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111. *Cf. Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 76 (Cal. 1994) (highlighting California’s “statutory policy of keeping children from starting on the road to tobacco addiction”).

112. CAL. PENAL CODE § 273f (West 1999) (emphasis added).

113. *See, e.g., Angie M. v. Superior Ct.*, 37 Cal. App. 4th 1217, 1225 (1995) (stating that the California Legislature’s enactment of this statute, among others, was “directed at protecting minors from sexual exploitation”).

114. *See supra* note 74 (explaining that the word “immoral” does not always refer to sexual matters).

115. *See supra* notes 107-11 and accompanying text (discussing what types of environments may be deemed “immoral”).

116. Alan Gewirth, *The Immoral Sense*, 13 CRIM. JUST. ETHICS 4 (1994).

117. *Id.* at 5-6.

118. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1647 (1998).

119. *Supra* notes 112-17 and accompanying text.



are involved, they must realize that seemingly innocent venues such as parks and schools can be immoral places unfit for minors.

### C. *Employment of Minors*

When a minor agrees to become an informant, he or she usually enters into a consent agreement or contract of some form, establishing an employment relationship with the law enforcement agency.<sup>120</sup> This type of agreement is an employment contract which violates California labor law and is contrary to the purpose of labor statutes pertaining to children.<sup>121</sup> Even if law enforcement officials were able to persuade courts to validate these agreements, California courts have the power to ultimately invalidate these contracts on the basis of public policy.<sup>122</sup>

#### 1. *The Employment Relationship*

Section 2750 of the California Labor Code states that an employment contract consists of an employer who engages another person, called the employee, "to do something for the benefit of the employer."<sup>123</sup> In determining whether an employer-employee relationship exists between two or more parties, the California Supreme Court examines, among other "secondary factors," the degree of control the purported employer has over the employee in terms of controlling the means and manner in achieving some result.<sup>124</sup>

##### a. *The Control Factor*

The California Supreme Court has stated that an employer's "right to control" an employee is the most important factor in determining whether an employment relationship exists.<sup>125</sup> An employer's "right to control" is evidenced when an

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120. Christensen & Pfeifer, *supra* note 47, at B6.

121. See *infra* Part III.C.2 (reviewing the legality of employing minors as informants).

122. See *infra* Part III.C.3 (discussing the role of public policy in contract law).

123. CAL. LAB. CODE § 2750 (West 1989).

124. See *Tieberg v. Unemployment Ins. Appeals Bd.*, 471 P.2d 975, 977 (Cal. 1970) (finding that an employment relationship exists when "the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired"); *Burlingham v. Gray*, 137 P.2d 9, 13 (Cal. 1943) (asserting that an employer-employee relationship exists "whenever the employer retains the right to direct how the work shall be done as well as the result to be accomplished" (quoting *S.A. Gerrard Co. v. Indus. Acc. Comm.*, 110 P. 2d 377, 378 (Cal. 1941))).

125. See *City of Los Angeles v. Vaughn*, 358 P.2d 913, 914 (Cal. 1961) (declaring that the most important factor to consider in determining whether someone is an "employee" is "the right [of the employer] to control the manner and means of accomplishing the result desired"); *California Employment Comm'n v. Los Angeles Downtown Shopping News Corp.*, 150 P.2d 186, 188 (Cal. 1944) (stating that the "right to control" factor is the most important in determining the existence of an employment relationship). Today, this is still the pervasive view in determining the existence of an employment relationship, as evidenced by its application by California appellate courts in *Holmes v. Roth*, 11 Cal. App. 4th 931, 935 (1992), and *County of Sonoma v. Workers' Compensation*

employer gives the employee instructions which must be obeyed.<sup>126</sup> In applying this jurisprudence to minors who have agreed to act as informants for law enforcement officials, the analysis leads to the conclusion that an employment relationship exists.

