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THE ELEMENT OF MATERIALITY IN THE FEDERAL CRIME OF PERJURY

RICHARD B. LILLICH†

"You can be the meanest crook on earth and never go to jail," agreed Mr. Tutt. "Plain lying is not a crime, but lying under oath is a crime,—yet only provided it is done in a legal proceeding and relates to a material matter. Nobody on earth knows what is 'material' and what isn't." Train, *The Adventures of Ephraim Tutt* 541 (1930).

The federal perjury statute provides that a person under oath who states or subscribes any "material matter" which he does not believe to be true commits the felony of perjury.¹ This requirement of materiality, introduced into the common law by Lord Coke² and perpetuated in federal and state statutes, has long been considered one of the essential elements of the crime of perjury.³ If the alleged false statement is not material, federal perjury is not committed since a defendant can be "convicted of crime only on proof of all the elements of the crime charged against him."⁴ Federal courts since 1927 have deemed the question of what is a "material matter" one of law for the court.⁵

This article, after an analysis of seventy-seven years of federal case law, arrives at three general conclusions. First, that federal courts have

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1. 18 U.S.C. § 1621 (1958).

2. See, e.g., King, *Perjury in Illinois*, 17 ILL. L. REV. 596, 600 (1923); *A Study of Perjury*, Leg. Doc. No. 60(F) at 12-15, Report N.Y. Law Rev. Comm'n 229, 238-41 (1935) (hereinafter cited as "1935 Report").

3. See, e.g., *United States v. Singleton*, 54 Fed. 488, 489 (S.D. Ala. 1892); *United States v. Landsberg*, 23 Fed. 585, 586 (C.C.S.D.N.Y. 1882); *People v. Teal*, 196 N.Y. 372, 376, 89 N.E. 1086, 1087 (1909); 1 BURDICK, LAW OF CRIMES 484, 497 (1946); ROSCOE, A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES 755 (2d ed. 1840).

4. *Christoffel v. United States*, 338 U.S. 84, 90 (1949).

5. *Carroll v. United States*, 16 F.2d 951 (2d Cir. 1927), cert. denied, 273 U.S. 763 (1927).

expanded the ordinary meaning of the word "material" to a point where it might as well be omitted from the statute. Second, that federal trial judges, by instructing juries that alleged false statements are material, have deprived defendants of their right to a trial by jury on this essential element of the crime charged. Third, that the Supreme Court, by studiously refusing to review circuit court decisions in perjury cases,⁶ has condoned these two dangerous developments in this area of federal criminal law, thus necessitating prompt remedial legislation. Criticism of the federal perjury law and its interpretation is long overdue, for, as the Fifth Circuit recently wrote, "heinous as the crime of perjury is under our law, it is entitled to no relaxation of the constitutional guaranty of the citizens in order to punish it."⁷

I. MATERIALITY IN FEDERAL COURTS

Punishing witnesses for perjury was a relatively late development in England, for at early common law the prevailing mode of trial did not require witnesses.⁸ Whether much later "perjury in a witness was punishable by the common law,"⁹ as Coke says, is still the subject of debate.¹⁰ However, by 1600, "through a combination of legislative action and the Star Chamber's exercise of jurisdiction, the crime of perjury had been firmly ensconced in the law."¹¹ Forty-four years later the offense was crystallized with the publication of Coke's Third Institute. Listing the elements of the crime, Coke specified that the false statement must be "in a matter material to the issue, or cause in question. For if it be not material, then though it be false, yet it is no perjury, because it concerneth not the point in suit, and therefore in effect it is extrajudicial."¹² More than a century later Blackstone made the same point when he observed that the false statement "also must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before mentioned."¹³ Thus at the time of the American Revolution immaterial false testimony, incapable of influencing the court

6. See, e.g., *Siegel v. United States*, 263 F.2d 530 (2d Cir. 1959), *cert. denied*, 359 U.S. 1012 (1959); *United States v. Moran*, 194 F.2d 623 (2d Cir. 1952), *cert. denied*, 343 U.S. 965 (1952); *United States v. Hirsch*, 136 F.2d 976 (2d Cir. 1943), *cert. denied*, 320 U.S. 759 (1943); *Woolley v. United States*, 97 F.2d 258 (9th Cir. 1938), *cert. denied*, 305 U.S. 614 (1938); *Carroll v. United States*, *supra* n. 5.

7. *Brooks v. United States*, 240 F.2d 905, 906 (5th Cir. 1957).

8. 1935 Report at 235.

9. 3 COKE, INSTITUTES *164.

10. 1935 Report at 236-37, 246.

11. *Id.* at 237.

12. 3 COKE, INSTITUTES *167.

