Journal of Criminal Law and Criminology

Volume 67 | Issue 3 Article 2

1977

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THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
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Vol. 67, No. 3
Printed in U.S.A.

RECANTATION OF PERJURED TESTIMONY

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Witnesses have violated their judicially administered oaths to tell the whole truth since the beginning of American jurisprudence, and courts and legislatures have engaged in continual efforts to cure the problem. American perjury laws have traditionally emphasized deterring witnesses from lying with threats of severe punishment, a philosophy which led to the practice of making completed perjury an unrecantable crime in both federal and state courts.

Perjury provisions in the Organized Crime Control Act of 1970[1] departed from a strict deterrence philosophy. While this legislation made it easier for prosecutors to obtain perjury convictions by liberalizing proof and evidentiary standards, it provided that in some circumstances completed perjury may be recanted, thereby providing an inducement to tell the truth for witnesses who have already given false testimony. The new federal rule bears close resemblance to the minority rule in state courts which was advanced by the New York case of *People v. Ezaugi.*[2] Despite this shift at the federal level, a majority of the states have not as yet adopted similar legislation and still cling to the stringent "completed crime" rule.[3]

This article will analyze the development of the completed crime rule, focusing on the inherent weaknesses which render the rule an unacceptable answer to the perjury problem. The operation of recantation provisions embodied in the minority state rule and the current federal law will then be explored and analysis of cases decided under the new federal rule will reveal a current misunderstanding of the statute's function. The article will conclude with the suggestion that federal courts must begin to apply this effective tool properly, while states adhering to completed crime rules should discard them and adopt the more workable recantation provisions of the Organized Crime Control Act of 1970.

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[1] 18 U.S.C. § 1623 (1970).

[2] 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957).

[3] See text accompanying notes 12–33 *infra.*

TESTIMONIAL CORRECTION TENDING TO SHOW INNOCENCE OF PERJURY: THE WILLFULNESS REQUIREMENT

The crime of perjury consists of a deliberate material falsification under oath.[4] Accordingly, the prevailing view in federal and state courts has been that a witness's correction or his effort to correct inaccurate testimony is admissible evidence probative of the conclusion that initial inaccuracies or omissions were indeed not deliberate falsifications.[5]

[4] The federal general perjury statute, and the model upon which state codes have been drafted, reads as follows:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 U.S.C. § 1621 (1948). All state statutes and the Model Penal Code follow this federal rule requiring that perjury be deliberate to be criminally culpable. *See* American Law Institute, MODEL PENAL CODE § 241.1 (Proposed Official Draft, 1962); *see, e.g.*, CONNECTICUT PENAL CODE § 53a–156.

[5] Most federal and state courts agree that evidence of recantation of a prior false declaration is relevant to show that the initial falsehood was not perjurious because it lacked the essential element of willfulness. It is also agreed that a witness's non-responsive answer is not perjury if it results from a mistake, misunderstanding or an inadvertent omission, that the determination of perjury requires evaluation of a witness's entire testimony and, consequently, that a witness's correction of his false testimony may be considered when making the overall evaluation.

The solidarity of judicial acceptance of this principle is emphasized by noting that courts which follow the completed crime rule and deny the recantation defense after perjury has been committed, as well as those courts which do allow recantation, agree with the willfulness requirement. *See, e.g.*, United States v. Kahn, 472 F.2d 272, 284 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973); United States

The range of proof which is admissible as material to a witness's lack of intent to testify falsely is extremely broad.[6] A witness's subjective misunderstanding will be admissible evidence,[7] as will his cultural heritage of lack of mental competence.[8] The promptness with which a witness corrects himself, his motive for doing so, the kind magnitude of inaccuracy and the witness's own explanation for the inaccuracy are also material to show absence of perjurious intent. Some courts have indicated in dicta that any evidence competent to explain away the false testimony will be admissible whenever it shows reasons disassociated from a willful or corrupt intention to deceive.[9] Consequently, there is general agreement that a witness may offer his correction of prior false testimony as probative evidence that he had never intended to testify falsely.[10] Although a charge of immateriality will not generally prevent offered proof from being admitted in evidence, it may influence how that evidence is subsequently weighed in reaching a judgment or in deciding what sentence should be imposed.[11]

v. Lococo, 450 F.2d 1196, 1198 n.2 (9th Cir. 1971); Beckanstin v. United States, 232 F.2d 1, 4 (5th Cir. 1956); United States v. Rose, 215 F.2d 617, 623 & n.5 (3d Cir. 1954); Seymour v. United States, 77 F.2d 577, 581-83 (8th Cir. 1935); People v. Baranov, 201 Cal. App. 2d 52, 59-60, 19 Cal. Rptr. 866, 870-71 (Dist. Ct. App. 1962); State v. Fasano, 119 Conn. 455, 461, 177 A. 376, 378 (1935); State v. Brinkley, 354 Mo. 337, 352, 189 S.W.2d 314, 320 (1945); People v. Brill, 100 Misc. 92, 102, 165 N.Y.S. 65, 71 (N.Y. County Ct. Gen. Sess. 1917); Kern v. United States, 169 F. 617, 619-20 (6th Cir. 1909). *Cf.* Humes v. United States, 186 F.2d 875, 878 & n.3 (10th Cir. 1951).

The basic dichotomy of judicial opinion on recantation is thus confined to dispute over the effect of a witness's subsequent correction of a prior *intentional* false declaration.

[6] Courts will decide whether prior erroneous testimony was given deliberately by considering subsequent corrections in the context of the total circumstances of the witness's testimony. For example, the New York Supreme Court dismissed an indictment for perjury when the defendant convinced the court that his original testimony that he had not signed a certain paper which he had in fact signed was falsely given because his "attention was not at first directed to the particular paper" which he was asked to identify. People v. Brill, 100 Misc. 92,102, 165 N.Y.S. 65, 71 (1917). The court was persuaded by the fact that defendant corrected himself as soon as a photographic copy of the document was shown him. On the other hand, the New York Court of Appeals did not give the benefit of the doubt to a witness who "was no novice on the stand." People v. Ezaugi, 2 N.Y.2d 439, 444, 141 N.E.2d 580, 583, 161 N.Y.S.2d 75, 78 (1957). In that case, because of the declarant's experience as a witness, the court interpreted the correction as no more than a calculated effort to escape the dire consequences of admitted false swearing, an effort made only because the state had shown the witness incontrovertible proof of his perjury.

[7] *See, e.g.*, Beckanstin v. United States, 232 F.2d 1 (5th Cir. 1956).

[8] *See, e.g.*, United States v. Rose, 215 F.2d 617 (3d Cir. 1954); Thrasher v. State, 31 Okla. Crim. 95, 237 P. 139 (1925).

[9] *See, e.g.*, State v. Fasano, 119 Conn. 455, 177 A. 376 (1935).

[10] The Supreme Court of Indiana approved a trial court's instruction that a witness's correction per se "rebutted the wilful and corrupt intent necessary to constitute perjury." Henry v. Hamilton, 7 Blackf. 506, 507 (1845). A California district court held that prejudicial error had been committed by a lower court in refusing to instruct that correction of testimony or attempt to correct testimony by a witness charged with perjury may be valuable to show no intent to testify falsely. Under California law "correction during the trial [is] evidence which may be considered of some value in determining the question of fact on whether or not the witness did or did not have wilful intent to testify falsely." People v. Baranov, 201 Cal. App. 2d 52, 60, 19 Cal. Rptr. 866 (Dist. Ct. App. 1962). In the extreme case, evidence of a correction has been so potent that the court dismissed the perjury indictment. Bijur v. Bendix, 285 F. 974 (D.C. Cir. 1923).

The fact that testimony has been corrected should always be admissible in evidence to help establish the defendant's lack of initial intent to swear falsely. The weight given to this evidence will usually then be left to jury determination. *See, e.g.*, People v. Baranov, *supra*. While the issue has not yet been discussed by any court, it would seem to follow that the prosecution should also be permitted to introduce the evidence of the correction to support its case.