The principal factor of an employer retaining the right to control the manner and means of the work involved is arguably present when minors agree to act as informants for law enforcement officials. Not only are minor informants typically required to be under direct police supervision before participating in criminal drug investigations,<sup>127</sup> but they are also required to follow any and all instructions of a supervising officer when engaging in such investigatory activities.<sup>128</sup> These requirements of following instructions and guidelines set by law enforcement officials and adhering to other conditions placed upon the minor are usually memorialized in some type of agreement or consent form.<sup>129</sup> When this occurs, as it did with Chad MacDonald, courts state that this enumeration of employment provisions is a "significant factor" to consider in determining the existence of an employment relationship.<sup>130</sup>

The fact that an employer has the ability to terminate the relationship with the employee with or without cause is a strong indication of the employer's right to control.<sup>131</sup> When the Brea Police Department arrested Chad for possession of drugs a second time, the department claimed that it severed its relationship with him.<sup>132</sup> However, whether remaining drug-free was a condition of Chad's employment remains unclear.<sup>133</sup> Even if it was not, the fact that the Brea Police Department was able to discontinue working with Chad evidences the control they had over the entire situation. This, in turn, leads to the conclusion that an employment relationship indeed existed between Chad and the Brea Police Department.

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*Appeals Bd.*, 222 Cal. App. 3d 1133, 1137 (1990).

126. *Riskin v. Industrial Accident Comm'n*, 144 P.2d 16, 18 (Cal. 1943); see *Burlingham*, 137 P.2d at 15 (indicating that an employer must exercise "complete or authoritative control" in order for a court to find an employment relationship). The right to discharge an employee at will, with or without cause, is also strong evidence of the employer's right to control. *Vaughn*, 358 P.2d at 915; *California Employment Comm'n*, 150 P.2d at 188.

127. See, e.g., *Christensen & Pfeifer*, *supra* note 47, at B6 (reproducing the consent form Chad was required to sign agreeing to act under officer supervision, before he was allowed to act as an informant for the Brea Police Department). This consent form appears to be a standardized form the Brea Police Department utilizes when dealing with any person acting as an informant.

128. *Id.*

129. See, e.g., *id.* (reproducing the consent form Chad was required to sign).

130. See, e.g., *Tieberg v. Unemployment Ins. Appeals Bd.*, 471 P.2d 975, 981 (Cal. 1970).

131. *City of Los Angeles v. Vaughn*, 385 P.2d 913, 915 (Cal. 1961).

132. *Supra* note 48; see *Blair*, *supra* note 23, at 3 (noting that the Brea Police Department claims to have severed its relationship with Chad more than a week before his death).

133. See *Christensen & Pfeifer*, *supra* note 47, at B6 (listing several factual issues in dispute, one of which pertains to whether or not the Brea Police Department actually told Chad he could no longer work as an informant because of his second arrest for possession of drugs).

b. Secondary Factors

Although the California Supreme Court utilizes the “right to control” factor almost exclusively, there are several secondary factors courts also may consider.<sup>134</sup> These secondary factors include the applicable skill required to complete the job, whether the one performing the services is in a distinct occupation or business, whether the type of work is usually done under supervision of the principal, whether the principal or worker supplies the tools and instrumentalities for the work to be done, and whether or not the work is part of the principal’s regular business.<sup>135</sup>

In the case of a minor working as an informant, it is arguable that a majority of these secondary factors favor a finding of an employment relationship. First, a minor working as a police informant is usually not engaged in the “occupation or business” of collecting information regarding drug activity for the police, or participating in undercover “sting” operations.<sup>136</sup> Second, a minor working as an informant is usually under strict supervision of some law enforcement official or officer.<sup>137</sup> Third, in terms of the amount of skill required to be an informant, law enforcement officials admittedly do not look to any criteria in assessing a potential minor informant.<sup>138</sup> Fourth, it is usually law enforcement officials who supply the instrumentalities and tools to enable the minor to engage in “sting” operations.<sup>139</sup>

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134. *Tieberg*, 471 P.2d at 979. The existence of an agreement between the purported employer and employee setting forth details of their relationship is a significant factor for consideration. *Id.* at 981; *see Isenberg v. California Emp. Stabilization Comm’n*, 180 P.2d 11, 15 (Cal. 1947) (labeling the factors other than the right to control as “secondary elements”).

