The LegalSpin

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Civil and Criminal Trial Lawyers Practicing in all State and Federal Courts

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What The United States Supreme Court Teaches About Colin Kaepernick

When former San Francisco 49ers quarterback, Colin Kaepernick, kneeled during the National Anthem to protest racism, President Donald Trump demanded that the NFL "Get that son of a bitch off the field right now!" In President Trump's vernacular: "He's fired!" To which Mr. Kaepernick's mother responded: "I guess that makes me a proud bitch."

While this was a pithy retort, the best response has been provided by the United Sates Supreme Court in the case of *West Virginia State Board of Education v. Barnette*.

In what may be the Court's most eloquent and admired statement of First Amendment principles, *Barnette* found in favor of two Jehovah's Witnesses school children who refused to salute the flag. To fully appreciate *Barnette*, it is important to first understand the social climate in which it was decided.

1942 - School children pledging their allegiance to the flag. Southington, Connecticut.

During the World War Two era, Nazi Germany famously required citizens to salute the flag or other symbols of national unity with a stiff-armed salute. Most people may not know that at the same time in America, cities and states across the country enacted laws that made saluting the flag compulsory in public schools.

Although many people complied with the laws, there were dissenters who refused to participate in the American stiff-armed, palms-up salute required by most school districts (which was virtually identical to the Hitler salute). Among the dissenters were Jehovah's Witnesses, who objected on the basis of their religious prohibition against pledging to symbols of political institutions.

In 1935, two Jehovah's Witnesses, Lillian Gobitis, then 13 years old, and her younger brother Billy, were thrown out of their school in Minersville, Pennsylvania for not saluting the flag. Expulsion was apparently insufficient—the minor siblings were also stoned and shunned by their neighbors for refusing to salute the flag. Their father filed suit in Federal District Court.

Philadelphia District Court Judge Albert Meris found in favor of Lillian and Billy, ruling that "Our country's safety surely does not depend upon the totalitarian idea of forcing all citizens into one common mold of thinking and acting or requiring them to render a lip service of loyalty in a manner which conflicts with their sincere religious convictions." The case was

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We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes... freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substances is the right to differ as to things that touch the heart of the existing order."

Long live football and stadiums filled with patriotic fans honoring our flag in any way they see fit.

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At Long Last, Lying Jailhouse Snitches Are Muzzled in Connecticut Courtrooms

In The Lincoln Lawyer, Matthew McConoughey plays a savvy, resourceful criminal defense attorney, who practices law from the back seat of a Lincoln Town Car driven by a former client paying off his bill. The film centers on a high-profile case in the form of a wealthy Beverly Hills playboy charged with attempted rape. After mounting an effective defense, and with victory in his grasp, McConoughey is confronted by every defense lawyer's nightmare: A jailhouse snitch. The prosecution calls the snitch without prior notice as a rebuttal witness after McConoughey rests his case. In the standout scene of the movie, the snitch, straight from jail and dressed in prison garb, testifies that the defendant unequivocally admitted to the crime: "I gave the bitch exactly what she deserved, I've done it before and gotten away with it and I'll get away with it again."

McConoughey successfully discredits the snitch with hastily acquired evidence showing that he has a history of giving false testimony. With understandable outrage, the judge dismisses the case.

Of course, this is Hollywood; in real life, the defense would have been caught flat-footed with no time to prepare an effective cross-examination. In some form or another, all criminal trial lawyers, including myself, have faced this situation in the trench warfare of a criminal jury trial. Far from dismissal, the usual outcome of this scenario is conviction and incarceration.

The process of "turning" witnesses to testify against a defendant in exchange for some benefit is commonplace in our criminal justice system. Yet, there is a dearth of legislative or judicial analysis into the corrupting effect of this breed of testimony. As most defense attorneys can attest, prosecutorial reliance on jailhouse informants is one of the most insidious and destructive of law enforcement practices.

