Michigan Law Review

Volume 53 | Issue 8

1955

Criminal Law - Contradictory Statements Under Oath as Grounds for Perjury in the Federal Courts

Richard M. Adams S.Ed.
University of Michigan Law School

CRIMINAL LAW—CONTRADICTORY STATEMENTS UNDER OATH AS GROUNDS FOR PERJURY IN THE FEDERAL COURTS—Perjury has frequently been described as one of the more difficult convictions to obtain,[1] and the truth of this saying is no better illustrated than in the case of Harvey Matusow. During the two years in which ex-Communist Matusow served as a professional government witness, he accused 180 or more persons as being members of the Communist Party or Communist sympathizers.[2] This same witness has now described himself as a "habitual and perpetual liar" and has publicly admitted that all of his previous testimony was false.[3] On the strength of this recantation, motions were filed for a new trial in two cases[4] where Matusow's testimony had played a key role in gaining a conviction for the government. In both instances, Matusow furnished sworn affidavits and took the witness stand to assert under oath that his former sworn testimony was a mere fabrication. In the *Jencks* case the motion was dismissed and Matusow was sentenced to three years

[1] 7 VAND. L. REV. 272 (1954); McClintock, "What Happens To Perjurers," 24 MINN. L. REV. 727 (1940); Hibschman, "'You Do Solemnly Swear!' Or that Perjury Problem," 24 J. CRIM. L. AND CRIM. 901 (1934).

[2] Matusow allegedly left the party in January 1951. From 1952 through 1954 he served as a government witness in several federal prosecutions involving Communism and appeared before numerous government agencies, including both the House Un-American Activities Committee and the Senate Permanent Subcommittee on Investigations. The reported tabulations on the number of people that he accused during this period as being in association with Communism has run from 180 [N.Y. TIMES, city ed., Feb. 4, 1955, p. 8] to 280 [N.Y. TIMES, March 20, 1955, §4, p. 2].

[3] Matusow so described himself before the Senate Permanent Subcommittee on Investigations on Feb. 21, 1955. N.Y. TIMES, Feb. 22, 1955, p. 8.

[4] In 1952, Matusow testified as a key government witness in the trial of 13 second-string Communist leaders who were convicted of violating the Smith Act. United States v. Elizabeth Gurley Flynn, (2d Cir. 1954) 216 F. (2d) 354. In 1953, he also served as a witness in the trial of Clinton E. Jencks, International Representative of the International Union of Mine, Mill and Smelter Workers, who was convicted of willfully filing a false non-Communist affidavit with the National Labor Relations Board in violation of the Taft-Hartley Act. United States v. Jencks, (D.C. Tex. 1954) Crim. No. 54013.

imprisonment for contempt of court.[5] The other motion has yet to be decided. On the surface this would seem to be an open and shut case of perjury, but the fact that to this date no indictment has been made points up one of the strangest paradoxes of the criminal law.[6]

Under both the common law[7] and the Federal Code,[8] Matusow has satisfied all the substantive elements of perjury. By his own admission, his lying was willful. The sworn affidavits or testimony on the witness stand at the Jencks and Flynn trials and the contrary testimony in the hearings for new trials, not to mention his numerous appearances before congressional investigating committees, are statements under oath before authorized tribunals. Though some courts may allow the witness to purge himself of the crime by recantation,[9] the perjury is generally deemed complete unless the correction is made immediately and as part of the same examination.[10] Nor could Matusow obtain any protection from the "self-incrimination" clause of the Fifth

[5] In sentencing Matusow for contempt, the court concluded that the recantation had been concocted merely as a scheme to publicize his book, note 53 infra.

[6] A similar case has recently developed in hearings for a license renewal of a Pennsylvania radio station before the Federal Communications Commission. Two government witnesses, who had accused the owner of the station of Communist affiliation during the hearings in September 1954 later recanted and charged that they had been "brainwashed" and coerced into giving false testimony by the government lawyers. On March 7, 1955, a nine-count indictment for perjury was brought against one of the witnesses, Mrs. Marie Natvig, charging that her recantation was false. The other witness, like Matusow who was also a government witness in this same hearing, has not yet been indicted. N.Y. TIMES, city ed., March 8, 1955, p.12.

[7] Wharton gives the common law definition of perjury as "the wilful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding." 2 WHARTON, CRIMINAL LAW, 12th ed., §1510, p. 1780 (1932).

[8] "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. . . ." 18 U.S.C. (1952) §1621.

