RECANTATIONS AND THE PERJURY SWORD

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Witness recantations pose a special problem in criminal law. Often, trial witnesses come forward, sometimes years after a criminal trial, and admit or allege that the incriminating testimony they gave at trial, and which contributed to the conviction of the defendant at that trial, was false or mistaken.[1] Convicted inmates submit such recantations as new evidence of actual innocence to courts in hopes of winning their release or at least a new trial.[2] Courts, however, are notoriously skeptical of recantation evidence, in part because of finality concerns, but also in part because judges tend to treat such statements as less reliable than the original, in-court testimony that was previously given.[3]

But here, courts have it exactly backward, largely because they misunderstand or underappreciate the extent to which the prosecutorial perjury sword places recanting witnesses in a legal dilemma. How many people, after all, are willing to admit publically that they erred or lied in the past and thereby risk a criminal perjury conviction and possible prison sentence simply to benefit some other person, possibly a complete stranger? In those relatively rare instances in which a witness does willingly recant

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[1] *See, e.g.*, Dobbert v. Wainwright, 468 U.S. 1231, 1232 (1984) (Brennan, J., dissenting) (demonstrating that witnesses sometimes recant testimony up to several years after a conviction); *see* Peter M. Agulnick, *In Search of Truth: A Case for Expanding Perjury's Recantation Defense*, 100 W. VA. L. REV. 353, 354–55, 356 (1997) (discussing the historical roots and modern prevalence of witness perjury and recantation).

[2] *See* Adam Heder & Michael Goldsmith, *Recantations Reconsidered: A New Framework for Righting Wrongful Convictions*, 2012 UTAH L. REV. 99, 100, 110; *see also* United States v. Smith, 433 F.2d 149, 150 (5th Cir. 1970) (demonstrating reliance on the recantation of a witness's trial testimony as grounds for a new trial).

[3] United States v. Santiago, 837 F.2d 1545, 1550 (11th Cir. 1988) ("[R]ecantations are viewed with extreme suspicion by the courts." (quoting Newman v. United States, 238 F.2d 861, 862 n.1 (5th Cir. 1956))); Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994) (explaining that recanting testimony is "exceedingly unreliable" (quoting Bell v. State, 90 So. 2d 704, 705 (Fla. 1956))); People v. Shilitano, 112 N.E. 733, 739 (N.Y. 1916) (noting the finality of the jury's original verdict in a denial of a new trial based on recanted testimony, which was deemed untrustworthy and unreliable); *see also* Heder & Goldsmith, *supra* note 2, at 100–01, 104, 106–07 (noting courts skepticism of recantations).

her trial testimony, such recantations should be granted a presumption of credibility rather than a presumption of falsity or simply dismissed, as they so often are.[4]

What's more, there is little popular appreciation of the extent to which the prosecutorial perjury sword—that is, the credible threat by police and prosecutors to bring perjury charges against witnesses who wish to recant prior statements—can itself be used to induce false witness testimony.[5] Witness statements are not always purely voluntary. Many witnesses must be pressured or induced to give information to the police, and sometimes, the pressure used to extract helpful information crosses over into outright coercion.[6] Regardless of how an initial statement is obtained, however, once a witness has provided a statement under oath, the game is on. The threat of perjury sanctions can be wielded to intimidate recalcitrant witnesses from diverging from the established script.[7] Thus, a single coerced, sworn statement can be used to ensnare a witness like a bear in a trap, leading inexorably from midnight backroom interrogation, to grand jury, to trial.[8] Later, after trial, some witnesses attempt to revoke their earlier testimony, but the perjury sword continues to threaten even then.[9]

There is no easy fix to the dilemma. It is imperative that witnesses testify truthfully at trial, and to the extent that penalties for lying at trial contribute to that goal, it is difficult to argue that they should be completely abandoned. On the other hand, perjury

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[4] *See, e.g.*, *Smith*, 433 F.2d at 150 ("Recantation is 'looked upon with the utmost suspicion.'" (quoting Harrison v. United States, 7 F.2d 259, 262 (2d Cir. 1925))); *Armstrong*, 642 So. 2d at 735 (dismissing recantation testimony as grounds for a new trial); *Shilitano*, 112 N.E. at 736 (noting that recantation testimony is presumed "unreliable" and "untrustworthy"). For more discussion regarding the recommendation that recantations should be granted a presumption of credibility rather than a presumption of falsity, see *infra* notes 129–30 and accompanying text.

[5] Perjury is typically defined as making a material false statement under oath or affirmation that one knows is false. *See* Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M.L. REV. 149, 152 (2009).

[6] *See, e.g.*, *infra* notes 30, 57 and accompanying text.

[7] *See, e.g.*, People v. Shapiro, 409 N.E.2d 897, 903–04 (N.Y. 1980) (describing the prosecutor's intimidating conduct when faced with recalcitrant witnesses for the defendant).

[8] *See, e.g.*, People v. Tolliver, 807 N.E.2d 524, 551–55 (Campbell, J., dissenting) (describing the "coercive atmosphere" in which each witness made their initial statements during interrogation, and the subsequent statements made to the grand jury, and then at trial); *see infra* notes 61–64 and accompanying text.

[9] *See, e.g.*, Eric Zorn, *No Take Backs—Prosecuting Witnesses who Change Their* Stories, CHI. TRIB.: CHANGE OF SUBJECT: OBSERVATIONS, REPORTS, TIPS, REFERRALS AND TIRADES (Sept. 7, 2011), http://blogs.chicagotribune.com/news_columnists_ezorn/2011/09/recant.html (describing a case from Illinois wherein the witness was charged with perjury after attempting to revoke his testimony given at trial, upon which a conviction was obtained); *see infra* notes 65–68 and accompanying text.

sanctions cannot and should not be used to discourage honest recantations. Trial truth is optimal, but truth delayed is better than no truth at all. The legal system must permit the responsible consideration of recantation evidence, even recognizing that doing so has a cost in terms of finality.

This short essay sets forth the argument for reforming our approach to recantation evidence. Part I discusses how police and prosecutors use the perjury sword to lock in helpful testimony that in some cases is the product of coercion, to compel witnesses to give false testimony at subsequent proceedings, and to intimidate witnesses from changing or retracting their stories. Part II acknowledges some of the challenges police and prosecutors face, particularly when dealing with crimes committed in high-crime, urban contexts, and in domestic violence cases. The perjury sword has proven to be a useful, and perhaps even essential, tool in those situations. Part III suggests some ways in which the use of the perjury sword might be alleviated. These include reducing witness exposure to perjury charges, expanding the recantation defense, and reconsidering how courts evaluate recantation testimony. Finally, Part IV briefly questions whether, at least in certain types of cases, we should remain wedded to a monistic account of truth, or whether sometimes it might be better to recognize the existence of a more pluralistic conception of what constitutes truth in criminal justice.

I. FROM INTERROGATION ROOM TO HABEAS HEARING: RECANTATIONS AND THE PERJURY SWORD

A witness's recantation is, as a rule, greeted with great skepticism. As evidence goes, recanted testimony is the ugliest stepchild. It has been described as "untrustworthy,"[10] "exceedingly unreliable,"[11] and deserving "utmost suspicion."[12] As one Virginia court observed, "recantation evidence is generally questionable in character and is widely viewed by courts with suspicion because of the obvious opportunities and temptations for fraud."[13]

[10] People v. Shilitano, 112 N.E. 733, 736 (N.Y. 1916).

[11] Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994) (quoting Bell v. State, 90 So. 2d 704, 705 (Fla. 1956)); McLin v. State, 159 So. 3d 870, 873 (Fla. Dist. Ct. App. 2015) (quoting *Armstrong*, 642 So. 2d at 735).

[12] United States v. Smith, 433 F.2d 149, 150 (5th Cir. 1970) (quoting Harrison v. United States, 7 F.2d 259, 262 (2d Cir. 1925)).

[13] Carpitcher v. Commonwealth, 641 S.E.2d 486, 492 (Va. 2007) (first citing Fout v. Commonwealth, 98 S.E.2d 817, 823 (Va. 1957); then citing Lewis v. Commonwealth, 70 S.E.2d 293, 301 (Va. 1952); then citing United States v. Johnson, 487 F.2d 1278, 1279 (4th Cir. 1973) (per curiam); and then citing United States v. Bynum, 3 F.3d 769, 773 (4th Cir.

Recantations are disliked for good reason. They necessarily call the integrity of the law's processes into question.[14] A recantation means either that the witness lied before, or is lying now. One way or another, the recanting witness is a liar, and who needs that? But knee-jerk rejection of recantation evidence is misguided not only because judges tend to misjudge the reliability of recantations, but also because the policy is a major contributor to the abuse by law enforcement officials of what I refer to here as "the perjury sword."

A. The Prosecutorial Perjury Sword

Witnesses in criminal trials are required to testify under solemn oath or affirmation.[15] That requirement performs two functions: first, it assures that witnesses appreciate the gravity of the proceedings and the importance of telling the truth.[16] Second, it also subjects the witness to prosecution for perjury for any lies the witness tells.[17] Although the importance of communicating the weightiness of the witness's duty to testify truthfully is obviously a valuable message to get across, it is the second feature of the oath/affirmation requirement that demands further consideration. For although the threat of perjury sanctions is undoubtedly a useful tool to encourage recalcitrant or biased witnesses to disclose facts for the sake of truth that are harmful to themselves or those they care about, or that open them up to retaliation by others, in some cases the threat of perjury can be manipulated by the state in ways that undermine the reliability of criminal proceedings.[18] This latter phenomenon can be seen in cases involving allegations of witness coercion by police officers or other state agents.

The perjury sword was clearly at work in a relatively run-of-the-mill prosecution for sexual assault against Julian Gutierrez. In a case involving allegations that the defendant improperly touched his fifteen-year-old daughter, the daughter told a grand jury that her stepfather had sexually abused her, but then indicated that she

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[14] *Cf.* State v. McCallum, 561 N.W.2d 707, 714 (Wis. 1997) (Abrahamson, C.J., concurring) ("[P]erjured testimony affects the integrity of the judicial process in a way that other newly discovered evidence does not.").