[11] *See, e.g.*, People v. Baranov, 201 Cal. App. 2d 52, 19 Cal. Rptr. 866 (Dist. Ct. App. 1962). Most courts have weighed evidence bearing on the intent of witnesses accused of perjury simply by considering probable intent in the light of all evidence presented, but some courts have relied almost exclusively on interpreting the meaning of the alleged perjurious remark in the linguistic context of defendant's entire testimony. *See* People v. Gillette, 126 App. Div. 665, 111 N.Y.S. 133 (1908). Under the contextual analysis the witness tries to prove absence of intent to deceive by showing that when the testimony is considered as a whole, the alleged perjury is modified or elaborated by subsequent remarks so that the net effect of the entire testimony is to give a truthful picture of the facts sworn to, thereby destroying the premise on which the perjury allegation rests.

The terminology used to describe a lack of mitigating context may become confusingly intertwined in the standard of a recantation's timeliness. A correction not made in a mitigating context may be described as being too late, and vice versa.

Regardless of which legal argument is adopted—the analysis which establishes intent directly or the contextual analysis—the probative factors tend to be the same. To be admissible, the evidence offered must tend to show lack of deliberate intent directly or indirectly by proving that the alleged false testimony was really true, or at least that the witness believed it to have been true when he testified.

Retaining the artificial distinction between proving in-

The Completed Crime Rule: Correction Ineffective to Prevent Prosecution for Perjury

While courts generally agree that an offer of testimonial correction is relevant to show that the inaccurate testimony was not deliberately false and that no perjury was therefore ever committed, there is a split of judicial opinion when the witness has made an intentionally false statement which he later seeks to correct. Most courts have followed a rule by which an intentionally false statement constitutes the completed criminal offense of perjury or of false swearing, thereby making any subsequent correction or retraction too late and consequently ineffective to bar prosecution.[12]

The United States Supreme Court stated the rule and its rationale in *United States v. Norris.*[13] While testifying before a Senate subcommittee, the defendant reported that he had not received certain money or support for his senatorial campaign. On the following day another witness testified that defendant had been given money, whereupon defendant returned to the stand on his own request to admit having received the money in question. The Supreme Court held that the correction could not alter the fact that intentionally false testimony had already been given and that perjury was therefore irrevocably established:

> Deliberate material falsification under oath constitutes the crime of perjury, and the crime is complete when a witness's statement has once been made. . . . [T]he oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross examination, by extraneous investigation or other collateral means.[14]

The threshold question in jurisdictions following this completed crime rule is whether the testimony which defendant seeks to correct was willfully false. If the falsehood was willful, no subsequent correction will be admissible. Once criminal intent has been conceded, neither the promptness of a correction,[15] the witness's motive for making it,[16] nor the extent of

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tention by direct or contextual demonstrations will affect the ease with which the standard of proof required to prove willfulness can be met. Courts adhering strictly to the linguistic contextual analysis of a witness's intention to testify truthfully may find other modes of proof besides context unacceptable. This could have the dangerous consequence of making it impossible for a witness accused of perjury to demonstrate his innocence with extrinsic evidence of an honest motive if his testimony was simply very brief or otherwise lacked surrounding verbiage sufficient to support the contextually-oriented showing of honest intent.

Since a contextual analysis only helps resolve the threshold question of whether the witness intended his original answer to be deceitful, and since the actual analysis any jury uses to reach its conclusion remains the jury's secret, the fine judicial distinction between admissibility based on direct proof of intention and indirect proof by context is unmanageably elusive and of questionable utility. Since all courts agree that perjury cannot be predicated on testimony not intended to deceive, the evidentiary weight given to a witness's subsequent correction should correlate with the correction's materiality to the witness's actual veracity or to his intent to be truthful, however that may be demonstrated.

[12] United States v. Talbot, 15 Alas. 590, 602–05, 133 F. Supp. 120, 126–27 (Dist. Ct. 1955); People v. Baranov, 201 Cal. App. 2d 52, 59–60, 19 Cal. Rptr. 866, 870–71 (Dist. Ct. App. 1962); State v. Fasano, 119 Conn. 455, 461, 177 A. 376, 378 (1935); State v. Phillips, 175 Kan. 50, 53–54, 259 P.2d. 185, 188 (1953); Martin v. Miller, 4 Mo. 47, 48–49, 28 Am. Dec. 342, 344 (1835); *In re* Caruba, 139 N.J. Eq. 404, 51 A.2d 446, 450–51 (Ch. 1947); Butler v. State, 429 S.W.2d 497, 500–01 (Tex. Crim. App. 1968); *cf.* People v. Markan, 123 Misc. 689, 692–93, 206 N.Y.S. 197, 199–200 (N.Y. County Ct. Gen. Sess. 1924). *But see* State v. Brinkley, 354 Mo. 337, 352, 189 S.W.2d 314, 320 (1945). *See* federal cases cited in notes 21 and 22 *infra.*

[13] 300 U.S. 564 (1937). The case came to the Supreme Court after the Eighth Circuit had acquitted the defendant because he had made a valid recantation. Norris v. United States, 86 F.2d 379, 381 (8th Cir. 1936). The Eighth Circuit found that a proper charge would have instructed that the respondent was not guilty if he corrected his prior incorrect or even intentionally false statements while the hearing was continuing and the matter still pending before the Senate subcommittee. The Eighth Circuit's exemplary charge stated the law on recantation as it had been decided under the "New York rule." *See* notes 48–50 *infra* and accompanying text. By reversing the Eighth Circuit, and ruling that there is no locus poenitentiae for perjury, the Supreme Court clearly rejected the New York rule permitting recantation after a deliberate falsehood.

[14] 300 U.S. at 574. Although the Court held that proven guilt could never be expunged by a subsequent repentance, it was careful to add in dictum that correction would certainly be admissible to show lack of initial intent. *Id.* at 576.

[15] *See* Llanos-Senarillos v. United States, 177 F.2d 164 (9th Cir. 1949). The Ninth Circuit stated that the promptness of a correction is of no importance when it has already been established that the defendant had willfully testified falsely. The court distinguished the circumstance where the false statement is withdrawn of the witness's own volition and without delay so that the statement and its withdrawal may be found to constitute "one inseparable incident out of which an intention to deceive cannot rightly be drawn." *Id.* at 165.

[16] *See* Kern v. United States, 169 F. 617 (6th Cir. 1909). The Sixth Circuit affirmed a perjury conviction based on willful false statements which the defendant had corrected before the truth became known to others. The court rejected the contention that a perjury conviction should not lie,

injury to judicial administration caused by his falsehood[17] is admissible to mitigate guilt. Consequently, if a witness has admitted having deliberately perjured himself, the only benefit he can hope to obtain from correcting his testimony is a reduction in sentence.[18]

Before the recantation rule was codified by the Federal False Declaration statute in 1970,[19] the completed crime rule had been universally endorsed by federal courts.[20] The Third, Sixth, Eight and Tenth Circuits expressly followed the rule,[21] and the Second, Fifth and Ninth Circuits recognized the rule by implication.[22] Federal courts have found perjury irrevocably culpable when committed before a federal grand jury,[23] a state grand jury,[24] a United States District Court,[25] a bankruptcy hearing,[26] and a Senate subcommittee hearing.[27] The purpose of the completed crime rule is to ensure that the deterrent value of perjury sanctions is not eroded by providing witnesses with the correction device as a means to escape punishment.[28]

Since the crime of perjury requires that the witness have *willfully* attempted to mislead, the completed crime rule must necessarily yield to an accused perjurer's showing that his false testimony was not given with the requisite intent.[29] Consequently, this rule does not completely eliminate the availability of testimonial correction as a defense to perjury; it merely complicates the witness's showing of proof, demanding first that he correct himself and second that he convince the court that the initial testimony was not deliberately false.