[9] Bijur v. Bendix, (D.C. Cir. 1923) 285 F. 974; People v. Gillette, 111 N.Y.S. 133 (1908); Brannen v. State, 94 Fla. 656, 114 S. 429 (1927). *Contra,* United States v. Norris, 300 U.S. 564, 57 S. Ct. 535 (1937), where testimony before a congressional committee was corrected the following day.

[10] For general discussion of this problem and collection of cases, see 23 VA. L. REV. 947 (1937); 8 INTRA. L. REV. (N.Y.U.) 193 (1953).

Amendment.[11] Yet even with all the substantive elements present, the Justice Department might still have trouble in gaining a conviction because of the technicalities in drawing the indictment and the requirements of proof under present federal law. These procedural difficulties and the policies behind them will be examined herein, and the relation of perjury to contempt will be noted. Finally, corrective legislation which has recently been proposed by the attorney general will be considered.

I. *The Indictment*

The first problem that the prosecution must face is drawing the indictment. Assuming that there have been two contradictory statements under oath and nothing more, it is almost impossible for the prosecution to form an indictment that will withstand objection under present federal law. Of the several possible alternatives, each has its pitfalls. First, both acts of swearing, though they occurred at different times, might conceivably be joined in a single count. But disjunctive charges—such as either the defendant lied on the first occasion or the second—are clearly objectionable.[12] On the other hand, if the acts are not pleaded disjunctively, the count could be stricken either for repugnancy[13] or duplicity[14] in including two separate offenses. A second possibility would be to join the two acts in two separate counts without stating which assertions were false.

It was recognized early in the federal courts that where the same person or persons are charged, several offenses could be joined in separate counts even though the offenses were committed at different

[11] Immunity which must be accorded to a witness compelled to give evidence against himself relates only to past offenses, and therefore does not exempt the witness from prosecution for perjury committed when so testifying. Glickstein v. United States, 222 U.S. 139, 32 S.Ct. 71 (1911).

[12] The alternative may be used in civil cases [Rule 8(e)2, Fed. Rules Civ. Proc., 28 U.S.C. (1952)] but not in criminal practice. United States v. Buckner, (2d Cir. 1941) 118 F. (2d) 468.

[13] If both statements were asserted as false, there would be an obvious contradiction in a material allegation of the indictment, the very essence of repugnancy. Sunderland v. United States, (8th Cir. 1927) 19 F. (2d) 202.

[14] Duplicity is the joinder of two or more distinct offenses in one count. Bratton v. United States, (10th Cir. 1934) 73 F. (2d) 795. The test in determining whether more than one offense is charged is: does each proposed offense require proof of some fact which the others do not? Dimenza v. Johnston, (9th Cir. 1942) 130 F. (2d) 465, reh. den. 131 F. (2d) 47 (1942). Defendant could logically argue that to convict on either of the two statements requires facts, such as time, oath, tribunal, which are different from the other and therefore separate offenses are charged.

times.[15] This would also seem to follow under the Court Rules of 1946.[16] But it has been determined both before[17] and after[18] the new court rules went into effect that each count is regarded as if it were a separate indictment and must be sufficient in itself. It must stand or fall upon its own allegations without reference to other counts not expressly incorporated therein. This, of course, is fatal in the case of contradictory statements, for neither statement will stand alone as a charge of perjury unless the prosecution can say that it was in that instance that the witness violated his oath. The obvious way around these difficulties is for the prosecution to name in the indictment the occasion when the accused has lied and use the other contradictory statement simply as evidence. This would appear particularly easy in a situation such as Matusow's where the accused has expressly admitted that he lied in his first testimony. This solution, however, has been tried on numerous occasions and raises a serious problem of evidence.

II. *The Problem of Evidence*

Perjury is one of the few crimes that require more than mere proof beyond a reasonable doubt. A certain quantitative standard must also be met. The rule generally stated is: direct testimony by two independent witnesses, or one witness and corroborating circumstances, are necessary to sustain a conviction.[19] Wigmore points out that this requirement is based both on historical and policy considerations.[20] Until the middle of the 17th century, the crime of perjury was dealt with almost exclusively by the Court of Star Chamber, which followed the ecclesiastical or numerical system of proof. This meant that facts were determined by counting the number of oaths in support or against the fact in question rather than by the quality or persuasiveness of the testimony. The idea of a quantitative basis of proof therefore already had a strong tradition when the jurisdiction of the Court of Star Chamber was transferred to the common law courts. This tradi-

[15] United States v. Wentworth & O'Neil, (C.C. N.H. 1882) 11 F. 52; United States v. Nye, (C.C. Ohio 1880) 4 F. 888.