[15] *See* FED. R. EVID. 603 (requiring witnesses in federal cases to take an oath before testifying).

[16] 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 245, at 179 (7th ed. 2013).

[17] *Id.*

[18] *See, e.g.*, Brown v. United States, 245 F.2d 549, 554 (8th Cir. 1957) (reversing conviction of a defendant brought before a grand jury to testify where the sole purpose was to prosecute the defendant for perjury and not for him to aid in ongoing investigations).

planned to recant those allegations at trial.[19] Upon learning that the daughter was considering changing her testimony, a police officer and a prosecutor from the district attorney's office visited the daughter at school.[20] They told her that she "could be prosecuted for perjury and that her two-year-old son could be taken from her if she did not appear at trial and testify consistently with her previous grand jury testimony."[21] She testified, and the defendant was indicted at trial.[22]

Or take the well-known Ford Heights Four case.[23] There, an intellectually disabled woman named Paula Gray was coerced into testifying that she had witnessed four of her friends commit a rape and murder, but Gray recanted her statement before trial.[24] The state, which was forced to drop charges against one of the defendants, in apparent retaliation charged Gray with perjury and murder.[25] Gray was convicted, but the convictions were subsequently reversed and the case remanded on appeal based on a finding that her attorney had a conflict of interest.[26] While awaiting retrial, Gray changed her story again and agreed to testify against the men in exchange for which prosecutors agreed to dismiss the murder charge and allow her to plead guilty to perjury alone.[27] Based in part on Gray's testimony, some of the defendants were convicted.[28] But Gray later told defense investigators that police had coerced her testimony, which, in any event, was proven false, and her recantation true, after DNA testing exonerated Gray and the other four defendants.[29]

What happened to Gray, and to the Ford Heights Four defendants, follows a standard script that is readily observable in

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[19] State v. Gutierrez, 2014-NMSC-031, ¶¶ 2, 11, 333 P.3d 247, 248, 250. The Court reversed for a double jeopardy violation and did not reach the issue as to whether prosecutor's perjury threats constituted misconduct, but cautioned all attorneys to think twice before pressuring witnesses into changing testimony, regardless of what motivates such pressure. *Id.* ¶¶ 32, 34–35, 333 P.3d at 255, 256.

[20] *Id.* ¶¶ 6–7, 12, 29, 333 P.3d at 249–50, 251, 254.

[21] *Id.* ¶¶ 10, 333 P.3d at 250.

[22] *See id.* ¶ 2, 333 P.3d at 248.

[23] Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L.J. 75, 94 (2008).

[24] United States *ex rel.* Gray v. Dir., Dep't of Corr., 721 F.2d 586, 591–93 (7th Cir. 1983).

[25] *Id.* at 592.

[26] *Id.* at 593, 597, 598.

[27] People v. Jimerson, 652 N.E.2d 278, 284 (Ill. 1995); Armbrust, *supra* note 23, at 95.

[28] *Jimerson*, 652 N.E.2d at 286–87; Steven Clark, *Procedural Reforms in Capital Cases Applied to Perjury*, 34 J. MARSHALL L. REV. 453, 454 (2001) ("Paula Gray's Perjury resulted in death sentences for two innocent men, Dennis Williams and Vernal Jimerson.").

[29] Armbrust, *supra* note 23, at 95.

numerous reported cases. Police bring pressure to bear on witness, witness makes statement incriminating defendant, and then later witness seeks to recant statement but prosecutors rattle the perjury sword, keeping the witness in line only to find, later, that a wrongful conviction resulted. Indeed, police pressure on suspects to make initial statements can often be quite intense, as it was in the Troy Davis case.[30] There, sixteen-year-old D.D. Collins was identified as an eyewitness to the shooting of a police officer in Georgia.[31] Troy Davis had been fingered by another person as the shooter.[32] Collins was brought in by police officers for questioning.[33] According to Collins:

> Early Saturday evening, a bunch of cops showed up at my house. There were a lot of them, maybe fifteen or twenty, and a lot of them had their guns drawn. I was scared as hell. They told me that they knew that I was there when the officer was killed and they were going to take me down to the barracks for questioning. An officer put handcuffs on me and put me in the back of the squad car. Like I said, I was scared. I was only sixteen years old. When I got to the barracks, the police put me in a small room and some detectives came in and started yelling at me, telling me that I knew that Troy Davis fired those shots in Cloverdale and killed that officer by the Burger King. I told them that I didn't know nothing (sic) about either of them and that I didn't see Troy do nothing (sic). They got real mad when I said this and started getting in my face. They were telling me that I was an accessory to murder and that I would pay like Troy was gonna (sic) pay if I didn't tell them what they wanted to hear. They told me that I would go to jail for a long time and I would be lucky if I ever got out, especially because a police officer got killed. I kept telling them that I didn't see Troy do nothing (sic), and they kept telling me that I was going to jail as an accessory. I didn't want to go to jail because I didn't do nothing (sic) wrong. I was only sixteen and was so scared of going to jail. They kept saying that they knew I saw Troy shoot at that car in Cloverdale and that he had messed with that man up at Burger King and

[30] *See* Davis v. State, 660 S.E.2d 354, 356–57, 359 (Ga. 2008).

[31] *Id.*

[32] *Id.* at 359, 360.

[33] Affidavit of Darrell "D.D." Collins ¶ 6, Davis v. Terry, 465 F.3d 1249 (11th Cir. 2006) (No. 04-13371).

> killed that officer. I told them that it was Red and not Troy who was messing with that man, but they didn't want to hear that. It was, "Troy did this, Troy did that." The detectives told me fine, have it your way, kiss your life good-bye, because you're going to jail.[34]

Eventually, Collins said, he gave in and signed a statement that was presented to him.[35] While recanting much of the statement he had signed at trial, Collins nonetheless made an incriminating statement against Davis at trial.[36] He did so, he explained, "because I was still scared that the police would throw me in jail for being an accessory to murder if I told the truth about what happened at Burger King even though I didn't do nothing (sic) and didn't see Troy do nothing (sic)."[37]

The availability of the perjury sword inevitably injects a degree of uncertainty into any case in which it has been wielded. A prime example of that can be found in the case of Jonathan Tolliver. Tolliver, a sixteen-year-old African-American male associated with gang activity in the Robert Taylor Homes projects in Chicago, and allegedly a member of the Gangster Disciples street gang, was accused of shooting and killing Chicago police officer Michael Ceriale.[38] Police recovered no physical evidence tying Tolliver to the crime.[39] Rather, the case against Tolliver was based on the eyewitness testimony of six individuals who told police, and then a grand jury, that Tolliver was involved in the shooting of Officer Ceriale.[40]

At trial, however, all six witnesses, at least four of whom the state alleges to be fellow Gangster Disciples, recanted their earlier statements and testimony.[41] According to the witnesses, police officers detained them for extended periods of time, beat and

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[34] *Id.* ¶¶ 6–7.

[35] *Id.* ¶ 8.

[36] *See id.* ¶ 10.

[37] *Id. See* Bell v. United States, 871 A.2d 1199 (D.C. 2005). In *Bell*, a recanting witness explained that he implicated the defendant "because the investigating detective . . . threatened to charge [him] unless [he] told him something he could use." *Id.* at 1203. He persisted with the story at trial because "[h]e felt that, because he had already given testimony at the trial of one of the co-defendants, he would be prosecuted for perjury if he changed his testimony." *Id.* at 1204. The defendant sought a new trial on the strength of the recantation. *Id.* at 1202. The court, however, denied the request, claiming that the recantation was not sufficiently credible. *Id.* at 1202, 1204.

[38] People v. Tolliver, 807 N.E.2d 524, 529, 536, 548 (Ill. App. Ct. 2004).

[39] *Id.* at 538.

[40] *Id.* at 531, 534–35.

[41] *Id.* at 530, 531, 532–33, 534, 538.

intimidated them, and threatened to charge them as accessories in the crime if they refused to implicate Tolliver and the other suspects.[42] According to the witnesses, in the face of this coercion they caved and gave signed statements, under oath, to police, often merely repeating accounts and descriptions provided to them by the interrogating police officers.[43]

Having obtained the sworn statements, the witnesses were then hustled over to the grand jury, where they were asked to repeat these statements.[44] The witnesses were told that if their testimony diverged from their statements, they would be subject to perjury charges.[45] With this threat hanging over them, the witnesses said they felt they had no choice but to repeat the lies in the statements.[46]

Later, when the case went to trial, the same witnesses were called to testify.[47] This time, however, despite the threat of perjury charges, all six witnesses recanted their prior statements, which they alleged to have been false and purely the product of police coercion.[48] Notwithstanding the recantations, the state proceeded with its case, introducing the prior statements of the witnesses as substantive evidence of Tolliver's guilt.[49] According to prosecutors, the witnesses' recantations were motivated, not by a desire to tell the truth, but out of devotion to an anti-snitching code among gangsters and a fear of retaliation by Gangster Disciples.[50] The result was a draw. The first trial ended in a hung jury.[51] Tolliver was tried a second time, and this time he was convicted and sentenced to sixty years in prison.[52]

The outcome of the *Tolliver* case is, perhaps, not that remarkable. What is remarkable, however, is what prosecutors did next—which was to bring perjury charges against five of the six recanting witnesses.[53] Faced with the threat of substantial criminal penalties

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[42] *Id.* at 531–34, 551, 552, 553.

[43] *Id.* "Serious doubt exists as to the voluntary nature of the original inculpatory statements of the recanting witnesses, who were held in police custody for up to 24 hours prior to being forced to testify before the grand jury." *Id.* at 551 (Campbell, J., dissenting).

[44] *Id.* at 532, 533, 552, 553.

[45] *See* Jeff Coen, *Ceriale Perjury Suspect Blames Cops*, CHI. TRIB. (Dec. 8, 2002), http://articles.chicagotribune.com/2002-12-08/news/0212080084_1_grand-jury-perjury-ordeal.