Because the prosecutor still bears the burden of establishing willfulness, whether the completed crime rule actually reduces the availability of the correction defense will ultimately be determined by the scope of the evidence admissible by either side to establish the presence or absence of intent. As pointed out above,[30] this standard is extremely variable, but the tendency is for courts to admit evidence of almost any type that might have relevance to the intent issue. For example, when a witness corrected himself because his perjury had been discovered, his motive for making the correction was held to bear on the willfulness with which he originally testified.[31] In the extreme case, when a witness corrected himself when he ought reasonably to have known that his original perjury had been discovered, his motive for making the correction the correction was found sufficiently tainted by an inferred desire to escape punishment to justify an underlying inference that the initial falsehood was willful.[32]

The theoretical result of the completed crime rule is to limit the availability of correction in direct relation to the leniency of the standard by which prosecutors are permitted to establish the willfulness of the initial false statement. Since proof of willful false testimony irrevocably forecloses the correction defense under this rule, when willfulness can be established easily, correction will be foreclosed more frequently. Many courts have substantially reduced the standard of proof by which the prosecutor must establish willfulness,[33] and it may be asked whether

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stating the general principle that "[t]he offenses of false swearing and concealment when once committed could not be retrieved by right and lawful conduct and the doing of things 'meet for repentance,' however they might affect the judgment of the court in imposing sentence." *Id.* at 620.

[17] *See* United States v. Norris, 300 U.S. 564, 574 (1937).

[18] *See, e.g.*, United States v. Lococo, 450 F.2d 1196, 1198 & n.2 (9th Cir. 1971); Kern v. United States, 169 F. 617, 620 (6th Cir. 1909).

[19] 18 U.S.C. § 1623(d) (1970).

[20] Prior to the enactment of 18 U.S.C. § 1623(d) (1970) only the circuits mentioned in the text had decided cases involving the correction issue.

[21] Humes v. United States, 186 F.2d 875 (10th Cir. 1951); United States v. Margolis, 138 F.2d 1002 (3d Cir. 1943); Seymour v. United States, 77 F.2d 577 (8th Cir. 1935); Kern v. United States, 169 F. 617 (6th Cir. 1909).

[22] Beckanstin v. United States, 232 F.2d 1 (5th Cir. 1956); Llanos-Senarillos v. United States, 177 F.2d 164 (9th Cir. 1949); United States v. Hirsch, 136 F.2d 976 (2d Cir.), *cert. denied,* 320 U.S. 759 (1943).

Despite passage of the False Declaration Statute, the Second and Ninth Circuits still appear to embrace the completed crime rule. United States v. Kahn, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); United States v. Lococo, 450 F.2d 1196 (9th Cir. 1972). See notes 87–95 *infra* and accompanying text for discussion of the judicial misapplication of the recantation provision in the False Declaration Statute.

[23] United States v. Lococo, 450 F.2d 1196, 1198 n.2 (9th Cir. 1971).

[24] United States v. Kahn, 472 F.2d 272 (2d Cir. 1973).

[25] *Id.* at 284. This holding was unusual in that the Second Circuit did not follow the New York rule stated in People v. Ezaugi, 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957). (See note 31 *infra* and accompanying text.) The Second Circuit reversed its position in United States v. Cuevas, 510 F.2d 848 (2d Cir. 1975).

[26] Kern v. United States, 160 F. 617 (6th Cir. 1909).

[27] Seymour v. United States, 77 F.2d 577 (8th Cir. 1935).

[28] *E.g.*, United States v. Norris, 300 U.S. 564, 574 (1933).

[29] See notes 4–11 *supra* and accompanying text.

[30] See notes 6–9 *supra* and accompanying text.

[31] *Cf.* United States v. Norris, 300 U.S. 564 (1937); People v. Ezaugi, 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957).

[32] *Cf.* People v. Ezaugi, 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957).

[33] See notes 31–32 *supra* and accompanying text.

the reduction does not often reach a point where the presumption of the defendant's innocence becomes an empty phrase.[34]

Theoretically, the completed crime rule provides the strongest deterrent scheme to prevent *initial* perjury. On the other hand, by limiting the availability of recantation, the completed crime rule has the unfortunate additional consequence of reducing the number of corrections of *completed* falsehoods which witnesses make.[35] One can only hope that the corrections which are discouraged because of the completed crime rule are predominantly ones which would have necessitated "extraction" by a prosecutor already in possession of the true answer, rather than voluntary ones made before anyone but the witness had learned the truth. In view of the questionable efficacy of the pure deterrent scheme, the issue raised is whether the possible decrease in initial deterrence value of perjury sanctions caused by permitting recantation is not outweighed by the benefits of obtaining more corrections of completed falsehoods.

Correction as Recantation Which Can Expunge Guilt of Prior Perjury

Where a defendant willfully testifies falsely but subsequently corrects his former statements, it has sometimes been held, in contrast to the completed crime rule, that the perjury has not been committed or that it has been committed but prosecution cannot be predicated thereon.[36] Before the perjury provisions of the Organized Crime Control Act[37] were enacted in 1970, no federal court had permitted recantation of deliberate false testimony. Consequently, judicial guidelines for applicability of the recantation rule have been generated by state courts.[38] When considered together, these diverse holdings develop the recantation principle into an ad hoc rule which forgives perjury after it has been properly corrected so that prosecution for the initial false testimony will be barred.

The specific test for determining a proper correction—one which will be acceptable as a recantation—still varies among jurisdictions, but courts have usually insisted that the correction be made before the same examining body to which the false testimony was originally given.[39] Local requirements differ on whether the correction is permissible as a recantation if the falsehood has already misled the investigation,[40] on how soon a correction must be made,[41] and on whether the correction must be motivated by an honest and voluntary effort to recant.[42] Jurisdictional variations of the rule can be analyzed as different combinations of one or more of these factors of prejudice, timeliness, and motive, including specificity as to the relative weight each should be given.

The Timeliness Standard

In *People v. Ezaugi,*[43] the New York Court of

[34] There are two issues here; (1) Is preventing testimonial correction, except under pain of perjury prosecution, an effective way to obtain more truthful testimony than we now receive? That is, will this kind of deterrence really have any impact on a person who intentionally testifies falsely on the stand; for example, a witness who is afraid for his life? Isn't it preferable to give him a way out in case he changes his mind, becomes willing to risk telling the truth and accepts police protection? (2) Even if this deterrence technique is effective, can we allow it to be administered in such a way that the defendant is shorn of his right of presumed innocence because the willfulness element of the crime has been made so easy to satisfy?

[35] *See* United States v. Lococo, 450 F.2d 1196 (9th Cir. 1972).

[36] *See generally,* Brannen v. State, 94 Fla. 656, 662–63, 114 So. 429, 431 (1927); Henry v. Hamilton, 7 Blackf. 506, 509 (Ind. 1845); State v. Brinkley, 354 Mo. 337, 352, 189 S.W.2d 314, 320 (1945); People v. Gillette, 126 App. Div. 665, 111 N.Y.S. 133 (1908); Commonwealth v. Irvine, 14 Pa. D. & C. 275 (1930). *Cf.* Commonwealth v. Giles, 353 Mass. 1, 13–14 & n.10, 228 N.E.2d 70, 78–79 & n.10 (1967); State v. Ledford, 195 Wash. 581, 585, 81 P.2d 830, 831–32 (1938). *But see* Martin v. Miller, 4 Mo. 47, 48–49, 28 Am. Dec. 342, 344 (1835).

[37] 18 U.S.C. § 1623 (1970).

[38] For this reason the completed crime rule has often been referred to as the "federal rule on recantation." *See, e.g.,* 60 Am. Jur. 2d *Perjury* § 47 (1966). This terminology has been abandoned in this article in favor of a simpler nomenclature by which "recantation" is used to describe a correction which potentially can exonerate the witness from guilt for his initial perjury. "Retraction" refers to withdrawal of the perjurious remark by correcting it, but it does not imply that guilt for the crime once completed can be forgiven.

[39] *See, e.g.,* People v. Brill, 100 Misc. 92, 102, 165 N.Y.S. 65, 71 (N.Y. County Ct. Gen. Sess. 1917).

[40] *See, e.g.,* People v. Ezaugi, 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957).