13. 4 BLACKSTONE, COMMENTARIES *137.

or jury on the basic issue, would not support a perjury charge.¹⁴ Whether the statement was material or not was usually left to the jury,¹⁵ although some cases held this to be a question of law for the court's determination.¹⁶ This split of English case law¹⁷ was resolved by the Perjury Act of 1911, which specifically states that "materiality is a question of law to be determined by the court."¹⁸

In the United States the first federal perjury statute omitted the element of materiality,¹⁹ but the requirement was introduced into the federal crime in 1873.²⁰ In construing the phrase "material matter" the federal courts naturally had recourse to state decisions, which by this time had considerably broadened the term's scope. The New York Court of Appeals, for instance, stated in 1874 that "It is not necessary that the false statements should tend directly to prove the issue in order to sustain an indictment. If the matter falsely sworn to is circumstantially material or tends to support and give credit to the witness in respect to the main fact, it is perjury."²¹ This interpretation of the phrase encompassing matter only indirectly relevant to the issues being tried was quickly adopted by the federal bench.²²

Although such a construction takes liberty with the dictionary definition of "material,"²³ it can be rationalized where the false statements are made in open court upon the trial of a law suit. In such circumstances the trial judge, by exercising his preliminary power of ruling on the materiality of evidence for admissibility purposes, necessarily excludes much immaterial matter and directs the thrust of the evidence toward matter which is generally material. Thus a witness at a trial can expect most of his testimony to be material in nature. Where the false testimony is not given at a trial, however, but before a grand jury, administrative agency or congressional committee, all of which may stray far afield with no judge to exclude irrelevant matter, a literal interpretation of "material" is preferable since a witness has little idea whether his testimony is ma-

14. *Rex v. Grieve*, 12 Mod. 139, 88 Eng. Rep. 1220 (K.B. 1692), is a typical case illustrating this point.

15. *Regina v. Goddard*, 2 F. & F. 361, 175 Eng. Rep. 1096 (N.P. 1861); *Regina v. Lavey*, 3 Car. & K. 26, 175 Eng. Rep. 448 (Q.B. 1850).

16. *Regina v. Phillpotts*, 2 Den. 302, 169 Eng. Rep. 514 (1851).

17. 1 RUSSELL, *CRIME* 308-09 (10th ed. 1950).

18. 1 & 2 Geo. V, c. 6, § 1(6).

19. Act of April 3, 1790, ch. 9, § 18, 1 Stat. 116.

20. Act of December 1, 1873, ch. 4, § 5392, 18 Stat. 1050.

21. *Wood v. People*, 59 N.Y. 117, 123 (1874).

22. *United States v. Shinn*, 14 Fed. 447, 453 (C.C. Ore. 1882); *United States v. Landsberg*, 23 Fed. 585, 586 (C.C.S.D.N.Y. 1882).

23. "Of solid or weighty character; substantial; of consequence; not to be dispensed with; important." WEBSTER, *NEW INTERNATIONAL DICTIONARY* (2d ed. 1945).

terial or not. Were material read to mean "circumstantially material" in these three instances, United States Attorneys would find it immeasurably easier to secure perjury convictions.

Such a situation has, in effect, developed since the 1927 decision in *Carroll v. United States*,²⁴ where a grand jury was investigating whether Earl Carroll had served champagne at a theatre party in violation of the Prohibition Act. Carroll testified that he had served ginger ale from an ice-cooled bath tub, and when asked whether anyone had bathed in the tub he responded in the negative. Actually a Miss Joyce Hawley had slipped off her chemise and jumped into the tub, whereupon Carroll had announced that "the line forms to the right; come up, gentlemen." At Carroll's trial for perjury, the trial judge ruled that his false testimony that no one was in the tub was material to the grand jury's investigation. This determination was affirmed unanimously on appeal, the Circuit Court formulating the following principles concerning the materiality of testimony before grand juries:

This body has powers of investigation and inquisition; the scope of the inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation When a witness is summoned before that tribunal, he is bound to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry. . . . The grand jury investigation does not necessarily cease after it has heard the witness brought before it by the United States attorney. Its investigation and full duty is not performed unless and until every clue has been run down and all witnesses searched for and examined in every proper way to find if a crime has been committed, and to charge the proper person with the commission thereof. Its investigation proceeds step by step. *A false statement by a witness in any of the steps, though not relevant in an essential sense to the ultimate issues pending before the grand jury, may be material, in that it tends to influence or impede the course of the investigation.*²⁵

In formulating this test, the court was following closely the words and reasoning of the Supreme Court in *Blair v. United States*.²⁶ In applying it, the court reasoned that the line of questioning which Carroll was subjected to concerned material matters, since the questions were con-

24. 16 F.2d 951 (2d Cir. 1927), *cert. denied*, 273 U.S. 763 (1927).

25. 16 F.2d at 953. (Emphasis added.)

26. 250 U.S. 273, 282 (1919).

ceived for the purpose of learning who was at the party so that they might be called as witnesses.