[46] *See id.*

[47] *Tolliver*, 807 N.E.2d at 531.

[48] *Id.* at 531–34.

[49] *Id.* at 534, 538.

[50] *See id.* at 530, 537, 542.

[51] *Id.* at 530.

[52] *Id.*

[53] Stefano Esposito, *Last of Five Accused of Perjury in Ceriale Slaying Trial Sentenced*,

if convicted at trial, all five of the witnesses ultimately plead guilty in exchange for modest sanctions.[54] The state declared itself vindicated.

The Chicago media largely agreed, treating the recanting witnesses as having received what they deserved for trying to obstruct justice and shield a guilty gangbanger and cop-killer from punishment.[55] But the reality is more ambiguous. While it is possible that police, prosecutors, and the press got this case right and the guilty parties all got what was coming to them, it is also possible that the establishment got it wrong. What if the witnesses' accounts of police misconduct were true? Cases of overzealous policing, especially in Chicago, are hardly unheard of.[56]

In fact, research on wrongful convictions, often based on data gathered from DNA exonerations, demonstrates that this sort of police misconduct occurs with some frequency.[57] Consider the bind in which a witness in cases like Tolliver's is placed.

First, some of the witnesses were teenagers.[58] They were brought to the police station and locked up in an interview room or cell for extended periods of time.[59] Those who were minors were interviewed without a parent or guardian present, and because they were not criminal suspects, this unsupervised interrogation likely contravened no laws.[60] A young kid in that position would feel extremely vulnerable, and aggressive police questioning would only heighten that sense of vulnerability. If the witness—already scared—were threatened with the possibility of being charged him or herself—and how is such a witness to evaluate the plausibility of that threat?—a difficult position might surely become intolerable.

CHI. SUN-TIMES, Aug. 3, 2004, 2004 WLNR 23736712.

[54] *Id.*

[55] *See, e.g.*, Editorial, *Taking Stand Against Lies*, CHI. SUN-TIMES, Nov. 26, 2002, 2002 WLNR 15288710 ("Perjury by witnesses should be taken . . . seriously.").

[56] The lead detective in the case, Kenneth Boudreau, had previously been identified in investigative news stories as "involved in a wide range of cases that ultimately collapsed even though the police obtained a confession," and was the subject of a civil complaint brought by another individual claiming to have been wrongly convicted due to actions by that officer. *See* Amended Complaint for Jury Trial at ¶¶ 7, 9(o), Smith v. Boudreau, No. 03 L 11581 (Ill. Cir. Ct. Sept. 15, 2004), 2004 WL 5740551.

[57] *See* James R. Acker & Catherine L. Bonventre, *Perspective: Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1265–66, 1266 n.91 (2010).

[58] People v. Tolliver, 807 N.E.2d 524, 552, 553 (Ill. App. Ct. 2004).

[59] *See id.* at 551, 552, 553.

[60] *See id.* at 554 ("[T]here is no *per se* rule that juveniles must be allowed to consult with their parents prior to questioning.").

Most witnesses placed in such a situation must surely succumb to the pressure and provide police with whatever statement they are being pressured to give.[61] Such witnesses, most likely, would be focused on extricating themselves from their immediate situation; resist and remain in police detention for an indeterminate time, facing potentially serious criminal charges, or comply with police demands and end the ordeal. Who can blame anyone for taking the latter path? The witness will only be told, "sign the statement, and then you will be done." But of course, once the statement has been signed, the witness is not done. The statement is but the first, albeit the most crucial, step down a long path. When the witness is subsequently called to testify in a grand jury proceeding or preliminary hearing, the witness will be reminded of his earlier ordeal.[62] And he will be told that any deviation from what he has already said in his sworn statement will not be tolerated.[63] If he renounces his statement he faces potentially harsh punishment.

By the time the case gets to trial, such witnesses find themselves in a deep and gut-wrenching bind. It now may be clear to the witness how much is at stake. Another person, perhaps a stranger or mere acquaintance, perhaps even a friend, faces serious punishment, maybe even death. Yet, to change course now puts the witness in serious personal jeopardy. Several years in jail is a lot to ask a person to risk to save another, even if that person is more than a stranger.

In the *Tolliver* case, we don't know if the witnesses' stories of police misconduct were true or false. The officers who took the witnesses statements denied the allegations, unsurprisingly, that they had engaged in any wrongdoing.[64] The state, however, did not put forward any evidence to disprove that the witnesses had been subjected to lengthy detention prior to providing their signed statements. The state did not record or videotape the interviews or the statements themselves. It was thus the word of the officers against the witnesses as to what happened during the long hours in which those witnesses were being held, incommunicado, from the outside world.

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[61] Allegations of such police pressure are relatively common. *See, e.g.*, Caldwell v. State, 853 N.W.2d 766, 769 (Minn. 2014) (discussing three witness recantations, two of which were made by trial witnesses who stated that they originally testified falsely at trial because they feared they would otherwise be charged for crimes).

[62] *See Tolliver*, 807 N.E.2d at 532, 533.

[63] *See id.* at 533.

[64] *See id.* at 539.

The perjury sword can be wielded in other ways as well. Regardless of whether there are allegations of police misconduct prior to trial, the state frequently uses the threat of perjury charges to try to lock in trial convictions and prevent witnesses from recanting trial testimony.[65] Often, the mere threat of charges is enough to dissuade witnesses from recanting.[66] Such witnesses may decline to testify in post-conviction proceedings, severely hampering the ability of defendants to get potentially significant exculpatory evidence in front of courts.[67] While defendants may be able to subpoena such witnesses in an effort to compel their testimony, the threat of perjury charges enables witnesses to invoke their Fifth Amendment privilege and avoid testifying.[68]

The back and forth caused by attempts to recant trial testimony and the fear of perjury charges can go to extreme lengths. In one recent case, a trial witness who was described as "the linchpin to a conviction" authored an affidavit recanting his trial testimony.[69] After being threatened with perjury charges by the state, he then signed another affidavit recanting his recantation.[70] When it subsequently became clear that the witness had been threatened

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[65] *See, e.g.*, *id.* at 533. In another case, witness Willie Johnson recanted testimony implicating two men in a murder, but the trial court found his recantation "inconsistent and implausible." Illinois v. Cal, No. 92 CR 10385 (01), slip op. at 5 (Ill. Cir. Ct. July 15, 2011); Zorn, *supra* note 9. He was then charged with perjury. *See id.*

[66] *See* United States v. Mitchell, 29 F.R.D. 157, 158 (D.N.J. 1962) ("After the trial [the witness] . . . asked to talk to the Court about the case. When he entered the Court's chambers, it appeared as though he wanted to discuss his own testimony, but the Court refused to hear him until the District Attorney had been called in. When Assistant United States Attorney Ritger arrived, Morgan refused to say anything, apparently fearing a perjury prosecution.").

[67] For example, Brian Keith Terrell, executed on December 9, 2015, contended that he was innocent of the murder charge for which he was convicted. *See* Rhonda Cook, *Execution for 1992 Murder Still on Track*, ATLANTA J.-CONST. (Dec. 8, 2015), http://www.myajc.com /news/news/local/execution-for-1992-murder-still-on-track/npfGs/. The primary witness against Terrell at trial apparently admitted that "he lied because police threatened to charge him with Watson's murder if he did not help them build a case against his cousin." *Id.* But "Johnson refuse[d] to sign an affidavit saying under oath that he lied," presumably for fear of opening himself up to perjury charges. *See id.* Because Terrell's ability to contest his conviction failed for lack of concrete evidence, the perjury sword was an executioner's sword in his case.

[68] *See, e.g.*, Duckett v. State, 148 So. 3d 1163, 1170 (Fla. 2014) ("Gurley took the stand at the evidentiary hearing but declined to answer any questions relating to the night of the murder. Instead, she invoked the Fifth Amendment privilege against self-incrimination."); Gould v. Comm'r of Corr., 123 A.3d 1259, 1263 (Conn. App. Ct. 2015) (describing how a recanting witness refused to testify at a post-conviction hearing, invoking her Fifth Amendment privilege).

[69] Douglas v. Workman, 560 F.3d 1156, 1167, 1174 (10th Cir. 2009) (quoting Powell v. Mullin, No. CIV-00-1859-C, 2006 U.S. Dist. LEXIS 5696, at *36 (W.D. Okla. 2006)).

[70] *Douglas*, 560 F.3d at 1167, 1168.

with perjury sanctions by the state if he failed to recant his recantation, he signed yet another affidavit recanting his recantation of his recantation.[71] In the face of this record, the Tenth Circuit granted the defendant's habeas petition.[72]

II. STREET JUSTICE AND GANGSTA' LAW

A. Ghettoside Policing

While the perjury sword can plainly be abused by the state, there are strong countervailing interests to any policy proposal to take perjury sanctions for untruthful witnesses completely off the table in criminal cases. The issue is complex. Especially in cases involving poorer, inner-city communities, perhaps the biggest obstacle confronting law enforcement is persuading witnesses to talk.[73] Witnesses testify in fear of retaliation, or being labeled as a "snitch" and ostracized from the community,[74] or simply being killed.[75] In the *Tolliver* case, after the six witnesses recanted their pretrial statements, prosecutors put in evidence that "a group of Gangster Disciples and relatives" of the codefendant confronted one of the witnesses and "threatened to blow up her apartment, hurt her, and kill her niece in retaliation for her testimony against [the defendant] before the grand jury."[76] Despite their best intentions, prosecutors can do little to protect these witnesses. Some witnesses can be relocated in witness protection programs, but relocation might not be a practical or realistic option for many whose lives and livelihoods are tied up in the geographic area in which they live.[77] Moreover, even where witnesses might be relocated, their extended families will not be eligible for relocation, and will remain vulnerable to retaliation.[78]

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[71] *Id.* at 1168.

[72] *Id.* at 1160.

[73] Jill Leovy provides an excellent discussion of the problem in her account of homicide investigation in Watts. *See* JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA 74 (2015).