135. *See Tieberg*, 471 P.2d at 979 (listing the following factors to be considered:

(a) whether or not the one performing the services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee);

*see also* RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (setting forth these same factors to consider when determining whether an employment relationship exists).

136. For example, Chad MacDonald was a high school student who played baseball in his spare time and was known as an “all-American” kid, not a “professional drug informant.” *Dateline* (NBC Television broadcast, Oct. 12, 1998).

137. Officers from the Brea Police Department testified that when they utilized Chad MacDonald as an undercover informant in drug buys, he was under police supervision. Tran and Hayes, *supra* note 21, at A1.

138. *See HARNEY & CROSS, supra* note 18, at 22 (noting that everyday people, ordinary citizens, can be used as informants); *see also* Curriden, *supra* note 22, at 43 (opining that what some law enforcement officers really want is for an informant to assist them in obtaining as many arrests as possible).

139. *See Martelle & Hayes, supra* note 2, at A1 (attesting that the Brea Police Department supplied Chad not only with the “instrumentality” used to purchase drugs as an informant, but also with the “tools” to ensure proper prosecution of the drug dealer (a microphone hidden in a pager)).

Lastly, it is the “regular business” of law enforcement agencies, such as the police, to utilize informants for the purpose of upholding the law and protecting society.<sup>140</sup>

By applying these secondary factors to the situation of minor informants, it appears that a lawful employment relationship does in fact exist. However, because the emphasis as previously stated is placed on the factor of control,<sup>141</sup> when the right to control is demonstrated by an employer, these “secondary” factors become mere indicia of the employer’s degree of control over the situation and the employee.<sup>142</sup> A strong showing of “authoritative control” can be found in almost any situation wherein law enforcement officials utilize minors as informants.<sup>143</sup> The secondary factors in determining whether an employment relationship exists between the two parties become “mere indicia” of law enforcement officials’ retention of the right to control.<sup>144</sup> Presumably, even if law enforcement officials could use a majority of these factors to show that minor informants are not “employees,” it would be quite difficult to convince a court in California to find no employment relationship when such a strong showing of the right to control is apparent.<sup>145</sup>

A valid employment relationship between minors and law enforcement officials exists for several reasons. First, law enforcement officials exert almost complete control over an informant’s means and manner of obtaining drug arrests for them. Second, any so-called “secondary factors” would indicate the extent to which law enforcement officials exert their control over minors and the entire situation of effecting drug arrests. Third, the terms of “employment” are usually memorialized in a written agreement of some type.

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140. See Mauet, *supra* note 15, at 563 (stating the fact that “informants have always played an important role in law enforcement”).

141. See *supra* note 124 and accompanying text (emphasizing that the right of an employer to control the employee’s acts is the dominant factor courts are to consider in determining whether or not an employment relationship exists).

142. *Tieberg v. Unemployment Ins. Appeals Bd.*, 471 P.2d 975, 982 (Cal. 1970) (explaining that if a sufficient amount of evidence is shown that “the employer has the right to control the actual details of the [employee’s] work,” other secondary factors such as how the employee is paid will appear “to be of minute consequence” to the determination of whether an employment relationship exists).

143. Although law enforcement officials may argue that because informants are in a sense “actors” who are attempting to gain acceptance into a criminal’s world, they are relinquishing some amount of control, the California Supreme Court in *Burlingham v. Gray*, 137 P.2d 9, 16 (Cal. 1943), stated that “the fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it.”

144. *Supra* note 143.

145. See *supra* note 125 (explaining that when there is evidence of an employer’s right to control, the fact that several of the secondary factors might indicate that there is no employment relationship is hardly of consequence, if the details are minute).