[41] *Compare* People v. Gillette, 126 App. Div. 665, 111 N.Y.S. 133 (1908), *with* People v. Ashby, 9 App. Div. 2d 464, 195 N.Y.S.2d 301 (1959), *rev'd on other grounds,* 8 N.Y.2d 238, 168 N.E.2d 672, 203 N.Y.S.2d 854 (1960).

[42] *Compare* Brannen v. State, 94 Fla. 656, 114 So. 429 (1927), *with* Commonwealth v. Irvine, 14 Pa. D. & C. 275 (1930).

[43] 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957). Two days after his original appearance before a grand jury the defendant in *Ezaugi* reappeared before the same grand jury to admit that the testimony he had previously given was deliberately false. The court found that defendant's second appearance was prompted by his realization that his initial false testimony had not succeeded in deceiving the district attorney. The court said the correction was made only because the defendant believed

Appeals[44] endorsed a recantation rule while prescribing rigid guidelines with respect to the fundamental factors of timeliness, motive and prejudice. The court held that the recantation defense to perjury is applicable to

> knowingly false testimony only if and when it is done promptly before the body conducting the inquiry has been deceived or misled to the harm and prejudice of its investigation, and when no reasonable likelihood exists that the witness has learned that his perjury is known or may become known to the authorities.[45]

Exactly what was meant by "promptly" is not clear. One reading of the court's language suggests that when the motive for correction is proper, and the investigation has not been frustrated, the chronological timeliness of a correction is only minimally important. The *Ezaugi* court seemed to imply that chronological immediacy is not the central inquiry but only an indicator of the extent to which the investigation has been prejudiced. The court, however, did not actually state this conclusion. To this extent the holding remains ambiguous, leaving unsettled whether "promptly" refers to a time period of vague duration or whether it merely characterizes any correction which may have been made before harm has been caused.

The New York Supreme Court had already wrestled with the timeliness issue in *People v. Gillette,*[46] which held that recantation should be allowed when the defendant's perjury has caused no harm because he told the truth immediately following his perjured testimony. Like the *Ezaugi* opinion, the court's language suggests that the competence of a subsequent correction to bar prosecution for initial perjury should be determined by inquiring primarily into the extent of prejudice which the false statement has caused the investigation, and that prejudice may be determined by the correction's promptness. Again, however, the language is unclear and does not settle whether the timeliness factor is an independent inquiry or a secondary index of the extent of harm or prejudice which the delay has caused. The policy upon which the court based its decision is persuasive of the latter view:

> A judicial investigation or trial has for its sole object the ascertainment of the truth that justice may be done. It holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not. This inducement would be destroyed if a witness could not correct a false statement except by running the risk of being indicted and convicted for perjury.[47]

In view of the *Gillette* court's stated policies, the immediacy with which testimony must be corrected

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that the prosecutor had "incontrovertible proof of his perjury," 2 N.Y.2d at 444, 141 N.E.2d at 583, 161 N.Y.S. 2d at 78, and that the correction was not therefore a demonstration of penitence, but a calculated effort to escape the consequences of his crime. The court also found that defendant's false testimony had frustrated the grand jury's investigation. The defendant's correction flatly failed the three-part test—promptness, motive, and harm to the investigation—and his conviction for perjury was affirmed.

[44] The New York Court of Appeal's position on recantation is particularly significant in the evolution of the recantation rule, for when the United States Supreme Court originally rejected the recantation rule, it paid attention to the fact that the New York Court of Appeals had not yet spoken:

> The Appellate Division of the Supreme Court of New York has definitely held with the respondent upon the point, in a case where the witness corrected his false testimony immediately and told the truth although, in that case, the conviction was reversed on several grounds any one of which would have been adequate for reversal. The Court of Appeals of New York has not spoken on the subject, and in a later case a lower court has refused to follow the decision mentioned where the contradictory statement was not part of the same examination at which the false statement was made.

United States v. Norris, 300 U.S. 564, 575–76 (1937) [footnotes omitted]. The arguments which the New York Court of Appeals advanced in *Ezaugi* responded directly to the issues which troubled the Supreme Court when it rejected the recantation rule in *Norris*.

[45] 2 N.Y.2d at 443, 141 N.E.2d at 583, 161 N.Y.S.2d at 78. It has been suggested that the recantation rule announced in *Ezaugi* is so strict that in most cases courts following that rule will achieve the same result as a decision under the completed crime rule. *See* Annot., 64 A.L.R.2d 276 (1959). A particular correction might fail to protect a witness from perjury prosecution on the one hand because it failed the rigid test set out in *Ezaugi* or on the other because of the dogmatic prohibition against forgiving the completed crime. The crucial difference between the application of the two rules, however, lies in the flexibility offered by the recantation rule which the completed crime rule cannot match. Thus, under the completed crime rule there is absolutely no circumstance in which a defendant can correct his willfully false testimony without inviting prosecution by so doing. The perjury sanctions act as an irrevocable threat which once made can never be withdrawn. If they fail to encourage truthful testimony in the first instance, they will surely discourage it in the second.

The recantation rule offers a similar degree of deterrent protection when its guidelines are strictly construed, but it also includes the option of removing the threat of penalty if the initial deterrence has not succeeded. Thus, while the two rules may achieve the same result in many cases, only the recantation rule is sufficiently adaptable to insure that perjury sanctions do not become counterproductive.

[46] 126 App. Div. 665, 111 N.Y.S. 133 (1908).

[47] *Id.* at 673–74, 111 N.Y.S. at 139.

in order for the perjury to be excused should be construed to require measurement not by an inflexible rule which perfunctorily rejects any correction made after an arbitrarily determined period of time. Instead, immediacy should be determined primarily by the measure of inconvenience or prejudice which the witness's false testimony has caused. This evaluation would be a determination of fact based on the particular circumstances of each case.

In *United States v. Norris*[48] the United States Supreme Court rejected this argument and interpreted "immediately," as used in the *Gillette* opinion, to be an extremely strict construction of the timeliness test, requiring chronological promptness as a prerequisite to admitting a correction as recantation competent to bar prosecution.[49] The Supreme Court did not interpret "immediacy" as a flexible measure of prejudice or harm to judicial administration. Rather, the Court decided that "immediacy" was historically a measure of literal timeliness, and then reached its own holding that any delay, however slight, between a false testimony and its correction is too long to be "immediate" because the crime of perjury is complete as soon as the false statement is made.[50]

Most jurisdictions have followed the Supreme Court and construed timeliness as an independent third prong of the recantation test. However, there are a variety of time periods which have been established as the cut-off point for determining the untimeliness of a correction, and frequently these variations have been more lenient than the *Norris* standard. Corrections have been permitted as recantations when made "before the submission of the case,"[51] two days after the initial testimony,[52] and in one case a correction made as long as nineteen days after the initial perjury was not automatically excluded simply because it was late.[53] However, the problem remains that a late correction which has not yet harmed the investigation and which was not improperly motivated may be obligatorily refused as a recantation simply because it is offered later than a particular jurisdiction's rule permits. This would reduce the likelihood of such corrections ever being made and would appear not to be offset by any beneficial judicial purpose.[54]

The jurisdictional variations of the timeliness test can be analyzed as a two-phased dispute. The issue at the first phase is whether timeliness is to be a fixed, independent standard or whether it is to be considered according to the likelihood that the investigation was prejudiced or as evidence of a correction improperly motivated. If the first alternative is followed, the issue at the second phase of analysis is how long a delay will still be found timely. Under the second alternative, chronological timeliness has diminished importance and inquiry focuses directly on whether the two fundamental tests of prejudice and motive have been satisfied.

The second alternative, considering the timeliness of corrections to be merely probative of a primary concern that judicial resources not be prejudiced, seems preferable to the inflexibity of a literal timeliness rule. If the timeliness test is construed in terms of prejudice, the same analysis may also indicate the likelihood that a correction was improperly motivated. Thus, a great delay between false statement and correction would create a presumption that the witness's motive for correcting was improper or that his falsehood had prejudiced the proceeding too much for recantation to be permissible. The witness offering the correction would then bear the burden of rebutting the presumption which his delay had established.