[74] *See id.* at 76; *see also* United States v. Di Paolo, 835 F.2d 46, 47, 48–49 (2d Cir. 1987) (noting that the defendant was convicted of witness intimidation as he seemed plainly to have coerced the complaining witness into recanting her original testimony and her recanting testimony at trial was facially implausible.). Specifically, it seemed implausible that the victim-witness inflicted bruises on her own face. *Id.* at 50.

[75] Leovy reports that on average at least seven and probably around a dozen witnesses are killed each year in Los Angeles County. LEOVY, *supra* note 73, at 76.

[76] People v. Tolliver, 807 N.E.2d 524, 531, 534, 542 (Ill. App. Ct. 2004).

[77] LEOVY, *supra* note 73, at 75.

[78] *Id.*

All this makes prosecuting crime difficult, and prosecuting crime in poor, crime-ridden, and gang-infested communities especially so. The costs of the reluctance of witnesses and victims to testify are borne primarily by citizens of those communities.[79] From this vantage, the legal system's distrust of recantations is far more understandable. Rendering recantations almost worthless, as present legal practice tends to do, at least has the salutary effect of diminishing the incentives of criminal defendants and their confederates to subject adverse witnesses to post-trial threats in the hope of getting them to recant their trial testimony.[80] At the same time, the perjury sword provides leverage to help prosecutors put together cases that might otherwise fall apart, or to shield the convictions they do obtain from later attack by providing a counterweight to pre- or post-conviction pressure applied by criminal defendants, friends, accomplices, associates, and criminal gangs.[81]

The routine use of the perjury sword for such purpose can be seen in one recent Louisiana case where, during an interview with a police detective, a witness identified a man named White as the perpetrator in a robbery and murder of an ATM attendant.[82] At a subsequent pretrial motion hearing, however, the witness recanted everything he had told the detective.[83] As a result, he was charged with perjury.[84] In the face of the charge, the witness then recanted his recantation and testified against White.[85] When asked to explain his flip-flopping, the witness stated that he had recanted "because he was scared that he would be killed if he testified against the defendants,"[86] and that he was testifying largely to avoid a perjury conviction.[87] Thanks in large part to the witness's

[79] *Id.* at 7–8 (describing a culture of violence that is fostered by under policing of certain impoverished African-American communities).

[80] *See, e.g.*, United States v. Santiago, 837 F.2d 1545, 1550 (11th Cir. 1988) (citing Newman v. United States, 238 F.2d 861, 862 (5th Cir. 1956)); Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994) (quoting Bell v. State, 90 So. 2d 704, 705 (Fla. 1956)).

[81] *See, e.g.*, State v. White, 2014-0397, p. 9 (La App. 4 Cir. 7/29/15); 174 So. 3d 177, 184 ("[The witness] admitted that part of his reason for testifying at trial was to rid himself of the perjury charge relating to the recantation of his testimony concerning [the defendant] and the shooting.").

[82] *Id.* pp. 2, 3–4; 174 So. 3d at 181, 182.

[83] *Id.* p. 8; 174 So. 3d at 184.

[84] *Id.*

[85] *Id.* p. 9; 174 So. 3d at 184.

[86] *Id.* pp. 8, 9; 174 So. 3d at 184.

[87] *Id.* p. 9; 174 So. 3d at 184. The witness also denied having any interest in the reward money offered by police, and stated that in addition to avoiding the perjury conviction, he wanted "to help the victim's family get justice." *Id.*

testimony, the prosecutors succeeded in obtaining a conviction against White at trial.[88]

As the *White* case, and countless others, illustrate, there is no doubt that threats of violence by defendants or their confederates can sometimes induce witnesses to back away from even truthful testimony.[89] Evidence can be found in cases where the recantation is itself wholly implausible. In one case, for example, the victim of a severe beating recanted testimony implicating the defendant, a reputed mobster charged with witness intimidation and assault who she told police had visited her house and badly beat her, by claiming that the severe bruises on her face at the time the police responded to the 911 call had been "self-inflicted," and that she had only called police at her husband's request.[90]

B. The Perjury Sword in Domestic Violence Cases

Nowhere does the use of the perjury sword seem more problematic than in domestic violence cases, where recantation by abuse victims is more the norm than the exception.[91] In these cases, victims recant for a variety of reasons, including fear of the abuser, the psychological and emotional trauma, economic and financial concerns, and mixed emotions regarding punishment of a spouse, boyfriend, or even pimp, upon whom the victim may be economically and emotionally dependent.[92] Child victims, similarly, face excruciating choices when their abuser is also their parent or caretaker. When such victims recant, prosecutors confront a difficult choice. They can drop charges against the abuser, or they can proceed with the case by compelling the victim to testify.[93] If the abuser lies on the witness stand, they can impeach the abuser with their prior statements, or even charge them with perjury for

[88] *Id.* pp. 19, 27; 174 So. 3d at 189, 193–94.

[89] *See, e.g.*, *id.* p. 8; 174 So. 3d at 184 (explaining that witness was afraid that if he testified, defendant would retaliate against him); United States v. Di Paolo, 835 F.2d 46, 48 (2d Cir. 1987) (demonstrating a defendant's retaliation and threats against a witness in order to prevent the witness from testifying).

[90] *Id.* at 48, 49, 50 & n.1.

[91] *See* Tom Lininger, *Prosecuting Batters After Crawford*, 91 VA. L. REV. 747, 768 (2005) ("Recent evidence suggests that 80 to 85 percent of battered women will recant at some point.").

[92] State v. Martinez, 2015 UT App 193, ¶ 19 n.4, 357 P.3d 27, 31 n.4 ("[C]ollecting cases and noting that victims in abusive relationships may be 'reluctant to report the battering' due to economic dependence, may recant their testimony, and may give conflicting accounts of the source of their injuries.").

[93] *See* Rutledge, *supra* note 5, at 179, 180 n.244.

concealing the truth.[94] Often, the mere threat of perjury charges is enough to dissuade a victim from recanting their prior statements.[95] But prosecutors who threaten to bring perjury charges must, to preserve their credibility, at least sometimes carry out the threat.[96] Many prosecutors may be reluctant to bring perjury charges, since bringing criminal perjury charges against recalcitrant witnesses in abuse cases often seems, quite literally, like punishing the victim. Its cruelty is sufficiently manifest that many prosecutors refuse to do it,[97] but some argue that the alternative—impunity for the guilty abuser—is worse, and in some cases it may be.[98]

Of course, there also are cases in which the complainant's allegations of abuse are false, and defendants are wrongfully convicted on the basis of the false testimony.[99] In such cases the perjury sword plays an especially insidious role, dissuading remorseful complainants who are inclined to redress the wrong by confessing their false allegations, obviously to the detriment of the wrongly convicted defendant.[100]

III. NOT ALL PERJURY IS ALIKE

Although criminal procedure rules give prosecutors many advantages over their counterparts on the defense side, from a standpoint of winning convictions and making them stick, the ability to lock favorable witnesses into pro-prosecution accounts must be counted among the most useful. And it is a one-sided power, one that defense attorneys wholly lack.[101] If a witness provides defense counsel with a favorable story—corroboration of an alibi, for instance—and then testifies differently at trial, defense counsel has no credible means to sanction the witness.[102] Even if the earlier statement was sworn before a notary or made under oath, only the prosecutor has the power to bring a perjury

[94] *Id.* at 149–50, 190.

[95] *See, e.g.*, United States v. Juan, 704 F.3d 1137, 1140 (9th Cir. 2013) (finding no impropriety where victim recanted allegations of abuse by husband, but then recanted the recantation after prosecutors discussed possible perjury charges at a lengthy sidebar and judge appointed counsel to represent recanting victim).

[96] Rutledge, *supra* note 5, at 153.

[97] *See id.* at 151 ("[F]ew prosecutors' offices want to face the criticism generated from prosecuting a domestic violence victim.").

[98] *Id.* at 153 ("In other cases, prosecuting a victim for perjury would be the right decision."); *see, e.g.*, *id.* at 154–55.

[99] *See* Heder & Goldsmith, *supra* note 2, at 100.

[100] *See* Rutledge, *supra* note 5, at 162; *see supra* notes 66, 67 and accompanying text.

[101] *See* Rutledge, supra note 5, at 191.

[102] *See id.*

prosecution against the witness, and where the witness has changed his or her story to benefit the prosecutor, there is virtually no chance that charges will be brought.[103] Indeed, even where the witness wants to stick to a pro-defense story, the prosecutor's threat to bring perjury charges against the witness can exert strong pressure on the witness to change her testimony, although such leverage must be exercised carefully, as overt threats that deprive defendants of evidence may well constitute due process violations.[104]

Prosecutors thus carry a large club at trial, one that defense lawyers don't have. The question, then, is if there is any alternative approach to recantation evidence that might even the scales of justice and be fairer to innocent defendants and browbeaten witnesses alike while still preserving the state's ability to bring credible criminal prosecutions. In crafting proposed solutions, it might be helpful to distinguish between recantations made at or before trial from those that occur only after conviction, as the latter class of recantations present more problems than the former.

A. Pretrial Recantations

One way to reduce the abusive potential of the perjury sword is straightforward: take perjury charges off the table for statements made in pretrial proceedings. Many of the problems discussed above could be mitigated by eliminating perjury and false statement liability for statements made to law enforcement officers or state agents, or in grand jury proceedings or preliminary hearings. Witnesses could still be asked to provide sworn statements during the investigation of criminal cases, and thereby be reminded of the gravity of the proceeding. Such legal formalism should continue to encourage witnesses to give true and accurate answers to police questions. Precluding the state from bringing perjury charges in cases in which witnesses recant testimony at or before trial would not prevent the state from calling those witnesses at trial or from using their earlier, sworn statements as evidence. As under current practice, if a witness testifies contrary to what the witness said previously, the prosecutor could still produce the earlier sworn

[103] *See id.*

[104] *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982) ("A violation of [the Sixth Amendment or the Due Process clause] requires some showing that the evidence lost would be both material and favorable to the defense."); Sheeley v. State, 991 P.2d 136, 138, 140 (Wyo. 1999) (reversing conviction where state investigator was asked to recall judge's pretrial caution regarding perjury to recanting victim, which improperly injected a judicial opinion about the witness's credibility before the jury).

statement, either to impeach the witness's new account, or as substantive evidence if state evidence law so permits.[105] Plainly, a witness who provides conflicting accounts of an incident would have serious credibility issues, but jurors might well believe the earlier version of events rather than the recantation testimony at trial.