[16] "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction. . . ." Rule 8(a), Fed. Rules Crim. Proc., 18 U.S.C. (1952) §3771.

[17] McClintock v. United States, (10th Cir. 1932) 60 F. (2d) 839; Hood v. United States, (10th Cir. 1930) 43 F. (2d) 353.

[18] Walker v. United States, (9th Cir. 1949) 176 F. (2d) 796.

[19] State v. Heed, 57 Mo. 252 (1874); Williams v. Commonwealth, 91 Pa. St. 493 (1879); United States v. Wood, 14 Pet. (39 U.S.) 430 (1840).

[20] 7 WIGMORE, EVIDENCE, 3d ed., §2040, p. 273 (1940).

tion was further supported by the fact that when the common law courts first took jurisdiction over the crime of perjury, it was the rule in all other criminal cases that the accused could not testify. Thus on a quantitative basis, one witness for the prosecution was in a sense something as against nothing. But in the case of perjury the defendant's oath was in effect always in evidence, and if only one witness was offered against him, the result was simply oath against oath. Hence the general rule of the early common law was that direct testimony by two witnesses, instead of the usual one, was necessary to convict for perjury. When (1) the accused was everywhere permitted to take the stand in his own defense, and (2) the value of an oath per se lost its significance, these reasons for making perjury an exception to the normal rules of evidence became indefensible. However, other policy considerations were found so that at least one witness and corroborative circumstances are still generally required. Some felt that because of the enormity of the crime, and its so-called unnatural and heinous character, perjury, like treason, should demand safeguards in addition to the usual standard of proof.[21] Others justified this exception on the grounds that a less stringent standard would increase the likelihood of false accusations of perjury by defeated litigants seeking revenge, and this way witnesses would be discouraged from taking the stand.[22] Because these historical and policy considerations have lost a great deal of force through the years,[23] some states have permitted circumstantial evidence alone to convict.[24] A few jurisdictions have even abandoned the quantitative theory of evidence altogether.[25] Yet it is still generally accepted doctrine in the majority

[21] State v. Courtright, 66 Ohio St. 35, 63 N.E. 590 (1902).

[22] Weiler v. United States, 323 U.S. 606, 65 S.Ct. 548 (1945); BEST, EVIDENCE, 3d Am. ed., §606, p. 558 (1908).

[23] "We find ourselves unable to approve the doctrine that perjury is a more heinous crime than murder, or that one charged with perjury should have greater immunity than one charged with murder." State v. Storey, 148 Minn. 398 at 403, 182 N.W. 613 (1921).

[24] For collection of cases see 15 A.L.R. 634 (1921); 27 A.L.R. 857 (1923), 42 A.L.R. 1063 (1926). Many of the cases cited in these annotations can be read so as to allow circumstantial evidence only in exceptional situations, such as where the only party who could give direct testimony was deceased, Marvel v. State, 3 Harr. (33 Del.) 110, 131 A. 317 (1925), where the false oath involves a state of mind or belief which is incapable of direct and positive proof by a living witness other than the accused himself, People v. Doody, 172 N.Y. 165, 64 N.E. 807 (1902), or where the accused is supported only by a presumption of innocence, State v. Cerfoglio, 46 Nev. 332, 213 P. 102 (1923). Nonetheless, these cases represent a strong minority trend away from the standard rule of two witnesses or one witness and corroborating circumstances.

[25] Ariz. Code Ann. (Supp. 1954) §43-4201(c); State v. Storey, 148 Minn. 398, 182 N.W. 613 (1921).

of American jurisdictions that direct testimony by two witnesses or by one witness plus corroborating circumstances are necessary to sustain a conviction for perjury.