The identification of the woman who stepped into the bathtub might also serve to produce a witness. A false statement as to the woman tended to mislead the grand jury, and to deprive them of knowledge as to who she was, so that she might not be obtained as a witness. . . . Clearly one who stepped into the bathtub by smell, sight, or taste, could testify as to whether or not it contained champagne. Thus the materiality of this testimony is made clear. . . . [Carroll's] statements were plainly calculated to dissuade the grand jury from further investigation. It would distort the plain meaning of the word "material" to hold otherwise.²⁷

While the court undoubtedly reached a correct decision in the *Carroll* case, its sweeping language whittled down the concept of immaterial testimony in grand jury cases.

The *Carroll* approach was applied subsequently to false statements before federal administrative agencies. In *Woolley v. United States*²⁸ the defendant, during a hearing before a Securities and Exchange Commission officer, falsely denied having a connection with a certain oil company. His conviction of perjury was affirmed on appeal, the court stating:

The Securities and Exchange Commission, as a fact-finding body, performs a function similar to that of a grand jury. . . . Such a body is not constrained by technical rules of admissibility. . . . *The test of materiality is whether the false testimony has a natural tendency to influence the fact-finding agency in its investigation.* If the testimony has such a tendency it will support a conviction for perjury. See *Carroll v. United States*, 2 Cir., 16 F.2d 951.²⁹

Here again materiality was predicated not on the fact that the false testimony concerned the main issue under investigation but on the theory that it was susceptible of influencing the agency's investigation as a whole.

The *Carroll* test, when applied to false testimony given before a congressional committee, also has the effect of virtually eliminating the requirement of materiality. In *United States v. Moran*,³⁰ for instance, the

27. 16 F.2d at 953-54.

28. 97 F.2d 258 (9th Cir. 1938), *cert. denied*, 305 U.S. 614 (1938).

29. 97 F.2d at 262. (Emphasis added.)

30. 194 F.2d 623 (2d Cir. 1952), *cert. denied*, 343 U.S. 965 (1952).

defendant testified falsely before the Kefauver Committee that while he was in public office a Louis Weber had visited him several times. When it was learned that Weber's visits had been much more frequent, Moran was tried and convicted of perjury. On appeal he argued that the number of times Weber had visited him was immaterial to the committee's investigation. The court replied:

We disagree. The authorized investigation covered a broad field, as appears from the Resolution creating the Committee. *The test of materiality of false testimony is whether the testimony has a natural effect or tendency to influence, impede or dissuade the investigating body from pursuing its investigation [citing Carroll v. United States and other cases]. . . .* Such was the case here. Part of the Committee's investigation concerned the relationship between public officials and organized crime. Moran was an official; Weber a convicted gambler. The number of times they met could well have a bearing on the intimacy of their relations, and false statements by Moran as to the frequency of those meetings could thwart or impede the inquiry and prevent disclosure of other facts.³¹

The above three cases show how the element of materiality has all but been read out of the statute when false testimony is given before grand juries, administrative agencies and congressional committees. The *Carroll* approach has even been adopted in cases where the testimony was given at a trial. Hence: "The materiality required is not as to any particular issue in the case, but as to the trial as a whole, that is, materiality is determined by whether the false testimony was capable of influencing the tribunal on the issue before it."³² In this fashion materiality, once "an excellent safeguard of rogues,"³³ has been excised from the crime.³⁴

Two other developments, one early and one relatively recent, have contributed to this result. The first is the argument that a false statement is material, no matter how collateral to the proceeding in which it is given, because it tends to strengthen the credibility of a witness. Under this "bootstrap" theory of materiality any answer, even when given on cross-examination and on an issue admittedly not before the court,³⁵ may

31. 194 F.2d at 626. (Emphasis added.)

32. *Blackmon v. United States*, 108 F.2d 572, 573 (5th Cir. 1940).

33. "The Genesis of Perjury," 25 J. Juris. 491, 493 (1881).

34. Cf. *People v. Teal*, 196 N.Y. 372, 378, 89 N.E. 1086, 1088 (1909): "We read the statute as we find it. If it is ever deemed wise to take out of the statute defining perjury the element of materiality in the false testimony given . . . that should be done by legislative enactment and not by judicial construction."