Prosecutors have many different incentives to offer a snitch in exchange for testimony and incriminating evidence. These enticements include, but are not limited to, reduced charges, lesser punishment, and even cash or the outright dismissal of a pending criminal case. As Professor Alan Dershowitz has famously said, cooperating witnesses of this type "are taught not only to sing, but also to compose."

Despite the ubiquity of prosecutors engaging in this practice, it would be a crime for a defense lawyer to bribe a witness; after all, federal law makes it a felony to give or promise a witness "anything of value" in exchange for testimony. One might think prosecutors are governed by the same set of rules when they seek to bolster a dubious case with testimony from a cooperating witness. Not so.

In *United States v. Singleton*, a case that sent shivers through the entire criminal justice system, the Court of Appeals for the Tenth Circuit held that the Government violated the federal bribery statute after adducing testimony from a cooperating witness against his co-defendant. The court held that this testimony was inadmissible because it was obtained in exchange for a sentence reduction. Such testimony was found to be impermissible because the federal bribery statute prohibits giving "anything of value" to a witness in exchange for testimony. While the defense bar cheered the decision, Justice Department attorneys considered the decision "absurd" and argued that the prohibition of this type of testimony would cause the entire court system to become clogged with cases and eventually breakdown.

A panicked Justice Department sought *en banc* review of the decision. Shortly thereafter, the full court reversed the ruling of the upstart panel. The prosecutorial boat was no longer in jeopardy of sinking. The full court ruled that plea bargaining was an "ingrained aspect of American legal culture" and that the bribery statute must be interpreted to exclude prosecutors who had a longstanding right to provide "leniency for testimony." Following the first *Singleton* decision, attorneys in federal courts across the country filed motions to suppress the testimony of jailhouse snitches who had received leniency in exchange for testimony. When the Tenth Circuit reversed itself, the other Circuits followed suit, and dismissed the motions.

It would seem obvious that all witnesses should be free from pressure and inducements in order to ensure that truth is the only consideration when offering testimony. Although the federal bribery

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promptly overturned by the United States Supreme Court, in *Minersville School District v. Gobitas* (the children's last names were misspelled). Justice Felix Frankfurter led the majority in deciding in favor of the school district. In his view, the flag salute represented the school's rightful attempt "to awaken in the child's mind considerations of patriotism and national loyalty." In the words of Justice Frankfurter, "[n]ational unity is the basis of national security," which presumably reflected the growing concern of war in Europe. The Court's decision triggered widespread criticism and inspired national debate over the meaning of "national unity" and, more specifically, the right of the government to compel anyone to salute the flag, most of all children.

In 1942, with the apparent blessing of the Supreme Court, the West Virginia Board of Education imposed a requirement for a stiff-armed salute of the American flag. Failure to comply resulted in expulsion. Marie and Gathie Barnette, Jehovah's Witnesses attending grade school near Charleston, West Virginia, brought suit in federal court. The statute was stricken down by the District Court and again by the Court of Appeals.

The stage was set for an appeal to the United States Supreme Court in *West Virginia State Board of Education v. Barnette*. In a stunning decision, the Court affirmed the decisions of the lower courts, thereby overturning its prior decision in *Gobitas*.

Critically, the decision in *Barnette* framed the analysis in terms of freedom of speech rather than religious liberty. The opinion, which was written by newly-appointed Justice Robert Jackson, is a masterpiece of legal writing that has been admired by lawyers and scholars alike for its soaring statement of the fundamental freedom of speech guaranteed by the Bill of Rights. The legal principles deriving from *Barnette* have carried through the decades; the case applies not just to obligatory flag saluting during the World War Two era, but also to Colin Kaepernick's political protest on behalf of oppressed African Americans.

Justice Jackson began his opinion by agreeing with Justice Frankfurter that the flag was a national symbol. The agreement stopped there, however, with Justice Jackson noting that the flag and flag salutes are not totalitarian symbols requiring slavish devotion. Instead, these symbols are a "primitive but effective way of communicating ideas. Moreover, it is essential to recognize that a person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."