## 2. *Illegal Employment*

Based on the analysis of the various employment factors, a valid employment relationship—and thus a contract of employment—exists between law enforcement officials and minors acting as informants. Because of the inherently dangerous nature of the employment circumstances involved, this arrangement might be determined to constitute an illegal employment of minors.<sup>146</sup> In that event, such an employment contract would be unenforceable.

The California Labor Code prohibits the employment of minors under the age of sixteen in “any occupation dangerous to the life or limb, or injurious to the health or morals of [a] minor.”<sup>147</sup> Although the employment of minors as police informants in drug cases is not specifically prohibited,<sup>148</sup> section 1296 of the Labor Code empowers the Division of Labor Standards Enforcement to prohibit employers from employing minors in any place of employment or in any occupation that is not already expressly forbidden by law.<sup>149</sup>

A minor working as an informant in drug investigations faces physical danger whenever he or she attempts to infiltrate a drug ring or participate in a drug transaction with drug dealers or users.<sup>150</sup> Even though no statistics are available to indicate the number of minor informants injured or killed in this line of work,<sup>151</sup> there are numerous cases across the nation of minors being murdered as a result of working for law enforcement agencies as informants.<sup>152</sup>

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146. *See* *Boyles v. Hamilton*, 235 Cal. App. 2d 492, 495-97 (1965) (noting that certain sections of the Labor Code have the purpose of protecting children).

147. CAL. LAB. CODE § 1294 (West 1988); *see also id.* § 1308(a)(1) (prohibiting employers of a minors under the age of 16 from encouraging such minor to engage in “any business, exhibition or vocation injurious to the health or dangerous to the life or limb of the minor”).

148. *See id.* § 1294 (prohibiting minors under 16 years of age to work in: any railroad; any “vessel or boat engaged in navigation or commerce”; any place where poisonous acids are used; occupations involving the manufacture of lye; places where dust in injurious quantities is produced; any mine, quarry, tunnel, or excavation; any place where tobacco is sorted, manufactured or packed; and operating trucks or cars).

149. *See id.* § 1296 (granting power to the California Division of Labor Standards Enforcement to determine which occupations minors are prohibited from entering). “No minor shall be employed or permitted to work in any occupation thus determined to be dangerous or injurious to minors.” *Id.*

150. Blair, *supra* note 23, at 3; Tran & Hayes, *supra* note 21, at A1; *see supra* notes 86-88 and accompanying text (discussing the threat of harm to minors acting as informants in drug cases). *See generally* Steve Watanabe, *Chad MacDonald*, L.A. TIMES, Mar. 30, 1998, at B4 (emphasizing the irony of the government allowing minors to be used as drug informants when the same government spends millions of dollars to keep children away from drugs); *Crime Work is Too Risky*, FLA. TIMES-UNION, Apr. 21, 1998, at A8 (questioning the wisdom of placing minors in situations wherein even “levelheaded adult undercover agents” have lost their lives).

151. *See* Blair, *supra* note 23, at 3 (indicating that the U.S. Department of Justice’s Bureau of Justice Statistics maintains no records on the use of minors as informants); Hastings, *supra* note 1, at A3 (reporting that statistics on the use of minors as informants are nonexistent).

152. Pfeifer et al., *supra* note 87, at A1.

Requiring a minor addict to be in the presence of illegal drugs can have an injurious effect on his or her health.<sup>153</sup> Furthermore, a minor's morals are also at serious risk of being corrupted or injured because the nature of employment at such places necessarily entails betraying and lying to others.<sup>154</sup>

Because minors are at a high risk of danger and injury when working for law enforcement officials as informants, the Division of Labor Standards Enforcement would most likely declare this type of employment of minors as prohibited under California law. Thus, law enforcement officials and agencies should not be allowed to employ minors as informants.