Though earlier statements might be used for evidentiary purposes, under such a rule prosecutors would simply not be able to punish the recantation with a criminal sanction. By depriving prosecutors of the perjury sword, witnesses would have less to lose by changing their testimony at trial, and thus might be more likely to change their stories later, either because of a change of heart or because they are feeling pressured to do so by others. This would complicate the state's task of putting and keeping viable cases together. Removing the perjury sanction would undoubtedly hinder the state's ability to prosecute some cases, since the loss of witness credibility might make cases that previously could have been brought now practically unwinnable.

But the consequences might not be all bad for prosecutors. Where witnesses have made up their minds to recant prior incriminating statements, prosecutors will find themselves arguably in a better position at trial. A witness who recants a statement made to police during the investigation which the witness says was coerced by police, and thereby subjects him or herself to potential criminal perjury charges, may well be a more credible witness than one who hazards no adverse consequences for changing course.[106] A witness willing to risk prison to tell "the truth" is not one to take lightly—especially if the jury is convinced that the witness's conscience will not permit him to contribute to the conviction of an innocent person.[107] Of course, in some cases the State will convince a jury that it was outside pressure, rather than mere conscience, that motivated the recantation, but if the jury rejects that explanation, the State's case is plainly in substantial jeopardy.[108]

Removing the threat of perjury (or false statement) sanctions for witnesses who back away from initial statements to police would obviously make it marginally more difficult for prosecutors to hold

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[105] *See, e.g.*, People v. Tolliver, 807 N.E.2d 524, 538 (Ill. App. Ct. 2004) ("The State introduced [witnesses'] prior inconsistent statements as substantive evidence pursuant to [state evidence rules].").

[106] *See* Heder & Goldsmith, *supra* note 2, at 109, 131–32.

[107] *See id.* (noting a recanting witness who admits to lying at trial will expose themselves to perjury charges).

[108] Rutledge, *supra* note 5, at 173.

reluctant or fearful witnesses to their initial stories.[109] The question is whether that limitation would unduly weaken the State's ability to prosecute cases. That seems unlikely. After all, the initial statement provided by the witness, once secured, should still be available to impeach a trial witness who changes her story at trial. In that case, the jury can hear both versions and make a judgment about which is more likely true.[110] Having given the statement, witnesses will already have exposed themselves to retaliation, reducing the incentives they have not to provide incriminating trial testimony.

The perjury sword gives prosecutors enormous leverage to compel witnesses to testify in ways that may not be entirely, or even partially, true. Once police have obtained statements during the investigation, and regardless of whether those statements were given freely or coerced, the threat of perjury or false statement sanctions acts as a powerful deterrent to witnesses who wish to change their stories at trial.[111] Removing this leverage might ultimately cost the state very little in its ability to prosecute criminals, but would greatly limit the State's ability to force coerced witnesses to stick to false stories at trial.

B. Post-Trial Recantations

The use of the perjury sword to stifle post-trial recantations presents different problems. If we took the sword away in the post-trial context, how much harder would it be for prosecutors to preserve the convictions they have won?

The problem in designing better methods to regulate recantation evidence and the use of perjury sanctions is to balance on the one hand the competing legitimate needs of the State to safeguard accurate convictions and to prevent criminal defendants from

[109] *See* Richard H. Underwood, *Perjury: An Anthology*, 13 ARIZ. J. INT'L & COMP. LAW 307, 346 (1996) (noting that a prosecutor can use the threat of perjury charges to stop witnesses from changing their testimony).

[110] Although, depending on state evidence law, the earlier statement may or may not technically be admissible for its truth value, either way there is little doubt that jurors will consider its substance. Of course, as a matter of presenting legally sufficient evidence, the formal status of the prior inconsistent statements as substantive or impeachment evidence could be significant if the state lacks other substantive evidence of guilt. *See* Steven V. DeBraccio, *That's (Not) What She Said: The Case for Expanding Admission of Prior Inconsistent Statements in New York Criminal Trials*, 78 ALB. L. REV. 269, 271–72, 275–76 (2015). But then, one has to wonder whether cases that are entirely dependent on vacillating witnesses are really ones that should be brought in the first place.

[111] *See* Underwood, *supra* note 109, at 346 (discussing the prosecutor's threat of perjury charges to stop witnesses from changing their testimony).

manipulating the criminal justice system with, on the other hand, the criminal defendant's interest in obtaining justice and the system's overall need to generate accurate and fair outcomes without expending undue resources.

Not all recantations are alike, and for purposes of permitting perjury charges against recanting witnesses, they need to be treated as such. Recantations given under circumstances where there is clear evidence that the witness was threatened, pressured, or induced to recant prior testimony obviously deserve more skepticism than those which are freely volunteered.[112] The motive for recantation, as well as the circumstances in which the recantation occurs, should be subject to careful scrutiny.[113] Even if perjury sanctions are not normally available against recanting witnesses generally, there might be an exception to this protection where the witness falsely denies having been threatened, pressured, or induced to recant. Attempts to coerce or pressure witnesses to recant testimony, moreover, might be further deterred by making evidence of that coercion or pressure affirmative evidence against the responsible party.[114] To encourage more expansive consideration of recantation evidence, this essay suggests two types of reform. First, as some commentators have argued, the recantation defense should be fortified and expanded.[115] Second, courts must rethink the manner in which they weigh recantation evidence.

1. A Fortified and Expanded Recantation Defense

In recognition that recantation of false testimony is, on balance, better than the alternative, some jurisdictions recognize a limited recantation defense. Under federal law, although there is no recantation defense to perjury, there is a recognized recantation

[112] *Compare* State v. Cook, 339 S.W.3d 523, 532 (Mo. Ct. App. 2011) (noting that the witness recantation was not free from pressure or undue influence), *with* State v. Mooney, 670 S.W.2d 510, 516 (Mo. Ct. App. 1984) (illustrating voluntariness where the witness recantation was free from pressure or undue influence).

[113] *See* Agulnick, *supra* note 1, at 371, 385; Janice J. Repka, Comment, *Rethinking The Standard for New Trial Motions Based Upon Recantations As Newly Discovered Evidence*, 134 U. PA. L. REV. 1433, 1456–57 (1986).

[114] *See, e.g.*, People v. Mendoza, 263 P.3d 1, 25 (Cal. 2011) (noting how the court properly allowed in evidence suggesting threats were made to a witness in order to bolster the witness's credibility).

[115] Agulnick, *supra* note 1, at 383, 385; *see* Rutledge, *supra* note 5, at 191–92 (proposing to expand recantation defense in domestic violence cases).

defense to a charge of making a false declaration or statement.[116] The requirements for presenting such a defense are quite stringent, including that the recantation occur in the same proceeding in which the false statement was made, that the false statement had not already substantially affected the proceedings, and that the false statement was not made only after it had "become obvious that the falsity of that statement had been exposed or would be exposed."[117] Other jurisdictions do recognize a recantation defense to perjury, usually in terms parallel to the federal formulation.[118] While in some states there seems to be some play in the joints of the defense, most jurisdictions seem to require proof that the false or perjurious statement be retracted in the same proceeding, and before the statement has prejudiced another party.[119] Indeed, "the majority of states still remain completed-crime jurisdictions," meaning that there is no recantation defense to a perjury charge, and that liability is complete once the false statement has been uttered.[120]

To blunt misuse of the prosecutor's perjury sword, the recantation defense needs to be made substantially more robust. For starters, the requirement that the recantation occur in the "same proceeding" must be dropped or interpreted to include direct appeal and collateral review proceedings.[121] To interpret the defense as only applying if the witness confesses his false testimony immediately, say during cross-examination or on redirect, is to make its use of little relevance to run-of-the-mill criminal cases. Similarly, a requirement that the recantation occur before the statement has a substantial effect on the proceedings nullifies the defense where it is most needed: after a victim or witness makes material false incriminating statements that lead to the wrongful conviction of an innocent person.[122]

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[116] *See* 18 U.S.C. § 1623(d) (2014).

[117] 2A KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 50:10 (6th ed. 2015).

[118] *See, e.g.*, N.Y. PENAL LAW § 210.25 (McKinney 2015) ("In any prosecution for perjury, it is an affirmative defense that the defendant retracted his false statement in the course of the proceeding in which it was made before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed.").

[119] *See* Agulnick, *supra* note 1, at 374–75.

[120] *See* United States v. Norris, 300 U.S. 564, 574 (1937); Agulnick, *supra* note 1, at 367, 380.

[121] *See* Agulnick, *supra* note 1, at 386 ("As long as the objective-view-of-motive standard requirement is strictly construed, . . . legislatures should eliminate all other elements. It is irrelevant when a liar ultimately recants his misstatements.").

[122] *See id.* at 354, 356 ("The policy behind the recantation defense is to encourage truth telling by barring a punishment for a witness who lied but might wish to purge his conscience

At the same time, there is clear utility in limiting the availability of such a defense to instances where the witness's recantation is not made merely to escape a looming perjury conviction. Accordingly, where the witness has come under investigative scrutiny for making false statements in some prior proceeding, a subsequent retraction of those false statements for the purpose of avoiding sanction need not be tolerated.[123] Of course, in the context of most concern here—those strong-armed, bribed or otherwise incentivized by the state to give false incriminating testimony against innocent defendants—the prospect that they will be subject to criminal sanctions for their earlier false testimony is in the vast majority of cases practically nonexistent.[124]

In short, we would be well-advised to consider greatly expanding the recantation defense. A truly robust recantation defense would permit any witness to recant his or her testimony at any time, regardless of whether that testimony prejudiced the rights of others, as long as recantation was not made to avoid likely conviction or sanction for making an earlier false statement, in a context in which discovery of the false statement or perjury was imminent. Such a recantation defense would not impede the state's ability to threaten witnesses with perjury charges who might be considering providing false exculpatory testimony on the defendant's behalf at trial if their testimony in fact could be proved untrue without reliance upon their own recantation or retraction. Recognition of such a robust recantation defense would go a long way toward ensuring that wrongfully convicted defendants are not prevented from obtaining critical evidence of their innocence from witnesses who later confess that their trial testimony was not accurate, true, or correct.