35. *Luse v. United States*, 64 F.2d 776 (9th Cir. 1933).

be deemed material. In *United States v. Shinn*,³⁶ the earliest federal case employing this credibility-materiality complex, the court observed: “[W]hen the superfluous or collateral matter [testified to falsely] is calculated and intended to prop and bolster the testimony of the witness on some material point, *as by clothing it with circumstances which add to its probability or strengthen the credibility of the witness*, the [testimony is material].”³⁷

The idea that “superfluous,” *i.e.* immaterial, false testimony can be converted into material testimony by means of the credibility fiction has found favor in the years following *Shinn*.³⁸ It is grounded on a fundamental failure to distinguish between what is material for admissibility purposes and what constitutes material matter as an element of the crime of perjury. This confusion is perfectly illustrated by *Claiborne v. United States*,³⁹ where collateral testimony by a grand jury witness was deemed material as bearing on his credibility. The case cited as authority was not even a perjury case, but one concerning the admissibility of evidence of criminal acts for the purpose of impeaching a witness.⁴⁰ While almost anything may be material (in the sense of being admissible) when used to attack a witness’s credibility, it does not follow that all false statements by a witness are material (for purposes of a perjury prosecution) because they might bear on the witness’s credibility. Here, as in the case of whether the judge or jury determines materiality,⁴¹ it appears that materiality for admissibility purposes has been substituted for materiality as an element of the crime. Carried to its logical extreme, the credibility theory absolutely eliminates the requirement, since any statement by a witness can be construed as reflecting in some remote fashion on his credibility. Questioned only once,⁴² the credibility argument has been

36. 14 Fed. 447 (C.C. Ore. 1882).

37. *Id.* at 453. (Emphasis added.) Cf. ROSCOE, A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES 764 (2d ed. 1840).

38. *United States v. Neff*, 212 F.2d 297 (3d Cir. 1954); *Blackmon v. United States*, 108 F.2d 572 (5th Cir. 1940); *United States v. Slutzky*, 79 F.2d 504 (3d Cir. 1935); *United States v. Allen*, 131 F. Supp. 323 (E.D. Mich. 1955). See also *United States v. Landsberg*, 23 Fed. 585 (C.C.S.D.N.Y. 1882). The states have followed suit: *Wood v. People*, 59 N.Y. 117 (1874); *People v. Courtney*, 94 N.Y. 490 (1884); *People v. Morris*, 155 App. Div. 711, 140 N.Y. Supp. 887 (1913). Commentators are in agreement: Note, 26 IOWA L. REV. 404, 405 (1941); 3 WHARTON, CRIMINAL LAW AND PROCEDURE § 1311 (1957).

39. 77 F.2d 682 (8th Cir. 1935).

40. *Williams v. United States*, 3 F.2d 129 (8th Cir. 1924).

41. See text at notes 56-65 *infra*.

42. This approach to materiality was rejected under the particular fact situation of *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956), where the court dismissed an indictment despite the government’s contention that the alleged false testimony was material because it bore on Icardi’s credibility. “The court has not overlooked the Government’s argument that the matters sought to be elicited by these six questions were

uniformly successful in securing perjury convictions for the government and has frequently been used to secure affirmance of a doubtful appeal.⁴³

The second and more recent development which has eased the government's burden in proving materiality also stems from the confusion between admissibility-materiality and perjury-materiality. A notewriter in 1941, examining the federal decisions which had construed the materiality requirement, concluded that:

[T]he courts have not looked solely at the alleged false statements in relation to the purposes for which they were elicited. Rather, they seem to have placed considerable emphasis upon the propriety of the question which called for the statement. If the question asked of the witness, or affiant, was a *proper* one—one directed at information which the questioner had a right to know—then the courts seem to have regarded the answering statement as “material.” A question apparently has been thought *proper* if it could properly be permitted over an objection that it was irrelevant or immaterial.⁴⁴

This wide open approach to materiality was solemnized eighteen years later in a decision by Judge Learned Hand who, assuming that the appellants' false answers before a grand jury could not have impeded its investigation, nevertheless found them to be material.

The error of the appellants' position is that they confuse the “materiality” of the question with the “materiality” of the answer, *as though it was proof that the question was immaterial, if the answer would have been so.* It is, however, at once apparent that this substitutes the opinion of the witness for that of the tribunal as to the “materiality” of the answer. No matter how right the witness might be in believing that the answer would not contribute to the investigation, he was bound to leave that decision to the tribunal. A question is “*material,*”

material because, if Icardi had impressed the subcommittee with his credibility and had produced substantial corroborative evidence, the subcommittee might have concluded that he was innocent. In the face of the evidence that, as of the time he was questioned, Icardi's answers could have no effect upon the subcommittee's conclusions in the field of legitimate congressional investigations, this slim conjecture cannot support a finding by this court, as a matter of law, that Icardi's answers related to a material matter. Whether Icardi denied or confessed guilt by his answers, his testimony could not have influenced the subcommittee's conclusion on subjects which might be legitimately under investigation.” *Id.* at 389. This case represents the sole check on permitting irrelevant testimony to be deemed material by means of the credibility catalyst.

43. Brief in opposition to petition for certiorari, pp. 16-17, *Siegel v. United States*, 359 U.S. 1012 (1959).

44. Note, 26 IOWA L. REV. 404, 406 (1941).

*no matter what the answer may be, unless it appears by its terms that the answer cannot be "material."*⁴⁵

Judge Hand's test, which shifts the emphasis from the answer to the question and makes any false answer to a "material" question material for perjury purposes, relieves the government of actually proving materiality. Henceforth the United States Attorney must only negate the remote possibility that the answer *could not* have been material. Presumably this will be done by showing one or more hypothetical answers which would be material. This substitutes what is conceivable for what is fact, making perjury turn on an abstract intellectual proposition rather than on probative evidence. In the process the burden of proof is subtly shifted from the government to the accused.