The Motivation and Prejudice Standards

While analysis of the disparate administration of the timeliness test leads to considerable complexity, varied approaches to motive for the correction and to prejudice caused to the investigation do not. These factors are not indicators of an independent criterion but rather are the *final* criteria by which the admissibility of a recantation is determined. They function as safeguards arising from a policy of concern that judicial administration not suffer because of its own effort to induce truthfulness through allowance of recantation. Jurisdictional var-

[48] 300 U.S. 564 (1937). See notes 13–14 *supra* and accompanying text for further discussion of the case.

[49] *Id.* at 575–76.

[50] *Id.* at 573–74. The Supreme Court's decision to construe timeliness as an independent inquiry rather than one merely probative of prejudice to the investigation or bad motive on the part of the witness offering to correct is the crux of the analysis setting out the completed crime rule. See notes 12–35 *supra* and accompanying text.

[51] People v. Brill, 100 Misc. 92, 102, 165 N.Y.S. 65, 71 (N.Y. County Ct. Gen. Sess. 1917).

[52] People v. Ezaugi, 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957).

[53] People v. Ashby, 9 App. Div. 2d 464, 467–68, 195 N.Y.S.2d 301, 305 (1959), *rev'd on other grounds*, 8 N.Y.2d 238, 168 N.E.2d 672, 203 N.Y.S.2d 854 (1960).

[54] Extreme cases, such as a correction offered subsequent to the completion of a trial, surely cannot be permitted. Thus, even under the most liberal view of "immediately," there must be some point after which a correction will always be too late.

iations indicate the extent to which local policy will tolerate sacrificing either the morally scrupulous requirement that witnesses tell the truth in the first instance or judicial efficiency in the effort to obtain truth.

A Pennsylvania court first considered the motive issue in *Commonwealth v. Irvine.*[55] At a previous trial the defendant had testified that bandits had robbed him of certain jewelry about which he was being questioned, but later he admitted that his story of the holdup was untrue and that he had pawned the jewelry in question. The fact that defendant's admission was forced from him "by the manifest impossibility of successful persistence in an incredible tale" did not prevent defendant's acquittal of the charge of perjury, the court taking the extreme view that the recantation rule was "not concerned with the witness's reason for changing his testimony."[56] Similarly, in *Brannen v. State,*[57] the Supreme Court of Florida allowed a recantation without inquiring into the witness's motive for correcting his prior falsehood.[58]

The questions of whether a witness's motive in correcting his false testimony is unacceptably improper and whether judicial administration has been prejudiced by a falsehood to such an extent that recantation should not be allowed are questions of specific fact which presiding judges should answer in their discretion. The presiding judge is in the best position to balance the interest of truth ascertainment against the harm to the judicial proceeding which he is administering. Similarly, the presiding judge is best able to gauge whether a witness who offers to correct his prior testimony is tainted by motive to escape punishment for his wrong, or whether he is honestly repentant and unlikely to lie in the future. Additionally, in the case of a correction offered under tainted motive, the judge should be given the option of permitting the witness to escape punishment in exchange for testimony which may benefit the overall judicial process more than the failure to punish a dishonest but repentant witness will harm it.[59]

While some state and federal courts have frustrated the development of a workable recantation rule through misplaced emphasis on chronological timeliness, the "New York rule" advanced in *Ezaugi* recognized the proper interweaving of the factors of timeliness, motive, and prejudice as a better solution to the perjury problem. The *Ezaugi* test requires that the presiding judge inquire initially into the "timeliness" of a correction; however, the question of timeliness turns on whether the testimony sought to be corrected has already prejudiced the administration of justice and on whether the witness believed he was providing information with his correction which the authorities did not already have.[60] By varying the intensity of this scrutiny, a deciding court can encourage corrections whenever it deems correction helpful without making the privilege available to every potential perjurer.

The Federal Recantation Statute: Recantation Before Federal Court or Grand Jury

The federal codification of the correction rule permitting recantation is set out in 18 U.S.C. § 1623(d) (1970), a provision in the Organized Crime Control Act of 1970 (OCCA):

> Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.[61]

This subsection, which is quite similar to the *Ezaugi* test,[62] provides that an admission which complies with its specifications for timeliness and motivation is a recantation that will purge a witness of liability for having made a knowingly false material declaration.

To be properly understood, the federal recantation provision should be considered in the context of the

[55] 14 Pa. D. & C. 275 (1930).

[56] *Id.* at 276.

[57] 94 Fla. 656, 114 So. 429 (1927).

[58] *Id.* at 662–63, 114 So. at 431. *But see* People v. Ezaugi, 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957) (inquiry into the recanting witness's motive is *vital* when determining whether to accept his recantation).

[59] United States v. Del Toro, 513 F.2d 656 (2d Cir. 1975), provides a good example of the breadth of a judge's freedom to determine whether a witness's recantation is permissible. In that case the prosecution showed to a witness suspected of perjury a box of tape recordings which allegedly contradicted his testimony. The court indicated in dictum that a recantation made after seeing the tapes would be permissible and would pass the motive test set out in the federal recantation statute. *Id.* at 666.

[60] The rigidity of the *Ezaugi* standard for permissible recantation is emphasized by the deciding court's use of restrictive conjunctive language in setting out the elements of its test. See note 70 *infra.*

[61] 18 U.S.C. § 1623(d) (1970).

[62] See note 74 *infra.*

complementary provisions set out in subsections 1623(a), (b), (c) and (e) which together form Title IV of OCCA. OCCA was enacted to eradicate organized crime in the United States "by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions" to deal with unlawful organized crime activities.[63] The Act is the latest step in a long effort to unify perjury statutes[64] and to tighten "loopholes" through which leaders of organized crime have frequently been able to escape convictions.[65] Title IV, section 401 of OCCA amended the general perjury statutes[66] by adding section 1623 expressly to discourage perjury in federal grand jury and court proceedings.[67] The new section facilitates federal perjury prosecutions by loosening the proof and evidentiary standards necessary to sustain a conviction, and it also increases the penalties for perjury. Subsection 1623(a) relaxes the "willfulness" standard specified in the general perjury statute to include "knowingly" as well as "willfully" false material declarations within the new title, and it provides greater penalties than the general perjury statute provides.[68] Section 1623(c) provides specifically for the prosecution of a false declaration in the case of irreconcilable contradictory statements, without the necessity of specifying which of the declarations is false.[69] Sections 1623(a) and (e) abolish the

[63] S. REP. No. 91-617, 91st Cong., 1st Sess. [hereinafter cited as S. REP.] 2 (1969); H.R. REP. No. 91-1549, 91st Cong., 2d Sess. [hereinafter cited as H.R. REP.] 2 (1970).

[64] 18 U.S.C. § 1621 (1948). Reviser's Note: based on 18 U.S.C., 1940 ed., § 231. March 4, 1909, ch. 321, § 125, 35 Stat. 1111 [derived from R.S. § 5392]. The Supreme Court discussed the statute's scope:

> This Statute takes the place of the similar provision of § 5392 of the Revised Statutes, which in turn was a substitute for a number of statutes in regard to perjury and was phrased so as to embrace all cases of false swearing whether in a court of justice or before administrative officers acting within their powers (see Revisers' Report, Vol. 2, pp. 2582, 2583).

United States v. Smull, 236 U.S. 405, 408 (1915), [prior history not recorded] [footnote omitted].

[65] H.R. 10788, 91st Cong., 2d Sess. (1970). This bill was sponsored by Hon. Mario Biaggi, Representative in Congress from the State of New York and was incorporated in S. 30, the Senate Bill which was enacted as section 1623. Mr. Biaggi stated the purpose of the forerunner bill:

> The purpose of the organized crime bill, H.R. 10788, is to fight the stranglehold organized crime has on our society by closing prosecution loopholes in our laws, which make it difficult, if not impossible, to prosecute major figures of organized crime and keep them in jail when they are convicted.

Hearings on S. 30 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess., ser. 27, at 144 (1970).