2. Rethinking Recantation Evidence More Generally

It is not enough, however, to merely limit the prosecution's power to dissuade witnesses from truthfully recanting false trial testimony. It is equally important to reform judicial attitudes

by retracting his false statement and providing the truth."); *see supra* note 117 and accompanying text.

[123] *See* United States v. Fornaro, 894 F.2d 508, 511 (2d Cir. 1990) ("In enacting the perjury statute with its recantation defense, Congress aimed to encourage truthtelling in judicial proceedings. It would be an odd result indeed if a witness were allowed to lie under oath, and then to recant the testimony only when it became apparent the falsity would be exposed. Such an interpretation would encourage witnesses to lie in the first place, and then to recant only when confronted with the threat of exposure or prosecution.").

[124] *See* Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 108 (2006).

toward recantation evidence more generally. In light of the judiciary's strong interest in finality and conservation of resources, courts' miserly attitude toward recantation evidence may be understandable, but given our increasing knowledge of the prevalence of wrongful convictions,[125] it is no longer tolerable. Courts must change their attitudes about, and the review standards applicable to, recantation evidence.[126]

First, although it might be advisable to limit the state's ability to punish recanting witnesses with perjury or false statement charges as this essay suggests, under our current practices recanting witnesses assume significant legal liability when they recant sworn testimony.[127] The fact that witnesses are often willing to assume substantial legal liability in order to recant is a fact too often overlooked by courts assessing the weight, truthfulness, and materiality of a recantation.[128] While current practice recognizes a de facto presumption that recantation testimony is false,[129] the opposite presumption might instead be warranted. At least where a witness is willing to assume the risk of perjury sanctions, the risk to the witness is real,[130] and the witness does not otherwise appear to have been induced or coerced into recanting, that recantation evidence deserves serious consideration.

Second, in light of what we now know about the pervasiveness of inaccurate eyewitness identifications and the unreliability of incentivized testimony, the presumption that recantation testimony

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[125] Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 8 (2009).

[126] For an argument along these lines, see Heder & Goldsmith, *supra* note 2, at 135 (proposing corroboration requirement for admissibility of recantations).

[127] Individuals found guilty of perjury under federal statues are subject to a Base Level Offense of fourteen under the Federal Sentencing Guidelines, which can result in a minimum of fifteen to twenty-one months in prison. *See* U.S. SENTENCING GUIDELINES MANUAL § 2J1.3(a) (U.S. SENTENCING COMM'N 2014).

[128] *See* Heder & Goldsmith, *supra* note 2, at 107, 134.

[129] *Id.* at 107, 125.

[130] For example, where a recanting witness is serving a life sentence in prison for other offenses, threats of perjury charges may not be empty. *See id.* at 107 ("For instance, in one case, the recanting witness [who was on death row] came forward years after the trial and [testified] under threat of perjury . . . ."). This does not mean that such recantations are not undeserving of careful consideration. As in most cases, the context in which the recantation occurs matters. If the recanting inmate initially testified pursuant to an incentive, such as the promise of reduced criminal penalties, then the recanting witness's present circumstances may provide more, rather than less, reason to believe that the recantation is true. *See id.* at 108 ("[R]ecanting witnesses are often those that were incentivized to testify against the defendant in the first place (such as a jailhouse informant testifying in exchange for a reduced sentence), and because such testimony is unreliable in the first place, it makes little sense to presume that the recantation is equally unreliable.").

is inherently unreliable is not defensible.[131] This is especially true where particularly suspect types of witnesses, such as eyewitnesses with identification testimony, and incentivized witnesses of various sorts, come forward to recant.

Eyewitness identifications in lab experiments have been shown to be incorrect approximately 59% of the time.[132] That is, in approximately half of all lineups, the eyewitness either: incorrectly identifies an innocent person; selects a known foil; or fails to identify a guilty culprit.[133] The danger of misidentifications, moreover, is not necessarily minimized simply because more than one witness identified the suspect. While in theory the existence of multiple separate and consistent eyewitness identifications should dramatically increase confidence in their accuracy, this is only true where lineup, showup, or photo array identifications are conducted absent any intentional or unintentional contamination, using non-suggestive procedures such as blind lineup administrators, properly selected lineup fillers, and the like.[134] Where suggestive lineup procedures are used, the existence of multiple positive identifications provides no statistical assurance that the identifications are accurate.[135]

Similarly, it is by now well-established that incentivized witnesses frequently lie. Such incentivized testimony is wildly unreliable in general.[136] Though there may be no practical way to avoid using some types of incentivized testimony, we should not pretend that such evidence is anything other than what it is—self-serving, prone to bias, and extraordinarily unreliable. Jailhouse

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[131] *Id.* at 108.

[132] *See, e.g.*, Steven E. Clark et al., *Regularities in Eyewitness Identification*, 32 L. & HUM. BEHAV. 187, 190 (2008).

[133] *See id.* at 188, 189.

[134] *See* Heather D. Flowe et al., *The Role of Eyewitness Identification Evidence in Felony Case Dispositions*, 17 PSYCH. PUB. POL. & L. 140, 156 (2011); Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 280 (2000); Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & HUM. BEHAV. 1, 7, 8, 16 (2009) (discussing the use of fillers, showups, lineup administrators, and photo arrays).

[135] For instance, in a prosecution against Fernando Bermudez, police brought in seven eyewitnesses to the shooting and asked them, collectively, while engaging in conversation with each other, to describe the shooter and to peruse photographs of suspects, a procedure that was later found to be "impermissibly suggestive." Bermudez v. City of New York, 790 F.3d 368, 371, 373 (2d Cir. 2015). Five of the witnesses initially identified Bermudez, but later recanted their identification. *Id.* at 372.

[136] ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 76 (2009); Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1383 (1996).

snitch testimony is a classic example.[137] Jailhouse snitches frequently testify about supposed confessions made by fellow inmates that they purportedly overheard while inside prison. In exchange for this testimony, snitches often receive significant inducements, often including sizeable reductions in punishment that they could obtain in no other way.[138] Not surprisingly, where snitches cannot report actual confessions made by their fellow prisoners, they often simply make them up. In some cases, prosecutors have even been accused of coercing recalcitrant inmates to testify to particular facts or suffer severe sanctions.[139] As a result, jailhouse snitches are tied to an inordinate number of wrongful convictions.[140]

Codefendants and accomplices likewise have powerful incentives to lie at trial, either in order to shift blame to another or to make it possible to cut a cooperation deal with prosecutors.[141] Like

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[137] Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375, 1375 (2014).

[138] *Id.* at 1379–80, 1428–29.

[139] *See, e.g.*, Bechtol v. Prelesnik, No. 1:09-CV-576, 2012 U.S. Dist. LEXIS 140421, at *66 (W.D. Mich. Aug. 29, 2012), *report and recommendation adopted in part, rejected in part*, No. 1:09-CV-576, 2012 U.S. Dist. LEXIS 139902 (W.D. Mich. Sept. 28, 2012), *aff'd*, 568 F. App'x 441 (6th Cir. 2014). According to the jailhouse snitch, Davis, who initially testified against the defendant, but later recanted his testimony:

> Prosecutor Brian Donnelly called Davis out of his cell at the Kalkaska County Jail. Davis explained to Donnelly that Petitioner told him that a home invasion occurred with regard to Jamie Moran and that Petitioner went inside to make Cron leave. According to Davis, that was all Petitioner ever told him. Davis claimed that Donnelly asked him to help him out by testifying against Petitioner and that he would tell Davis everything he needed to know. Donnelly allegedly threatened that if Davis did not testify against Petitioner, Donnelly would charge him with multiple counts of CSC and tell the judge that Davis was withholding information in the Moran case so that the judge would give Davis a more severe sentence. In exchange for his testimony, Donnelly allegedly offered Davis a plea to a "lesser" and told him that he would be sentenced to time served. In addition, Donnelly told Davis that he would have to pass a polygraph examination and advised him how to pass.

Id. at *65–66.

[140] NW. UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2004-2005) (finding that 45.9 percent of documented wrongful convictions in capital cases involved testimony by jailhouse informants or by killers trying to avoid suspicion).

[141] *See, e.g.*, Pamela Colloff, *Innocence Lost*, TEX. MONTHLY, Oct. 2010, at 108, 196 (discussing the case of former death-row inmate Anthony Graves). Graves was set to be retried for capital murder, but prosecutors dismissed the charges in October 2010 after a special prosecutor who reinvestigated the case, Kelly Siegler, found no evidence linking Graves to the slayings. Martha Neil, *Prosecutors Blast Ex-DA in 'Nightmare' case of Innocent Man Jailed 18 years*, ABA JOURNAL (Oct. 28, 2010, 9:07 PM), http://www.abajournal.com/news/article/prosecutors_blast_ex-da_in_nightmare_case_of_innocent_man_who_served_18_yea/. A co-defendant had originally testified that Graves was an accomplice, but he later recanted. *Id.* Siegler called the original prosecution a "horrible" miscarriage of justice. *Id.*

jailhouse snitch testimony, accomplice testimony is particularly unreliable and is a frequent cause of wrongful convictions.[142] It is not uncommon for jailhouse snitches and accomplices to recant prior testimony.[143] Such recantations typically occur years after trial, and often only after the snitch has been re-incarcerated for some subsequent crime and has nothing to lose by coming clean about the prior perjured statements.[144]

When an eyewitness or an incentivized witness comes forward to recant, there is strong reason to take the recantation seriously, and certainly no basis for a knee-jerk presumption that the recantation is less reliable than the original testimony. This is precisely what did not happen in the case of Beniah Alton Dandridge. There, Dandridge was convicted of killing 71-year-old Riley Manning, Sr., based largely on the trial testimony of a codefendant and a jailhouse snitch.[145] Two years later, both witnesses recanted their testimony.[146] Dandridge filed a motion for a new trial but the motion was denied.[147] Dandridge spent another sixteen years in prison before lawyers from the Equal Justice Institute finally convinced Alabama investigators and prosecutors that Dandridge was not involved in the murder.[148] While there can be no blanket rule and each recantation must be considered in light of its context and content, courts presented with such recantations have an affirmative obligation to take such recantations seriously and to conduct further factual inquiry, where appropriate, to determine whether the recantation is in fact credible.