The Court emphasized that national unity cannot be coerced by state-imposed rituals. The purpose of the First Amendment is to protect "intellectual individualism and the rich cultural diversities" of America. In searing language, Justice Jackson warned that "those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."

The decision firmly rejected the argument that issues like compulsory flag salutes could be ordered by elected officials. In language quoted to this day, Justice Jackson wrote: "If there is any fixed star in our constitutional constellation, it is that no official high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

Forty-six years later, the reasoning of *Barnette* was affirmed by the Supreme Court in the 1989 decision of *Texas v. Johnson*. There, the Court held that the First Amendment protected Gregory Lee Johnson's right to pour kerosene over an American flag and burn it in public during the Republican National Convention. Relying on *Barnette* and the wonderful eloquence of Justice Jackson, the Court rejected arguments that anti-flag desecration statutes

were necessary to preserve national unity: "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages, would be to enter territory having no discernible or defensible boundaries." As noted in Justice Kennedy's concurrence: "It is poignant but fundamental that the flag protects those who hold it in contempt."

These decisions by the Supreme Court teach a great constitutional irony: We honor our flag precisely because it protects our right not to honor it all. This is a form of free expression in America, a country where no one dictates what we must believe or how we may pledge allegiance to our beliefs whatever they are.

Justice Jackson said it best: "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous, instead of a compulsory routine, is to make an unflattering estimate of the appeal of our institutions to free minds.

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statute makes no exception for prosecutorial prerogatives, the *en banc Singleton* decision remains the law of the land.

Jailhouse snitches are widely regarded as the least reliable witnesses in the criminal justice system and fall into the most notorious and troublesome subclass of informants.

As convicted felons, jailhouse snitches make questionable witnesses. They understand the criminal justice system and are adept at turning innocuous, sometimes truthful information into fantastical testimony. At the same time, every informant is desperate for sentence reductions. Because they are under the control of jail officials, there are many benefits that can be exchanged for information, such as visiting privileges, work assignments, and cell locations. Informants are most valuable in prosecutions with weak forensics. An old prosecutorial aphorism holds that winning cases are best made with "a hair and a snitch."

The biggest problem with jailhouse snitches is their inherent unreliability. Unlike most Western countries, our criminal justice system fosters the routine trade of perks for information or testimony. The expectation of leniency creates a powerful incentive to lie. In the modern era of DNA testing and academic studies, the unreliability of jailhouse informants is now recognized as a profound and widespread failure of the criminal justice system. Nationwide, a growing list of citizens have been found to be wrongfully convicted in capital cases, and are being released after spending years in prison.

According to Professor Samuel Gross, the founder of the National Registry of Exoneration, approximately 50% of wrongful convictions for capital crimes are based on testimony from a "jailhouse snitch or another witness who stood to gain from the false testimony." A report issued by the Center on Wrongful Convictions at Northwestern University Law School found that over 45 percent of all wrongful capital convictions are based on false testimony by incarcerated witnesses, concluding that "snitching is the leading cause of wrongful convictions in U.S. capital cases." According to Pro Publica, more than 140 people have been exonerated in murder cases involving jailhouse informants since 1966, when the U.S. Supreme Court found it constitutional to use compensated government informants in *James Hoffa v. United States*.

What is truly alarming is that data only exists for an extremely limited number of overturned convictions obtained by testimony from a compromised witness. The vast majority of these convictions were reversed because a small number of dedicated lawyers were able to obtain DNA testing that proved their clients were innocent. Resources for this kind of work are nil (the Innocence Project estimates they are only able to take on less than 1% of cases because of limited funding).

It is a chilling thought to consider the numbers of wrongful convictions that have been obtained because of testimony from a compromised informant that we do not know about; particularly those wrongful convictions where exoneration vis-à-vis DNA evidence is not possible.