The perjury statute measures materiality by what the witness "states" or "subscribes," not by the terms of the question "no matter what the answer may be." Judge Hand, overlooking this fact, no doubt was swayed by *Sinclair v. United States*,⁴⁶ a contempt case cited elsewhere in his opinion in which the Supreme Court necessarily emphasized the question and its connection to the subject under inquiry. In contempt proceedings there is usually no answer to consider, and thus in determining the question of pertinency the court must examine the question in its context. When a witness is prosecuted for an allegedly false and material answer, however, no amount of mental gymnastics should replace the government's duty to come forth with common law proof of materiality.

From the above analysis of federal case law, it can be seen that the element of materiality has been almost, if not entirely, emasculated by the *Carroll* approach, the credibility concept and Judge Hand's test. A quick glance through the federal reports shows that for this reason perjury has replaced conspiracy as the darling of the federal attorney's nursery.

II. DETERMINATION OF MATERIALITY

Judge Hand's recent opinion on materiality concluded: "It is scarcely necessary to add that 'materiality' is always a question for the court."⁴⁷ All categorical assertions call for critical examination, this more than others. The Constitution guarantees a jury trial to those accused of

45. *Siegel v. United States*, 263 F.2d 530, 533 (2d Cir. 1959), *cert. denied*, 359 U.S. 1012 (1959). (Emphasis added.)

46. 279 U.S. 263 (1929). The authorities cited by Mr. Justice Butler do not support his dictum that materiality in perjury cases is a question of law for the court.

47. 263 F.2d at 533.

perjury.⁴⁸ While federal trial judges determine the law,⁴⁹ they may not withdraw from the jury factual issues upon which there is any evidence, even though the evidence be uncontroverted.⁵⁰ The defendant in a federal criminal trial may not be deprived directly of this constitutional right to a jury trial on disputed factual issues by being tried without a jury or by allowing the trial judge to direct a verdict of guilty.⁵¹ Nor may he be deprived of this right indirectly by permitting the trial judge to instruct the jury to find against the accused on any factual issue which is an essential element of the crime charged, even though the evidence against the defendant is uncontroverted.⁵²

When an essential element of the crime is not submitted to the jury in a perjury case the conviction must be reversed because due process requires that "all the elements of the crime charged shall be proved beyond a reasonable doubt."⁵³ Convictions are uniformly reversed for failure to let the jury make factual determinations similar to that of materiality.⁵⁴ Yet, since the *Carroll* holding in 1927 that "whether . . . [the false testimony] was any 'material' matter was a question of law for the court,"⁵⁵ federal judges have ruled on the issue of materiality.

The *Carroll* rule that materiality is always for the court to determine

48. U.S. CONST. art. I, § 9; U. S. CONST. amend. VI.

49. *Sparf v. United States*, 156 U.S. 51 (1895).

50. *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525, 533-40 (1958); *Hodges v. Easton*, 106 U.S. 408 (1882).

51. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955); *United Brotherhood v. United States*, 330 U.S. 395, 408 (1947); *Ex parte Milligan*, 71 U.S. 2 (1866); *Billeci v. United States*, 184 F.2d 394, 401 (D.C. Cir. 1950); *Wissel v. United States*, 22 F.2d 468, 471 (2d Cir. 1927).

52. *Bollenbach v. United States*, 326 U.S. 607 (1946); *Manuszak v. United States*, 234 F.2d 421, 424-25 (3d Cir. 1956); *Carothers v. United States*, 161 F.2d 718, 722 (5th Cir. 1947).

53. *Christoffel v. United States*, 338 U.S. 84, 89 (1949).

54. *Brooks v. United States*, 240 F.2d 905, 906 (5th Cir. 1957) (authority of officer administering oath in perjury case); *Carothers v. United States*, 161 F.2d 718, 722 (5th Cir. 1957) (whether price ceiling had been exceeded); *United States v. Manuszak*, 234 F.2d 421, 424-25 (3d Cir. 1956) (whether stolen goods had been in interstate commerce); *Schwachter v. United States*, 237 F.2d 640 (6th Cir. 1956) (whether car was in interstate commerce); *Taylor v. United States*, 222 F.2d 398, 404 (D.C. Cir. 1954) (sanity); *United States v. Raub*, 177 F.2d 312, 315-16 (7th Cir. 1949) (whether tax scheme was fraud); *United States v. Gollin*, 166 F.2d 123, 126 (3d Cir. 1947), *cert. denied*, 333 U.S. 875 (1948) (whether shipment was interstate); *Short v. United States*, 91 F.2d 614, 620 (4th Cir. 1937) (defense of former jeopardy); *Luse v. United States*, 49 F.2d 241, 245 (9th Cir. 1931) (whether defendant gave perjured testimony); *Konda v. United States*, 166 Fed. 91, 93 (7th Cir. 1908) (whether pamphlet was obscene).