Second, post-conviction review standards need to be changed to accord the appropriate amount of evidentiary weight to credible

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[142] Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1533 (2008) ("[F]ifteen American states and one territory apply a corroboration requirement [to accomplice testimony] in some form . . . out of concerns that accomplice testimony is 'unreliable, weak, and subject to other infirmities owing to a possible desire by the accomplice to implicate another so as to draw judicial scrutiny away from himself.'").

[143] *See* Freeman v. Trombley, 483 F. App'x 51, 61 (6th Cir. 2012); Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure at 6, 24, 27, 28–29, Dandridge v. State (Ala. Cir. Ct. Nov. 21, 2014) (No. CC-95-988.61) [hereinafter Petition for Relief].

[144] *Freeman*, 483 F. App'x at 62, 64; Petition for Relief, *supra* note 143, at 24, 28–29; *see supra* note 130 and accompanying text.

[145] *See* Petition for Relief, *supra* note 143, at 3, 5, 6, 10; Maurice Possley, *Beniah Alton Dandridge*, NAT'L REGISTRY EXONERATIONS (Oct. 12, 2015), https://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4768 [hereinafter *Beniah Alton Dandridge*].

[146] *See* Petition for Relief, *supra* note 143, at 24, 28–29; *Beniah Alton Dandridge*, *supra* note 145.

[147] Petition for Relief, *supra* note 143, at 11; *Beniah Alton Dandridge*, *supra* note 145.

[148] Petition for Relief, *supra* note 143, at 11; *Beniah Alton Dandridge*, *supra* note 145.

recantation evidence. Currently, in most jurisdictions defendants cannot obtain relief unless they can present affirmative evidence of innocence.[149] A Virginia case against Alex Carpitcher illustrates the problem. Carpitcher was convicted of molesting a 10-year old girl.[150] The primary evidence at trial was the testimony of the victim.[151] Based on that testimony, Carpitcher was convicted and sentenced to 73 years in prison, with 35 years suspended.[152] One year after the trial, the victim told her mother and her psychotherapist that her trial testimony was false and that the defendant had not touched her.[153] She repeated her recantation at a subsequent hearing following a petition by Carpitcher.[154] Because there was some evidence in the record that the victim had been pressured to recant, however, the court concluded that it could not determine whether the trial testimony, or the recantation, was true. Accordingly, it refused to grant relief to Carpitcher.[155]

Like in many jurisdictions, the Virginia court held that it could not provide relief based on recanted testimony unless the defendant proved that the recanting witness's recantation was "true."[156] Mere equipoise between the two statements is not sufficient.[157] In many cases, however, there may be little or no basis on which to make a credibility determination one way or the other. Requiring defendants to prove the truth of the recantation, therefore,

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[149] *See* Herrera v. Collins, 506 U.S. 390, 404 (1993); *see infra* notes 155–56 and accompanying text.

[150] Carpitcher v. Commonwealth, 641 S.E.2d 486, 488–89 (Va. 2007).

[151] *Id.* at 489.

[152] *Id.*

[153] *Id.*

[154] *See id.*

[155] *Id.* at 493 ("We conclude that the Court of Appeals did not err in holding that Carpitcher was required, and failed, to prove that H.L.'s recantation was true. On the present record, H.L.'s recantation testimony did no more than establish that she spoke falsely on one or more occasions. Therefore, we hold that H.L.'s recantation testimony was not 'material' to the issue of actual innocence . . . .").

[156] *Id.* In a case against defendants Gould and Taylor, the Connecticut Supreme Court held the same. *See* Robert M. Casale et al., Gould v. Commissioner of Correction *and the Conundrum of Being Legally Guilty but Actually Innocent in the Criminal Justice System*, 86 CONN. B.J. 262, 262–63 (2012) ("[T]he Connecticut Supreme Court reversed [the lower state court], explaining that, in order to merit post-conviction relief on the basis of actual innocence, convicted defendants, like Gould and Taylor, must do more than totally eviscerate all evidence of their guilt; they must produce affirmative evidence of their innocence." (citing Gould v. Comm'r of Corr., 22 A.3d 1196, 1198 (Conn. 2011))).

[157] Casale et al., *supra* note 156, at 263; *see* Armstrong v. State, 642 So.2d 730, 735 (Fla. 1994) ("Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury." (quoting Bell v. State, 90 So.2d 704, 705 (Fla. 1956))); Thomas v. State, No. M2014-00884-CCA-R3-ECN, 2015 WL 1568235, at *4 (Tenn. Crim. App. Apr. 1, 2015).

establishes an overly burdensome barrier to relief.[158] A freely volunteered recantation should provide sufficient basis to vacate a conviction if, absent the witness's recanted testimony, the state could not have proved guilt beyond a reasonable doubt.[159] Absent some obvious motive to fabricate or the existence of reliable corroborating evidence, the truthfulness of a recantation may simply be a matter of subjective credibility determination.[160] Recantation evidence should be deemed sufficiently reliable where there is at least a reasonable probability that the recantation is true.

In assessing the credibility of any recantation, trial judges must pay careful attention to the motives of the witness, both past motive for providing the allegedly initial false testimony, and present motive for providing the subsequent recantation. Admissions by witnesses that they testified falsely in order to obtain an inducement, or to shield themselves or others from criminal liability, might provide a valid basis to find the recantation plausible.[161] Evidence that the recantation was made under pressure, threat, or duress, in contrast, would undermine its reliability.[162] Credible allegations of police misconduct are, of

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[158] *See* Gould v. Comm'r of Corr., 123 A.3d 1259, 1263 (Conn. App. Ct. 2015) ("The court noted that although Stiles' perjury entirely undermined the state's case, it did not satisfy the petitioner's burden to prove his innocence." (citing *Gould*, 22 A.3d at 1209)).

[159] *See, e.g.*, People v. Dotson, 516 N.E.2d 718, 719, 722 (Ill. App. Ct. 1987). There, the victim, a material witness, recanted her testimony that the defendant raped her, but the court none the less found the defendant did not meet his burden of proof to allow for a new trial. *Id.* Dotson was later exonerated by DNA testing, which supported the victim's recanted testimony. Armbrust, *supra* note 23, at 76–77.

[160] Kristy L. Fields, Note, *Toward a Bayesian Analysis of Recanted Eyewitness Identification Testimony*, 88 N.Y.U.L. REV. 1769, 1778 (2013) (discussing judges' subjective skepticism toward recanted testimony).

[161] *See supra* note 130 and accompanying text. In this *Dobbert v. Wainwright*, Dobbert was convicted of strangling his daughter. Dobbert v. Wainwright, 468 U.S. 1231, 1231 (1984). At trial, his 13-year-old son testified that he saw Dobbert kill the victim. *Id.* Based on this testimony, Dobbert was convicted and sentenced to death. *Id.* Eight years later, however, the son recanted his testimony, explaining that his father had been generally abusive and that he testified against his father because he was afraid of him, that he was on Thorazine at the time, and that he wanted to please the adults in whose custody he had been placed. *Id.* at 1232. After Dobbert sought relief based on this new evidence, the district court denied Dobbert's claim. *Id.* at 1233. In finding the recantation unpersuasive, the trial judge reviewed the witness's prior statements and concluded that the statements were consistent with each other and did not indicate that they were untrue. *Id.* In conducting this evaluation, what the judge did not do was to consider those statements in light of the recantation, nor attempt to evaluate the plausibility of the recantation in its own terms. *Id.*

[162] *See* State v. Cook, 339 S.W.3d 523, 526, 532 (Mo. Ct. App. 2011). A Missouri appellate court affirmed the denial of a motion for new trial based on the fifteen-year-old victim's recantation that she had been sexually assaulted by her stepfather, where the prosecution presented transcripts of phone calls from prison showing "that Defendant's wife, at

course, especially probative, indicating not only a valid reason to suspect the prior testimony, but also establishing a constitutional basis upon which relief might properly be granted.[163] Both the knowing use of false testimony and the failure to turn over exculpatory material evidence can provide the basis for post-conviction relief.

In assessing the materiality of the recantation, trial judges must also pay careful attention to the circumstances that allegedly generated the false testimony.[164] For instance, where a recanting witness makes credible allegations of police misconduct during the investigation, that fact might color the weight of other evidence in the case, particularly where the other evidence's credibility depends on the integrity of the investigation. In such cases, it might well be reasonable to ask not only if the recanted testimony, if true, establishes innocence or undermines the State's case, but also whether there is a reasonable probability that the jury, had it been informed of the circumstances that led to the witness's false trial testimony (such as police strong-arm tactics), would not have convicted.[165] In this sense, recantations may serve as the visible tip of an evidentiary iceberg, potentially calling into doubt the veracity of other evidence that might have been accepted without the degree of scrutiny warranted.[166]

Finally, paying greater heed to allegations of police misconduct by recanting witnesses could supply important incentives for police to better document the integrity of their initial investigation and

Defendant's direction, worked on the victim for several months in an effort to persuade or pressure the victim to make a statement that would either exonerate Defendant or seek leniency on his behalf." *Id.*

[163] Brown v. Mississippi, 297 U.S. 278, 286 (1936) (first quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935); and then quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

[164] People v. Tolliver, 807 N.E.2d 524, 554 (Ill. App. Ct. 2004) (Campbell, J., dissenting) ("Courts look to the totality of the circumstances and consider factors including defendant's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning; the legality and duration of the detention; the duration of the questioning; and any physical or mental abuse by police, including any threats or promises." (citing *In re G.O.*, 727 N.E.2d 1003, 1012 (Ill. 2000))).