Connecticut has a long history of injustice related to wrongful convictions obtained by informant testimony. This is something I have personally experienced in my own practice representing claimants in wrongful conviction cases. A recent illustrative example is that of Alfred Swinton, a case brought by the Connecticut Innocence Project. In March 2018, Mr. Swinton was freed after serving 18 years of a 60 year sentence for a murder he did not commit. He was convicted on the basis of testimony offered by a jailhouse snitch. Two decades later. Mr. Swinton was exonerated when DNA evidence proved he was not the killer.

Mr. Swinton's case had all the hallmarks of the growing number of exonerated inmates left to rot in jail for crimes they never committed. Mr. Swinton's prosecution began with a weak forensic case buttressed by the testimony of a jailhouse informant. A "forensic odontologist" testified that a bite-mark on the victim's right breast matched Swinton's teeth. Evidence of matching bite-mark patterns has since been widely criticized as unreliable; indeed, DNA testing ultimately proved that the saliva in the bite-mark did not match Mr. Swinton's.

As is typical in cases with weak forensics, the prosecution relied on the testimony of a professional informant to buttress its case. At trial, the informant claimed that Mr. Swinton admitted to the crime while they were in jail together. Also typical, the jury was never informed that the snitch was an informant in other cases and that he obtained a deal to gain early release from prison.

Another recent distressing example of wrongful imprisonment based on the testimony of a jailhouse snitch is the case of Miguel Roman, who spent over 20 years in a Connecticut prison for the murder of his girlfriend, a crime he never committed. The State's case and the conviction resulted from the testimony of an experienced snitch who testified that Mr. Roman confessed to him in prison while awaiting trial. The snitch, who recanted several years later, was given favorable treatment by the prosecutor's office, a fact that was never learned by the jury. The Connecticut Innocence Project became involved and successfully proved that DNA found on several items at the crime scene was not Mr. Roman's and instead matched the DNA of a habitual sex offender charged in the murders of two other women.

Until very recently, the government's ability to induce and rely upon testimony from a snitch was seemingly unchecked. Indeed, prosecutorial dependency on informants has been an accepted,

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baked-in part of the criminal justice system, an arena where reform occurs at a glacial pace. Last year, however, Connecticut took a formidable step toward solving this crisis, by taking the nationwide lead in restricting jailhouse informant evidence.

On October 1, 2019, Connecticut enacted a statute which provides essential safeguards against the dangers posed by jailhouse informants. With this statute, Connecticut became the first state to require each prosecutor's office to keep background information on every jailhouse witness, including a record of the "substance and use of their testimony and any of their testimony and any benefits that have been or may be provided."

The statute requires this information to be tracked by the state Criminal Justice Division and made available to all prosecutors to consider when assessing an informant's reliability. The statute requires disclosure of data pertaining to the cooperating witness within 45 days of a motion filed by the defendant. Additionally, defendants are now statutorily entitled to the disclosure of any and all benefits received in exchange for testimony, the criminal history of the witness, as well as disclosure of any other cases in which testimony was given and benefits received for that testimony. In cases of rape or murder, judges must, upon the defendant's request, hold a pre-trial hearing to determine the reliability of jailhouse witness testimony. The prosecution has the burden of proving, by a preponderance of the evidence, that the testimony is reliable by establishing certain factors such as specificity of the information and whether details of the testimony could be obtained from a source other than the defendant.

In his comments to the General Assembly, the former Chief State's Attorney objected to the bill, claiming that it "embodies a presumption that a jury of the defendant's peers cannot be trusted to carefully consider and assess all of the testimony that is presented to it, including that which is given by a witness whose testimonial motivations may be called into question."

As one might imagine, both Alfred Swinton and Miguel Roman believe differently, which they made clear in their testimony to the General Assembly. The fact is, juries do not consider all of the testimony because it is not fully presented to them. This is particularly true with respect to the testimonial history of jailhouse witnesses and the deals they broker with the prosecution.

This statute is a criminal justice milestone. Testimony from cunning and malicious jailhouse snitches, with little to lose and everything to gain, enabled by prosecutors, has resulted in appalling miscarriages of justice. Connecticut has made a great step forward in protecting innocent defendants from this glaring deficiency in our system of criminal justice.

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