Still other cases have permitted juries to determine issues of a type logically indistinguishable from the question of materiality. *Gorin v. United States*, 312 U.S. 19, 32 (1941); *Pierce v. United States*, 252 U.S. 239, 244, 250 (1920); *Schaefer v. United States*, 251 U.S. 466 (1920); *United States v. O'Connor*, 237 F.2d 466 (2d Cir. 1956); *Imboden v. United States*, 194 F.2d 508, 513-14 (6th Cir. 1952), *cert. denied*, 343 U.S. 957 (1952).

55. 16 F.2d at 954.

undoubtedly was an outgrowth of the fact that courts pass on materiality (1) when the *admissibility* of evidence is in question, and (2) when a *motion* is made to dismiss the indictment. The fact that the courts determine materiality in these instances, however, is no reason for allowing them to determine materiality as an essential substantive element of the felony of perjury.

It has been demonstrated above that there is a great difference between determining materiality for admissibility purposes and as an element of the crime of perjury.⁵⁶ The Supreme Court, in another context, has observed that matters which are initially questions of law when their admissibility is disputed may become questions of fact for the jury's determination by the end of the trial.⁵⁷ New York, refuting the idea that materiality is something too difficult for juries to comprehend, has expressly adopted this approach in perjury cases.

While as lawyers we are accustomed to thinking of materiality as a matter for judicial ruling, there is nothing in the nature or quality of materiality which makes it essentially a legal concept or removes it from the ken of a layman's discernment and determination. The word "material" and the idea of materiality are commonly understood, and every day judgments on a variety of subjects are made upon the basis of a layman's sense of materiality.

In the last analysis questions of materiality cannot be removed from a jury's consideration. Although to an exclusionary extent the court may rule out evidence as immaterial, it does not follow that the materiality of the evidence admitted is not something for the jury to consider in weighing the evidence. When we say that the materiality of evidence is for the court but the weight to be given to it is for the jury, we only indicate a certain separation in the function of court and jury in sifting the evidence. It would be a mistake to think that any question of materiality is thereby removed from the jury's sphere or that the jury process of weighing evidence is something entirely apart from judging its materiality.

What the law really does, in the interest of a fair trial and reasonably controlled trial, is to vest in the court a preliminary power of ruling on the materiality of evidence to the end that evidence which a jury should not consider at all may be

56. See text at notes 38-45 *supra*.

57. *McNabb v. United States*, 318 U.S. 332, 338 (1943).

excluded from their consideration altogether. *A ruling in favor of materiality means no more than that the jury may consider the evidence. Its materiality then becomes a question of fact for the jury. And certainly materiality as a substantive element of the crime of perjury is something more than materiality considered in an evidentiary ruling by the court. Materiality in such a case becomes a matter for ultimate determination by the decisional process.*⁵⁸

The fact that the court determines materiality when a motion is made to dismiss the indictment also caused many courts, including the one in *Carroll*, to hold that the trial judge may pass upon materiality in all instances. For example, the only federal authority cited in *Carroll* was an 1892 district court case, *United States v. Singleton*,⁵⁹ where a demurrer to a perjury indictment was sustained, the court holding that the alleged false statement was not material. It is clear from the court's opinion⁶⁰ that it was only stating the traditional role of the court in testing the legal sufficiency of the allegations in an indictment.⁶¹ No hint is given that, had the indictment been held good and the case gone to trial, the judge could then have ruled affirmatively that the requirement of materiality had been met, thus removing this vital element of the crime from the jury's contemplation.⁶²

The earliest federal decision dealing with the role of the court in the determination of materiality, and one not cited in the *Carroll* opinion, is *United States v. Shinn*,⁶³ where again a demurrer to an indictment was sustained. With the facts admitted for purposes of the demurrer the

58. *People v. Clemete*, 285 App. Div. 258, 261-62, 136 N.Y.S. 2d 202, 205-06 (1954), *aff'd mem.*, 309 N.Y. 890, 131 N.E.2d 294 (1955). (Emphasis added.) See Note, 21 BROOKLYN L. REV. 273, 274 (1955).

59. 54 Fed. 488 (S.D. Ala. 1892).

60. *Id.* at 489.

61. See, e.g., *United States v. Bressi*, 208 Fed. 369 (W.D. Wash. 1913); *United States v. Pettus*, 84 Fed. 791 (W.D. Tenn. 1897); *United States v. Perdue*, 4 Fed. 897 (W.D. Pa. 1880).