[165] *See, e.g.*, Carpitcher v. Commonwealth, 641 S.E.2d 486, 493 (Va. 2007) ("Therefore, to meet this statutory burden, Carpitcher was required to prove both that the recantation evidence was true and that, when considered with all the other evidence in the current record, no rational trier of fact could have found him guilty of the crimes.").

[166] *See, e.g.*, People v. Shilitano, 112 N.E. 733, 736 (N.Y. 1916) ("Evidence of recantation upon the part of a witness is not merely evidence which tends to impeach or discredit a witness. Its character is much more fundamental. If the recantation be true it may in certain cases destroy the basis upon which the judgment of conviction rests and under the ample power vested in this court in reviewing a judgment of conviction in a capital case might be sufficient of itself to justify the granting of a new trial.").

witness interviews. Allegations that lineups were conducted in a suggestive manner could be rebutted with video records depicting the circumstances in which positive identifications were made, while allegations that witness statements were coerced by police threats or induced by improper promises could similarly be disproved by reference to the video record of the interviews.[167] Because such electronic records would provide an invaluable resource to safeguard the integrity of police investigations, legal rules that encourage police and prosecutors to better document the investigative process should be embraced wherever possible.

At the same time, the push to document the investigative process should not be limited to the government. Too often, defense investigators and counsel prepare and submit affidavits by witnesses who purport to recant statements or testimony, and then when called upon to testify in adversarial proceedings, back away from those affidavits and statements.[168] In such cases, it is unclear whether the witnesses are retreating from the affidavits because they did not accurately reflect their views, or because they were threatened or bullied by the government (often with threats of perjury charges) to think twice about recanting sworn testimony. While recording is not a panacea, a more accurate record of witness interviews conducted by defense investigators would, as with prosecution witnesses, bring some helpful clarity to this factual morass. Accordingly, defense investigators like those on the prosecution side should also be encouraged to videotape interviews where possible to preserve a contemporaneous record of the witness's recantation.

IV. TWO STORIES, TWO TRUTHS?

Finally, we must consider the special problems that accompany a particular subset of witness recantations: those by the victim himself or herself. Some alleged crimes—rape, sexual assault, molestation, and other sexual offenses involving minors, for

[167] *See, e.g.*, Greywind v. State, 2004 ND 213, ¶¶ 20, 21, 689 N.W.2d 390, 396 ("The State introduced a videotape of Huynh and Berns's statements and the testimony of law enforcement officers involved in the arrests. The law enforcement officers testified they did not coerce Huynh and Berns into making false statements and did not believe them to be intoxicated at the time. . . . The fact that Berns and Huynh are now saying that their memory was impaired by alcohol and drugs is not credible when one views the actual videotaped statements.").

[168] *See, e.g.*, State v. Parker, 153 S.E.2d 183, 183–84 (S.C. 1967) ("To hold such affidavits sufficient to require the granting of a new trial would be to open the door to fraud and perjury, as well as to invite interminable delays in the disposition of causes.").

example—are often largely or even wholly dependent on the victim's account of what transpired.[169] If the victim in such a case now claims that the allegations made earlier were not, in fact, true, that recantation is significant, not only as a matter of evidence.[170] As the victim of the purported offense, arguably no one has a greater stake in the outcome of these criminal cases. Victim recantations—at least in these types of cases—thus deserve special consideration.[171]

The argument for permitting victims to recant incriminating testimony without fear of perjury sanctions is strong. Where a criminal conviction is secured on the basis of false trial testimony by a purported victim, wrongly convicted defendants have little to gain, and a lot to lose, if the victim faces potential perjury charges after coming forward with the truth. While alleged victims should remain subject to prosecution for perjury when their lies are discovered, or disproved, without their voluntary admission, the threat of such sanctions is amply sufficient to dissuade persons from lightly making false accusations against others.[172]

Cases of victim recantation raise additional, and more profound, concerns of epistemology and ontology in criminal law. While we stubbornly cling to the conceit that there is a single truth "out there" to be discovered, and that our legal processes and presuppositions must reflect that fact, the daily realities of criminal practice belie that claim. Take, for example, the prosecution of Charles Farrar, who was convicted of multiple counts of sexual abuse of his then-fifteen-year-old daughter.[173] At trial, the daughter alleged that she had been sexually abused on multiple occasions by both her mother and her father.[174] Her uncorroborated testimony, however, was the only evidence in the case.[175] A year after Farrar was convicted and sentenced to 145 years to life in prison, the

[169] *See, e.g.*, State v. Cook, 339 S.W.3d 523, 529 (Mo. Ct. App. 2011) ("The general rule is that a criminal conviction may be sustained by the victim's testimony alone, even if that testimony is uncorroborated." (citing State v. Baker, 23 S.W.3d 702, 709 (Mo. Ct. App. 2000))).

[170] *Carpitcher*, 641 S.E.2d at 492 ("[W]hile we know from [her] lips that this witness spoke falsely on one occasion, this does not establish that [her] testimony at the trial was false and the [later] statements . . . were true." (quoting Lewis v. Commonwealth, 70 S.E.2d 293, 302 (Va. 1952))).

[171] *Carpitcher*, 641 S.E.2d at 492 ("Unless proven true, recantation evidence merely amounts to an attack on a witness' credibility by the witness herself." (citing Odum v. Commonwealth, 301 S.E.2d 145, 149 (Va. 1983))).

[172] *See supra* text accompanying note 130.

[173] Farrar v. People, 208 P.3d 702, 704 (Colo. 2009).

[174] *Id.*

[175] *Id.*

daughter "provided the defense with an affidavit recanting her allegations of sexual abuse and asserting that she had been threatened and told how to testify by the prosecutors and social workers."[176] On the basis of the recantation, Farrar filed a motion for a new trial.[177] The trial court conducted a hearing on the motion at which the daughter testified and repeated her recantation, explaining that "she made up the story because she was unhappy with her home life and wanted to move to Oklahoma to live with her maternal grandparents."[178]

The victim's grandmother testified that she had cautioned prosecutors that the victim lacked credibility, but a former boyfriend of the victim testified that the victim had confided to him that she had been sexually abused by her parents.[179] The prosecution produced testimony about a diary belonging to the victim detailing instances of abuse, but the victim described the diary as a work of fiction and produced a second diary which she claimed contained actual, contemporaneous admissions that her allegations had been fabricated.[180]

In the face of this convoluted evidentiary record, the trial court denied the motion for new trial, "[c]oncluding that the victim had substantial credibility issues, with regard to both her testimony at trial and her testimony supporting the motion for new trial," and therefore that the court was "unpersuaded that any newly discovered evidence would produce an acquittal."[181] The court, with perhaps more candor than is typical, seems to have simply thrown up its hands and declared that the truth is unknowable.

But the upshot of the court's inability to resolve the conflict between the victim's trial testimony and her post-trial recantation was maintenance of the status quo, which meant that Farrar must continue serving his 145-year-to-life prison sentence.[182] That outcome follows only if we insist that there can only be one true account, and that the burden on those who have been convicted of crimes must, in a post-trial challenge to the conviction, adduce affirmative evidence of innocence in order to be entitled to relief. Is it not possible to admit, in cases such as this, that there simply is no

[176] *Id.*
[177] *Id.*
[178] Casale et al., *supra* note 156, at 277.
[179] *Farrar*, 208 P.3d at 705.
[180] *Id.*
[181] *Id.*
[182] *See id.* at 704, 709–10.

way to know what constitutes the truth? Indeed, in cases involving child victims, the victims themselves may no longer know what constitutes the truth.[183] In such cases, we might be better served by rejecting the conceit that there is a single, objective, or definitive truth out there to be revealed, and instead embrace the possibility that there might be two truths, two historical accounts, neither better nor "truer" than the other, but one—the newer, contemporary, account—which by its contemporaneity supersedes the old. In other words, we need not entirely disown the original jury verdict before embracing the truth of the new recantation-based account. Rather than sticking to a story now deeply problematized by the victim's recantation, doesn't it simply make more sense to stop punishing Farrar for a crime the victim now claims never happened, a claim that is as consistent with the evidentiary record as its opposite?

Truth—in the sense of a single, authoritative, account of human affairs—seems in this context like a cognitive hang-up, an obsession with epistemological tidiness that is belied by the fragility and messiness of the evidentiary building blocks with which we build our narrative structures. Perhaps we would be better living with a pluralistic conception of truth in criminal justice rather than insisting on a formal, monistic, authoritative account. Perhaps eight years is enough punishment for the commission of a crime its purported victim says never occurred.

V. CONCLUSION

Like democracy and sausage-making, the more one studies the way that criminal cases are constructed and defended, the more uneasy one becomes about the correlation between the facts "found" in the course of the proceedings and historical truth. Recantations provide an open window into that process, and perhaps for that very reason, are greeted with special hostility by the legal system. The prosecutorial perjury sword exists largely to make recantations rare, or at least rarer than they might otherwise be. The perjury sword can be wielded for either good or ill, but its use in some cases of wrongful conviction raises troubling concerns about whether, and under what circumstances, it has been used not to reveal but to obscure truth. Certainly, it can be, and has been, used to turn

[183] *See* Rutledge, *supra* note 5, at 168–69 ("PTSD is a prevalent diagnosis for victims of violent crimes. . . . Avoidance[, due to PTSD,] can include inability to recall the event in some victims who are mentally blocking the event.").

backroom interrogation pressure into sworn trial testimony. Those concerned with safeguarding the integrity of the criminal justice system need to look carefully at whether the benefits of its existence outweigh the dangers it poses of convicting the innocent.