### 3. Public Policy

Assuming that law enforcement officials possess a valid employment contract with minors under which the latter will work as informants, California courts may nonetheless hold such an employment contract void and unenforceable by finding that it violates public policy.<sup>155</sup> In an effort to clarify the meaning of "public policy," a California appellate court in *Noble v. City of Palo Alto*<sup>156</sup> equated "public policy" with "the public good."<sup>157</sup> Although California acknowledges the often cited axiom that "whatever is injurious to the public is void on the grounds of public policy,"<sup>158</sup> courts may not render any contract void on the basis of public policy unless an in-depth inquiry into the circumstances regarding the contract is undertaken.<sup>159</sup> When analyzing whether a contract is void on the basis of public policy, the Restatement (Second) of Contracts section 178 sets forth the following balancing test:

- (2) In weighing the interest in the enforcement of a term, account is taken of
  - (a) the parties' justified expectations,
  - (b) any forfeiture that would result if enforcement were denied,and

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153. See Teri Sforza, *Undercover Work Risky in Many Ways*, ORANGE COUNTY REG., Mar. 26, 1998, at B1 (determining that a minor's drug addiction will only get worse if he or she is allowed to work as an informant in drug-related cases).

154. See Blair, *supra* note 23, at 3 (recognizing that it is wrong to teach a minor informant to betray others); see also *supra* notes 78-79 and accompanying text (acknowledging that working around people who break the law can have a detrimental effect on a minor's morals and values).

155. See RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981) (delineating the various factors to consider before any contract is held as void on the basis of public policy); *infra* notes 159-64 and accompanying text (describing the procedure courts will follow to find a contract void on the basis of public policy).

156. 264 P. 529 (Cal. 1928).

157. *Id.* at 530 (emphasizing that anything "which has a tendency to be injurious to the public or against the public good" is against public policy).

158. *Moran v. Harris*, 131 Cal. App. 3d 913, 919, 182 Cal. Rptr. 519, 522 (1982).

159. *Id.*

- (c) any special public interest in the enforcement of the particular term.
- (3) In weighing a public policy against enforcement of a term, account is taken of
  - (a) the strength of that policy as manifested by legislation or judicial decisions,
  - (b) the likelihood that a refusal to enforce the term will further that policy,
  - (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
  - (d) the directness of the connection between that misconduct and the term.<sup>160</sup>

In applying these factors to a contract involving the sale of a corporation whose primary business was the manufacture of drug paraphernalia, the court in *Bovard v. American Horse Enterprises*<sup>161</sup> found that the factors favoring enforcement of the contract were not as strong as the factors in favor of not enforcing the contract on the basis of public policy.<sup>162</sup> The court noted that it was in the best interests of not only the parties involved, but the public in general, to prohibit the manufacture and use of illicit drugs.<sup>163</sup>

Using these Restatement factors to analyze contracts for minors to act as police informants, courts could find that contracts such as the one Chad MacDonald signed are unenforceable as a matter of public policy. Arguably, the main interest in enforcing such a contract is the “special public interest” in contract enforcement. As noted, using minors as informants may lead to the arrests of drug dealers and users or interception of drug rings,<sup>164</sup> which could possibly alleviate the problem of the drug trade. Although this interest is real and justifiable, the factors against enforcing these contracts are much stronger for three reasons. First, the policy of protecting children is one that California has continually espoused since the early 1900s.<sup>165</sup> Second, refusing to enforce contracts with minors to act as informants

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160. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

161. 201 Cal. App. 3d 832 (1988).

162. The court explained that the following factors favored a public policy against enforcement of the contract at bar: (a) there was a strong public policy against manufacturing drug paraphernalia because of the statutory prohibitions “against the possession, uses, etc., of marijuana, a prohibition which dates back at least to 1929”; (b) refusing to enforce the contract would further the public policy against drugs and drug paraphernalia; and (c) the fact that “both parties knew that the corporation’s products would be used primarily for purposes which were expressly illegal” evidences the deliberateness of the misconduct regarding the contract. *Id.* at 841.

163. *See id.* (concluding that a refusal to enforce the contract at issue is within the court’s power).

164. *See Wagner & Maharaj, supra* note 3, at A3 (recognizing law enforcement officials’ arguments that if informants were not used, many crimes would probably go unsolved).