[66] 18 U.S.C. §§ 1621, 1622 (1948).

[67] The Senate Judiciary Committee indicates that section 1623 is a special amendment to section 1621. The committee said: "The proposal is intended to supplement, not supplant, the existing statutes dealing with perjury and subornation of perjury, 18 U.S.C. §§ 1621, 1622...." S. REP. 109.

On the other hand, the Judiciary Committee has justified the distinction between the statutes by emphasizing the need to make perjury convictions easier to obtain in federal grand jury and court. S. REP. 110.

These statements of purpose leave unresolved the question of whether a government attorney has discretion to prosecute perjury committed in those proceedings under whichever statute he chooses. See notes 68 and 79 *infra.*

[68] 18 U.S.C. § 1623(a) (1970) reads as follows:

> Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The general perjury statutes (18 U.S.C. §§ 1621, 1622) provide for a fine of not more than $2,000 or imprisonment for not more than five years, or both. The co-existence of the general perjury statutes and section 1623, which only applies to false declarations in federal court or grand jury, may have undesirable consequences in cases of violations occurring in those proceedings. The legislative history of the statutes is inconclusive on the extent to which section 1623 supplants section 1621, if it does so at all. See note 14 *supra.*

If section 1623, the narrower statute, does not control, friction between the statutes will develop in cases in which both apply, because the statutes permit different maximum penalties and because section 1623(d) allows the defense of recantation which section 1621 does not recognize.

Thus, the disturbing possibility exists that the government may be able to elect to prosecute under whichever statute it chooses in cases involving perjury in federal court or grand jury. This would give the prosecutor the power to manipulate the maximum penalty and the standard of proof required to convict and to render useless a recantation defense simply by bringing charges under one statute or the other. *See* United States v. Kahn, 472 F.2d 272, 282-83 & n.8 (2d Cir. 1973), *aff'g* 340 F. Supp. 485 (S.D.N.Y. 1971). See note 73 *infra.*

[69] 18 U.S.C. § 1623(c) (1970). The statute reads:

> An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—
>
> (1) each declaration was material to the point in question, and
>
> (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

"two-witness rule" not only where there are two or more inconsistent statements made under oath,[70] but also where only one of the allegedly inconsistent statements is made under oath.[71] Contrary to previous practice,[72] section 1623(e) provides that proof beyond a reasonable doubt is sufficient for conviction and no special kind of proof is required.[73]

By increasing the likelihood of conviction for perjury in federal court and grand jury proceedings, as well as the consequent penalties, subsections 1623(a), (b), (c) and (e) are intended to deter witnesses from initial false testimony. Subsection 1623(d) was intended to provide an attractive escape from the harsh penalties of the accompanying subsections by providing "an inducement to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk [sic] prosecution by doing so."[74]

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

[70] 18 U.S.C. § 1623(e) (1970) reads as follows:

Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

The "two-witness" rule evolved from the fundamental rule of ecclesiastical law (before 300 A.D.) that testimony of a single witness was in no case sufficient proof to justify a legal verdict. By the early 1700's English common law had substantially rejected this system of counting witnesses in favor of the principle that credibility does not depend on numbers of witnesses but rather on the quality of their testimony. Accordingly, the common law adopted the general rule that the testimony of a single witness may suffice in any case as evidence upon which a jury may found a verdict. The single common law exception to that doctrine, denominated the "two-witness rule," was that one witness, without corroborating circumstances, did not suffice on a charge of perjury. Since the accused could not testify in criminal proceedings, the oath of one witness would normally have positive value. In perjury, however, the accused's own oath was at issue, and in evidence, and if only one other witness testified there would be merely "oath against oath," which was not deemed sufficient to establish a legal proof.

The direct evidence rule simply specified that, although the corroboration could be of any nature, it had to be evidence designed to increase the witness's credibility by confirming his testimony without necessitating inference or presumption. This rule has usually been applied to permit documentary corroboration of a witness's testimony. The direct evidence rule, like the two-witness rule, is a quantitative rule of evidence in the sense that it permits corroborating evidence to "replace" a second witness. W. BEST, THE PRINCIPLES OF THE LAW OF EVIDENCE WITH ELEMENTARY RULES FOR CONDUCTING THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES §§ 596-606 (American ed. Chamberlayne 1883); 7 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2040-43 (3d ed. 1940).

The favored rationale for retaining the quantitative evidence rules in modern times is that they protect witnesses from unwarranted attacks in the guise of perjury prosecutions which might otherwise deter citizens from voluntarily and honestly participating as witnesses in the judicial system. The contrary argument recognizes that the system cannot operate without witnesses, but it adds that the same evidence rules which may protect honest witnesses make it difficult to prosecute dishonest ones.

When the first drafts of the Model Penal Code were being written, there was considerable debate on whether quantitative evidence rules should be continued, or whether the requirement should be simply that proof must be established beyond a reasonable doubt. *Compare, e.g.,* Orfield, *Proof of Perjury and the "Two Witnesses" Requirement in Federal Criminal Cases,* 17 SW. L.J. 227 (1963) *with* Comment, *Proof of Perjury: The Two Witness Requirement,* 35 S. CAL. L. REV. 86 (1961). The final draft of the Model Penal Code, however, retained the two-witness corroborative evidence rule. MODEL PENAL CODE § 241.1 (6) (Proposal Official Draft 1962). Judicial opinion has also retained the "two-witness" evidence requirement in prosecutions brought under the general perjury statute, 18 U.S.C. § 1621 (1948). Weiler v. United States, 323 U.S. 606 (1945), *rev'g* 143 F.2d 204 (3d Cir. 1944) decided under 18 U.S.C. § 231 (1909), on which section 1621 was based; United States v. Goldberg, 290 F.2d 727 (2d Cir.), *cert. denied,* 368 U.S. 899 (1961). The treatises are in accord. 7 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2042 (3d ed. 1940).

Thus, the specification that proof beyond a reasonable doubt will sustain a conviction for false declaration in federal court or grand jury is a major departure from historical precedent.

[71] United States v. Hamilton, 348 F. Supp. 749, 750 (W.D. Pa. 1972).

[72] *See* Weiler v. United States, 323 U.S. 606 (1945); Hammer v. United States, 271 U.S. 620 (1926) (comparison with previous standard of proof).

[73] Section 1623(e) makes proof beyond a reasonable doubt under this section sufficient for conviction. It is specified that proof need not be made by any particular number of witnesses or by documentary or other particular type of evidence. This provision permits proof of the false declaration offense to be made by the same beyond a reasonable doubt standard required for conviction in prosecutions for all other criminal offenses.

2 U.S. CODE CONG. & ADM. NEWS 404 (1970).

See note 68 *supra* for discussion of the possible consequences of applying the "reasonable doubt" standard of proof to the crime of perjury.

[74] H. R. REP. at 48. The inducement which section

The provisions of section 1623 function as two complementary parts—the deterrence subsections and the inducement inherent in the recantation subsection—which together make the statute a potent truth-gathering tool added to the judicial armory to aid the fight against organized crime.[75] This "carrot and stick" analysis makes sense out of the statute's otherwise inconsistent legislative history. When Congress enacted section 1623(d)'s recantation provision, the Senate cited as authority the leading case for the completed crime rule,[76] emphasizing that initial perjury must be deterred.[77]

1623(d) offers is greater than that offered in either case law or state statutory predecessors. The federal statute enhances the inducement effect of the recantation provision by making the privilege available in a greater variety of situations. The same language which increases the potential applicability of the privilege has the collateral consequence of increasing the trial court's influence in determining whether the privilege will be available in particular cases. This broad statutory construction is exemplified by comparing the text of section 1623(d) with the recantation rule as it had evolved under case law in *People v. Ezaugi* (see notes 38–40 *supra* and accompanying text) and with the subsequent New York codification of that rule, N.Y. PENAL LAW § 210.25 (McKinney 1975).