62. Like *Singleton*, the leading New York case cited in the *Carroll* opinion involves only the sufficiency of an indictment. *People ex rel. Hegeman v. Corrigan*, 195 N.Y. 1, 87 N.E. 792 (1909). As a close reading of this case and subsequent decisions shows, New York has never held that at the trial of the indictment the court may instruct the jury that the alleged perjurious statement was material. A court may rule on materiality at the indictment stage or hold the alleged false statement not material at trial. "I think, however, that at such a trial such materiality is one of the questions of fact, which must be submitted to the jury, and which the court cannot assume to decide as against the defendant." *People v. Redmond*, 179 App. Div. 121, 123, 165 N.Y. Supp. 821, 823 (1917), *appeal dismissed*, 225 N.Y. 206, 127 N.E. 785 (1919). See *Materiality in Perjury As a Question of Law or a Question of Fact*, Leg. Doc. No. 65(G) at 22, Report N.Y. Law Rev. Comm'n 303, 322 (1939) (hereinafter cited as "1939 Report").

63. 14 Fed. 447 (C.C. Ore. 1882).

court stated: "Where the facts are disputed, the question should be left to the jury, with proper instructions from the court. But when the facts are admitted the question of materiality is one for the court. 1 Whart. Crim. Law, sec. 1284; State v. Bailey, 34 Mo. 350."⁶⁴ There is no intimation that it was within the province of the court to rule affirmatively on materiality should the case reach trial. That the comments of the court were meant to apply solely to rulings on the pleadings is clear both from the decision itself and the case cited by the court as authority.⁶⁵

The *Carroll* holding that materiality at trial is a question of law to be determined by the judge has been followed unquestioningly since 1927.⁶⁶ Not only is this generality historically incorrect, as the above analysis shows, but it represents a begging of the basic question. The element of materiality in the crime of perjury is essentially one of fact and ought not, because of a misconception of the traditional role of the judge in determining materiality or because some might think it better to leave the question to the judge to decide than submit to the jury, to be converted into a question of law and under that label automatically assigned to the court. Maguire and Epstein, discussing fact issues which may govern a judge's ruling on admissibility (*e.g.*, materiality) and which may also be "an ultimate question on the merits," point out that many of these problems have been entrusted to the jury.

Yet in many determinations on the merits we have deliberately exchanged the comparative predictability of judge-made decision for the uncertainty of jury-made decision. One of the reasons for doing so is that both litigants and society at large are better satisfied. If that reason be at all sound, it applies strongly here, where *ex hypothesi* evidential and ultimate problems coincide.⁶⁷

In light of the reasoning in the New York case mentioned above,⁶⁸ one may speculate whether allowing the jury to determine this essential element of the crime would substitute uncertainty for predictability. However, this is beside the point. Constitutionality must prevail over any presumed desirability, and the conclusion appears inescapable that when a trial judge is permitted to instruct a jury that an accused's false

64. *Id.* at 452. Textwriters are in accord: See 1 BURDICK, LAW OF CRIMES 500 (1946); 3 WHARTON, CRIMINAL LAW AND PROCEDURE 1310 (1957).

65. State v. Bailey, 34 Mo. 350 (1864), where an indictment was quashed.

66. See, *e.g.*, United States v. Alu, 246 F.2d 29 (2d Cir. 1957) and the cases cited therein.

67. Maguire and Epstein, *Preliminary Questions of Fact in Determining Admissibility of Evidence*, 40 HARV. L. REV. 392, 415-16 (1927).

68. See text at note 58 *supra*.

statement related to a material matter he thereby deprives the accused of his constitutional right to a trial by jury of all the essential elements of the crime charged.

III. SUGGESTED LEGISLATION

Twenty-five years ago the New York State Law Revision Commission concluded that "the word 'material' is inherently ambiguous. In any given context it may bear several interpretations. In short, as a criterion of the criminality of a false statement, it is, taken by itself, worse than useless."⁶⁹ Ironically, the problem today is not so much what the term means as how to give it some meaning. The Supreme Court having refused to consider the problems raised in Parts I and II of the article,⁷⁰ Congress must be looked to for modification. Fortunately, in the case of perjury, the plea for remedial legislation is more than mere wishful thinking.

Senator Keating from New York is the author of a proposed perjury statute introduced during the last session of Congress.⁷¹ Acting on the belief that no one who swears falsely before a duly constituted tribunal should go completely unpunished,⁷² his bill reflects the New York experience of dividing perjury into two degrees, requiring materiality for first degree perjury—a felony—and eliminating the element from second degree perjury—a misdemeanor.⁷³ Section 1621 of title 18 of the United States Code would be amended to read as follows:

(a) 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 in the first degree, 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.

(b) Whoever commits perjury under circumstances not

69. 1935 Report at 238.