165. *See supra* note 89 (providing a list of California cases that have stressed the importance of protecting children).

would undoubtedly further California's policy of protecting children.<sup>166</sup> By not sending minors into harmful environments to interact with drug dealers and users, the deaths of minor informants such as Chad MacDonald can be avoided. Third, because California law can be applied to prohibit the use of minors as informants, law enforcement officials engaging in this practice are demonstrating their "deliberate" disregard for California law. Furthermore, a direct connection exists between the misconduct of using minors as informants and the employment contract itself—California law prohibits any person from: (1) contributing to the delinquency of minors; (2) sending minors to immoral places; and (3) violating employment statutes.<sup>167</sup> Thus, employment contracts between law enforcement officials and minors as informants promote conduct that is directly contrary to California jurisprudence.

Although California courts emphasize that the freedom to enter into contracts should not be interfered with lightly,<sup>168</sup> that contracts contrary to established public policies are injurious to society as a whole and should therefore be deemed void is also worthy of emphasis.<sup>169</sup> Those in law enforcement continually stress the "necessary evil" in using minors as informants,<sup>170</sup> but the California Supreme Court stresses that "[p]ublic policy is not made or unmade by the acts or omissions of a police department."<sup>171</sup> Because contracts between law enforcement officials or agencies and minors to act as informants are contrary to the firmly established policy of protecting children, it is in the best interests of not only children, but the public as well, that California prohibit the use of minors as informants.<sup>172</sup>

#### IV. CONCLUSION

Chad MacDonald was an average high school student, and like other high schoolers his age, he had his share of problems.<sup>173</sup> After being arrested for possession of drugs, he struck a deal with the police to act as an informant to avoid

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166. See *supra* note 89 (detailing California's adherence to the policy of protecting minors).

167. See *supra* Part III.A-C (discussing how law enforcement officials and agencies using minors as informants violate the law).

168. *Rosenberg v. Raskin*, 181 P.2d 897, 898 (Cal. Ct. App. 1947).

169. *Id.*; see also *Maryland Cas. Co. v. Fidelity & Cas. Co.*, 236 P. 210, 212 (Cal. Ct. App. 1925) (recognizing that although it is within the Legislature's "prerogative" to decide what contracts are unlawful, the courts may follow the "spirit. . . of the law" in declaring void contracts that are in opposition to stated public policies).

170. *Curriden*, *supra* note 22, at 44.

171. *Chateau v. Singla*, 45 P. 1015, 1016 (Cal. 1896).

172. See *supra* Part II.A-C (stressing California's interest in protecting minors from the dangers of becoming police informants).

173. See *Sforza*, *supra* note 154, at B1 (indicating that Chad MacDonald had a problem with drugs, and yet police officials threw him "back into drug houses as . . . [an] informant[ ]").



prison,<sup>174</sup> and as a result of this “employment” was beaten and killed for being a “snitch.”<sup>175</sup> In response to Chad’s death, the California Legislature enacted Chapter 833. However, this law is not entirely effective in protecting minors because it continues to allow law enforcement agencies to utilize minors as informants. Additionally, the problems of contributing to the delinquency of a minor, sending minors to immoral places, and legality of continued employment are neither addressed nor remedied by this piece of legislation. Protecting children should be placed above any concerns of obtaining arrests,<sup>176</sup> and thus they should not be used as “foot soldiers” in the war against drugs.<sup>177</sup>

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174. See *supra* notes 1-12 and accompanying text (providing details on the life and death of Chad MacDonald).

175. *Id.*

176. See Eric Bailey, *Law Signed Limiting Use of Youth Informants*, L.A. TIMES, Sept. 26, 1998, at B4 (quoting Governor Wilson as asserting, “solving crimes is the responsibility of law enforcement officials and other qualified adults, not of children”).

177. See *Minors as Informants*, *supra* note 48, at B6 (commenting that one of the effects of the nation’s war on drugs is the “coerced conscription of minors as foot soldiers”).