The court's opinion in *Ezaugi,* like the text of § 210.25, phrases the retraction requirements in the conjunctive. For a recantation to be sufficiently timely to be permissible it must be made before the examination has been misled *and* before there is reasonable likelihood that the witness has learned that his perjury no longer deceives. In contrast, 18 U.S.C. § 1623(d) substitutes the disjunctive "or," thereby greatly increasing the situations in which the recantation bar to perjury prosecution becomes available to witnesses. For instance, under section 1623(d) one who admits a prior false declaration in the same continuous proceeding may escape prosecution for perjury even if the investigation has been substantially hindered by the false declaration so long as it has not become obvious that the falsity has been or will be exposed.

[75] *See* United States v. Lardieri, 497 F.2d 317 (3d Cir.), *rev'd on reargument,* 506 F.2d 319 (1974), for a discussion of the complementary function of the statute's separate parts. In *Lardieri,* the Third Circuit discussed a possible extreme ramification of the complementary theory, suggesting that an affirmative duty to inform witnesses of the recantation provision may attach whenever a prosecutor highlights the perjury penalty provisions. The court was motivated by concern for the adverse effect on the evidence-gathering system that a prosecutor's intimidating threats to witnesses could have:

> The seminal modern treatment of the history of the offense concludes that one consideration of policy overshadowed all others during the years when perjury first emerged as a common law offense: "That the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying." Study of Perjury, reprinted in Report of New York Law Revision Commission, Legis. Doc. No. 60, at 249 (1935).

497 F.2d at 321, *quoting* Bronston v. United States, 409 U.S. 352, 359 (1973).

[76] The Senate Judiciary Committee understood 18 U.S.C. § 1623(d) (1970) to be based on N.Y. PENAL LAW § 210.25 (McKinney 1975), which reads:

> 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.

The statute, the Committee indicated, embodied the rule on retraction promulgated in *United States v. Norris.* The Committee reported: "This provision codifies dictum in present case law under 18 U.S.C. § 1621. *See* United States v. Norris, 300 U.S. 564, 573, 574 (1937)." S. REP. 150.

The Senate Committee's cite to *Norris,* however, is not consistent with its reference to the New York Penal Law, because *Norris* holds that completed perjury will *always* sustain a conviction. Furthermore, this cite expressly rejects the statement in the Practice Commentary accompanying N.Y. Penal Law § 210.25 which indicates that the statute codifies the case-law rule on "recantation" established in People v. Ezaugi, 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957). The Commentary also interpreted the *Ezaugi* case, and concluded that it set out a more liberal rule than *Norris* did. Furthermore, by replacing the *Ezaugi* requirement that a recantation be "done promptly" with the provision that it be made "in the course of the proceeding," the commentator said, "§ 210.25 recognizes that the purposes of justice are equally well served if the retraction is something less than 'promptly' made . . . . ", thereby suggesting that § 210.25 is even more liberal than the *Ezaugi* rule. N.Y., PENAL LAW § 210.25, Practice Commentary 489–90 (McKinney 1975).

The use of the word "retraction" in the New York statute provides the only justification for citing *Norris.* Thus, the *Ezaugi* court called the defense a "recantation," because under its rule the crime of perjury would be forgiven if the witness's correction complied with the court's specifications, while *Norris,* on the other hand, completely rejects *all* notions of absolution, and any defense under that rule could more aptly be termed a "retraction" defense than a "recantation."

See 2 G. MOTTLA, NEW YORK EVIDENCE WITH PROOF OF CASES § 897 at 81 (2d ed. 1966) for description of the retraction defense to perjury under New York law.

[77] In 1967, three years before 18 U.S.C. § 1623 (1970) was enacted, the President's Commission on Law Enforcement reported:

> Many prosecutors believe that the incidence of perjury is higher in organized crime cases than in routine criminal matters. Immunity can be an effective prosecutive weapon only if the immunized witness then testifies truthfully. The present special proof requirements in perjured cases inhibit prosecutors from seeking perjury indictments and lead to much lower conviction rates for perjury than other crimes. Lessening of rigid proof requirements in perjury prosecutions would strengthen the deterrent value of perjury laws and present a greater incentive for truthful testimony.

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The House, however, alluded to the leading case for the recantation rule as its authority,[78] since it wanted to encourage correction of false testimony which had *already* been made.[79] By accident, legislative compromise has produced an anti-perjury statute which is potentially more powerful and also more flexible than any previous statute or judicial rule. The stepped-up penalties and reduced proof requirement express the Senate concern that deterrence should be emphasized in fighting perjury. The recantation provision is the inducement which the House Committee had intended to enact. Thus, the statute combines the deterrent and inducement approaches which had previously characterized separate trends in judicial and congressional thinking into one rule which, if properly administered, can have the respective advantages of its predecessors but not their weaknesses. While the recantation provision may theoretically detract from the deterrent value of the penalty provisions, this sacrifice is amply compensated for by inducing corrections of completed perjury, thereby providing information completely unavailable under the previous scheme.

Section 1623 clearly holds implications for change in the federal courts. Since the rule must be applied consistently with the congressional truth-inducing

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AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 201 (1967). The Commission recommended that Congress abolish the two-witness and direct evidence rules in perjury prosecutions. *Id.* at 141.

The Senate Judiciary Committee makes a striking case for the need for controlling perjury:

> Today, however, the possibility of perjury prosecution is not likely, and if it materializes the likelihood of a conviction is not high. Using the available Federal figures (1956–65 Att'y Gen. Ann. Reps.), we see that only 52.7 percent of the defendants in perjury cases were found guilty in the 10 year period from 1956 through 1965. In all other criminal cases, however, 78.7 percent of the defendants were found guilty. The difference is striking. Indeed, out of 307,227 defendants only 713 were even charged with perjury during this period. The threat of a perjury conviction today thus offers little hope as a guarantee of truthfulness in

S. REP. 57–58. Additionally, discussion in the Senate Subcommittee Hearings centered on the primary aim of making perjury conviction easier, and section 1623(d) was never referred to as an encouragement to tell the truth.

Hearings centered on the primary aim of making perjury conviction easier, and section 1623(d) was never referred to as an encouragement to tell the truth.

On the other hand, permissive language which broadens the applicability of section 1623 (see note 74 *supra* and accompanying text) was accepted without comment. Thus, while the Senate Judiciary Committee was most concerned with loosening the evidentiary standards required for perjury conviction, there is no indication that it intended an open conflict with the House Committee's "inducement" view of the recantation proposal. *See Hearings on S. 30 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969).

[78] See note 76 *supra*. While the House Judiciary Committee did not expressly cite any case authority for 18 U.S.C. § 1623(d) (1970), the Committee did say: "This recantation or retraction provision is modeled upon a New York penal statute. (N.Y. Penal Law § 210.25)." H.R. REP. 47–48. The Practice Commentary to this Penal Law states that the section is based on the holding in *Ezaugi*. N.Y. PENAL LAW § 210.25 at 489 (McKinney 1975).

Therefore, the inference was raised that the House Committee accepted the cite to *Ezaugi*. Additionally, the Committee stated that section 1623(d)

> [s]erves as an inducement to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk [sic] prosecution by doing so.

H. REP. 40. The *Ezaugi* court's policy of encouraging truthful testimony is clearly consistent with this purpose.

Finally, in redrafting the New York penal law into section 1623(d), the Penal Law's requirement that a witness "retract" his false statements was altered to require that he "admit" them. This change is consistent with the "recantation" principle set out in *Ezaugi* and which the Practice Commentary to § 210.25 explicity endorses.

Thus. in the absence of clear indication to the contrary, any citation to N.Y. Penal Law § 210.25 should be construed to recognize *Ezaugi* as the supporting case authority.

[79] The House Judiciary Committee believed strongly in an inducement approach to truth-gathering. The Committee stressed Title IV's dual objective of facilitating federal perjury prosecutions while also encouraging recantation under some circumstances.