70. See, e.g., *Siegel v. United States*, 359 U.S. 1012 (1959).

71. S. 1516, 86th Cong., 1st Sess. (1959).

72. Letter from Kenneth B. Keating to the author, July 10, 1959. As indicated by Part I, the concept of "material matter" has been so greatly expanded that the Senator's concern is more theoretical than real.

73. See 1935 Report. The Senator, however, did not borrow all of New York's experience in the matter. See 1939 Report and text at note 75 *infra*.

amounting to perjury in the first degree, shall be fined not more than \$500 or imprisoned not more than one year, or both.⁷⁴

This amendment, in addition to meeting Senator Keating's stated objective, would encourage a more literal reading of the term material, since the alternative to finding the false statement material would be second degree perjury rather than dismissal of the indictment or acquittal. All perjurers would be subject to criminal sanctions, but petty offenders would receive a punishment more fitting their offense. Materiality once again would have meaning.

One aspect of the proposed bill, however, needs clarification. In making materiality the determining factor which distinguishes first degree from second degree perjury,⁷⁵ it is not apparent whether the question of materiality has been transferred from the court to the jury. New York's statute, which served as Senator Keating's model, contained a similar omission, and twenty years passed before the courts had an opportunity to rule that materiality was definitely a jury question.⁷⁶ Accordingly, it has been suggested to Senator Keating that he revise his bill by modifying section (b) and adding section (c), to read:

(b) Whoever commits perjury under circumstances not amounting to perjury in the first degree, in that the perjury did not relate to a material matter, is guilty of perjury in the second degree, and shall be fined not more than \$500 or imprisoned not more than one year, or both.

(c) Upon an indictment for perjury in the first degree, a jury may find the defendant not guilty of the degree charged

74. S. 1516, 86th Cong., 1st Sess. (1959).

75. Actually the fact that materiality distinguishes the two degrees of perjury is not made clear by the proposed bill. The bill is derived from New York Penal Law §§ 1620-a and 1620-b. However, New York has a general perjury prohibition, Penal Law § 1620, against which these sections must be read. It spells out the elements of the crime; § 1620-a repeats these elements and adds materiality; and § 1620-b covers perjury not amounting to perjury in the first degree under § 1620-a, *i.e.* perjury on immaterial matters. The proposed bill, however, apparently has no general introductory section and hence there is no way to determine that materiality distinguishes the degrees, since § 1621-b only states that "whoever commits perjury under circumstances not amounting to perjury in the first degree" is guilty of perjury in the second degree. The question is raised: what circumstances? Obviously materiality is intended, but this does not appear on the statute's face. The omission could be remedied by revising § 1621-b to read: "Whoever commits perjury under circumstances not amounting to perjury in the first degree, in that the perjury did not relate to a material matter, . . ." Such a suggestion has been made to Senator Keating. See proposed revised bill in text at note 76 *infra*.

76. See text at note 58 *supra*. The 1939 Report recommended an amendment to the statute which would have had this effect but it was never adopted.

in the indictment, and may find him guilty of perjury in the second degree.

Such a perjury law would not only fill the gap in Senator Keating's bill and place the determination of materiality where it constitutionally belongs, but it might well increase convictions. For if the two degrees of perjury were to be mutually exclusive and the trial judge permitted to instruct the jury in a first degree perjury prosecution that the matter was material, the jury could always disregard the judge's ruling, even if it believed the accused had lied, and there would be no way to determine this from the face of a verdict of not guilty. However, by giving the jury in such a prosecution the option of convicting the defendant of perjury in the second degree, punishment of the offender is assured.

It should be pointed out that the perjury law proposed above is no panacea. It is not guaranteed to stop witnesses from lying any more than conflict of interest statutes have prevented public officials from self-dealing. Morality cannot be legislated, and cross-examination or the threat thereof will continue to be the major deterrent to false testimony. However, such a statute, broad enough to prohibit all false swearing and graded to permit adjustment of the degree of punishment to the seriousness of the offense, would no doubt serve to increase witness veracity. At the same time it would halt the erosion of the requirement of materiality, which has made perjury a catch-all crime, used to prosecute various forms of alleged misconduct not falling within the scope of other offenses.⁷⁷

Increasing the scope of the crime of perjury by the use of fictions, as has occurred during the past thirty years, should not be tolerated, for they invariably lead to abuses and spawn the cynicism with which the public and the bar now view many perjury prosecutions. While false testimony cannot be condoned, it seems repugnant to our sense of justice that a person may be branded a felon for giving testimony which had no bearing upon the issue under inquiry and may well have been given because the line of questioning which evoked it was deemed wholly immaterial to the matter under investigation. A statute which would emphasize the importance of the materiality requirement for a felony conviction and yet punish immaterial false swearing as a misdemeanor would insure respect for the integrity of our government and protect the rights of those accused of the offense, thereby putting the crime of perjury in its proper place in our federal criminal law.

77. See, *e.g.*, *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956); *United States v. Lattimore*, 215 F.2d 847 (D. C. Cir. 1954).