> Ths [sic] title is intended to facilitate Federal perjury prosecutions and establishes a new false declaration provision applicable in Federal grand jury and court proceedings. It abandons the so-called two-witness and direct evidence rule in such prosecutions and authorized a conviction based on irreconcilably inconsistent declarations under oath. As amended title IV also permits recantation to be a bar to prosecution if the declaration has not subtantially affected the proceeding or it has not become manifest that the declaration's falsity has been or will be exposed.

H. R. REP. 33. The Senate Report, on the other hand, shows concern only for making perjury convictions easier to accomplish.

> The purpose of this title, according to Senator McClellan, is to 'abolish the outmoded two-witness and direct evidence rules in perjury cases, and [to] provide for the prosecution of persons making contradictory statements under oath, without requiring proof of the falsity of one of the statements.' (115 Cong. Rec. S 280). The theory behind this apparently is that since title IV would create a new Federal crime dealing with false statements before courts or grand juries, the common law rules of evidence applicable to perjury prosecutions generally would not be applicable to it.

S. REP. 109.

purpose, there should be no reluctance to allow a correction and to excuse the initial perjury in proper circumstances. In addition, courts may have some affirmative duty to notify the witness of his alternatives: "If the recantation provision is to serve its purpose, it would seem to follow that in some circumstances there may be a requirement that the witness know of its existence."[80] However, this does not mean that reversible error will have been committed if a prosecutor fails to inform the witness of the section 1623(d) recantation opportunity.[81] To impose a duty on the prosecutor to warn every witness of the recantation opportunity "in effect shields the witness from a perjury prosecution until, if ever, such a warning is given."[82] If the custom became to give warnings sparingly, witnesses could reasonably rely on receiving notice that their perjury was suspected in time to recant. Since the witness's original oath serves as a general warning against perjury, giving every witness a second notice, in case he had ignored the first, would saddle judicial administration with an unnecessary burden. Between the extremes, however, it is both administratively feasible and consistent with the congressional truth-inducing purpose for the prosecutor or the judge to alert witnesses of the recantation possibility, perhaps in conjunction with a recitation of the perjury sanctions, whenever he feels it would be advantageous to do so.[83] Thus, whenever the presiding officer of a federal grand jury or court questions in his own mind a witness's sincerity, he should make his doubts known to the witness by explaining on the one hand the penalties at stake for conviction of perjury, and on the other the recantation alternative which is available now but which may be foreclosed to the witness later.[84]

Analysis of the case law since adoption of section 1623 reveals that federal courts have been slow to understand how the statute should be implemented to achieve maximum anti-perjury effect. The explanation may lie in the broad discretionary powers which the statute vests in presiding judges who have been accustomed to the strict completed crime rule,[85] or it may be that the tangled legislative history of this relatively new law has confused some judges.[86] Whatever the reason, it is clear that section 1623 has not always been properly applied.

In *United States v. Kahn*,[87] the Second Circuit, while professing to understand the workings of the recantation provision, rejected a defendant's statement of the section 1623(d) recantation principle in favor of a district court's reiteration of the superseded completed crime rule.[88] Similarly, the Third Circuit decision in *United States v. Lardieri*[89] determined the permissibility of recantation primarily by considering whether allowance would jeopardize the deterrent impact of section 1623,[90] a holding which

[80] United States v. Lardieri, 497 F.2d 317, 321 (3d Cir.), *rev'd on rehearing*, 506 F.2d 319 (1974). The court correctly noted, however, that grand jury witnesses are not generally entitled to the protective warnings which must be given to criminal defendants, let alone the special warning the court proposed: "[U]nder the existent law a grand jury witness, which is all that appellant was, is not entitled to a warning of right to counsel and to remain silent." United States v. DiMichele, 375 F.2d 959, 960 (3d Cir.), *cert. denied*, 389 U.S. 838 (1967). The government's failure to give *Miranda*-type warnings [Miranda v. Arizona, 384 U.S. 436 (1966)] to a grand jury witness, even one as to whom the proceedings have become accusatory or one whom the government anticipated would perjure himself if called to testify, does not bar a perjury prosecution for false testimony before the grand jury. United States. v. DiGiovanni, 397 F.2d 409 (7th Cir.), *cert. denied*, 393 U.S. 924 (1968).

[81] United States v. Lardieri, 506 F.2d 319 (3d Cir. 1974). *Accord*, United States v. Cuevas, 510 F.2d 848 (2d Cir. 1975).

[82] United States v. Cuevas, 510 F.2d 848 (2d Cir. 1975).

[83] The guidelines set out by section 1623(d) are a broad delineation of the timeliness, prejudice, and motive inquiries made by a court in deciding whether to allow a recantation. While the statute marks the guideposts for this inquiry, it leaves wide latitude to a judge in deciding the relative weights to give each factor. The trial judge is in the best position to make this determination, and reversal on appeal would be unlikely.

On its face, the recantation provision and its attendant discretionary provisions appear to be weighted neither for nor against a finding that a correction is acceptable as recantation. However, since the universal rule followed in federal courts prior to section 1623(d) was grounded in a deterrent principle which allowed no recantation, it is reasonable to assume that, even under the new statute, the recantation privilege will be allowed only sparingly. Accordingly, the statute's broadness may produce some bias in practice, and it is arguable that the law should have been more explicit, making clear the congressional intent that recantation is to be encouraged.

[84] Effective use of the recantation scheme requires that judges and counsel be permitted to confront witnesses they suspect of perjury. However, where a criminal defendant testifying at his own trial is suspected of perjury, a warning of this type could be highly prejudicial. For this reason the jury should be excused while the warning is being given.

[85] See note 83 *supra*.

[86] See notes 76–79 *supra* and accompanying text.

[87] 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

[88] *Id.* at 284. In a case decided after *Kahn*, however, the Second Circuit appeared to properly analyze the inducement component of section 1623. *See* United States v. Cuevas, 510 F.2d 848 (2d Cir. 1975).

[89] 506 F.2d 319 (3d Cir. 1974).

[90] *Id.* at 322 & n.5.

appears to upset the anti-perjury balance of section 1623 by understressing the inducement component.[91] In *United States v. Crandall,*[92] the District Court for the Western District of Pennsylvania categorically held that a recantation was impermissible because it was made a substantial period of time after the original false testimony.[93] However, a more proper view was taken by the District Court for the District of Columbia in *United States v. Krough,*[94] where literal lateness was not stressed. Rather, the court held that recantation was impermissible because the grand jury before which the false testimony had been given had already acted and it had become manifest that the falsehood would be exposed.[95]

Conclusion

The completed crime rule, with its attendant emphasis on the deterrence of initial falsehood, is of questionable utility because of the potential threat it poses to a defendant's presumption of innocence and because it forecloses the potential for corrections which may further the law's primary purpose of truth-gathering. Recantation provisions seek the different goal of inducing correction of prior false testimony. By measuring the timeliness of a correction through a weighing of prejudice to the proceeding and an inquiry into the motivation of the witness, the deciding court is able to further the primary purpose of truth-gathering while taking only a minimal risk that a dishonest witness will escape prosecution for perjury.

This basic formula for operation of a recantation provision has been incorporated into the federal law under 18 U.S.C. § 1623. The statute has preserved the deterrent value of perjury sanctions through increased penalties while giving courts greater flexibility in deciding whether to invoke them. If a witness perjures himself in spite of the sanctions, the penalties may still be "turned off" at the court's discretion so that immunity from prosecution may be bartered for information which the authorities do not have.

The misunderstanding and misapplication of the federal recantation statute since its inception in 1970 should not be taken as an indication of the statute's unworkability. Federal courts must begin to apply this law in accordance with its complementary provisions, and those states which still cling to the completed crime rule should discard it in favor of more flexible recantation statutes.

[91] Compare *Lardieri* with United States v. Cuevas, 510 F.2d 848 (2d Cir. 1975), and United States v. Cook, 497 F.2d 753 (9th Cir. 1972), *rev'd on rehearing,* 489 F.2d 286 (9th Cir. 1973).

[92] 363 F. Supp. 648 (W.D. Pa. 1973).

[93] *Id.* at 654–55.

[94] 366 F. Supp. 1255 (D.D.C. 1973).

[95] *Id.* at 1256.