Applying this general rule to the situation of contradictory oaths, or where the accused has directly contradicted sworn testimony by documentary evidence of his own making,[26] such as business records,[27] the accused is in a sense a witness against himself; hence, another witness or corroborative circumstances are all that are required. In speaking of an "oath against an oath" in this instance, it is merely the accused's oath that is in question. There is no occasion for concern over the need for protection against the unsupported oath of another or the possible vengeance of a defeated litigant. Yet the courts have continued almost universally to require corroborating circumstances on the ground that it is impossible to tell when the witness is telling the truth and when he is lying.[28] Even when he swears under oath that his previous testimony was perjurious, as in the Matusow case, he could just as well be lying under the second oath as under the first, and additional corroborating circumstances are still necessary to prove which one is false.[29] Only when the accused takes the stand in his own defense and admits that he violated his oath on the particular occasion charged is the rule dispensed with.[30] Under this principle the coincidence that any number of people may have heard Matusow testify at the original *Jencks* or *Flynn* trials is immaterial because the corroboration must go to the falsity of the testimony.[31] It must be evidence aliunde defendant's testimony showing in which instance he lied.[32] As to what form the corroborating circumstances may take, it is almost impossible

[26] United States v. Wood, 14 Pet. (39 U.S.) 430 (1840).

[27] United States v. Mayer, (D.C. Ore. 1865) 26 Fed. Cas. 1225, No. 15,753; Jacobs v. United States, (6th Cir. 1929) 31 F. (2d) 568.

[28] People v. McClintic, 193 Mich. 589, 160 N.W. 461 (1916); Blakemore v. State, 39 Okla. Cr. 355, 265 P. 152 (1928); Paytes v. State, 137 Tenn. 129, 191 S.W. 975 (1917); Billingsley v. State, 49 Tex. Cr. 620, 95 S.W. 520 (1906).

[29] An early New York case, People v. Burden, 9 Barb. (N.Y.) 467 (1850), held that an express admission, under oath, of corruptly falsifying previous testimony was sufficient in itself to indicate that perjury had been committed on the first occasion. This line of reasoning was also followed in Behrle v. United States, (D.C. Cir. 1938) 100 F. (2d) 714. But the majority position is clearly the other way. 25 A.L.R. 416 (1923). For criticism of the Burden case, see Schwartz v. Commonwealth, 68 Va. 1025 (1876); State v. Burns, 120 S.C. 523, 113 S.E. 351 (1922); McWhorter v. United States, (5th Cir. 1952) 193 F. (2d) 982.

[30] If the accused takes the stand in his own defense, an admission of perjury on the occasion charged in the indictment is deemed tantamount to a plea of guilty. United States v. Buckner, (2d Cir. 1941) 118 F. (2d) 468.

[31] 7 WIGMORE, EVIDENCE, 3d ed., §2042, p. 280 (1940).

[32] McWhorter v. United States, (5th Cir. 1952) 193 F. (2d) 982.

to lay down any fixed rule.[33] It has been held that a mere failure to deny the charge of perjury[34] or the accused's own mannerisms and conduct on the witness stand may be enough.[35] Or the corroboration may simply go to show motive or design.[36] Thus any evidence which convinces the jury beyond a reasonable doubt as to the occasion upon which the oath was violated would seem to be sufficient.[37]

Drawing the indictment and finding sufficient corroborative evidence are therefore the two major hurdles facing the prosecution in the case of contradictory statements under oath. These two procedural difficulties are in essence opposite sides of the same coin. Both rest on the fact that the prosecution must show on which occasion the accused has committed perjury. Few courts, however, stop to explain what difference it should make that the time is unknown. That the crime has been committed is not in the slightest doubt. Is there anything wrong with the disjunctive?[38] The most common argument against its use is that of "indefiniteness" or "uncertainty."[39] The uncertainty in the case of contradictory oaths, however, does not place an unreasonable burden on the defendant such as might arise in other situations, e.g., an alternative charge of assault or battery. Here only a single crime is charged, with the time left open. The New Jersey Supreme Court has expressly held that this is all the notice to which the accused is entitled.[40] A second objection that is sometimes given against the disjunctive is that by denying one count the accused is forced to admit his guilt on the other.[41] Though in many situations

[33] For collection of cases where various forms of circumstantial evidence have been used for corroboration, see 111 A.L.R. 825 (1937).

[34] People v. Todd, 9 Cal. App. (2d) 237, 49 P. (2d) 611 (1935), where accused tried to avoid the element of criminal intent by claiming her false statements were a mistake.

[35] State v. Miller, 24 W.Va. 802 (1884).

[36] Ibid.

[37] Sometimes it is said that the evidence must be "strongly" corroborative, United States v. Hall, (D.C. Ga. 1890) 44 F. 864, or that it must be strong enough to overcome the oath of the defendant and the legal presumption of his innocence. State v. Smails, 63 Wash. 172, 115 P. 82 (1911). But where the defendant has as much as admitted his guilt and it is only his own oath that is in question, these cases would not be in point. The only logical standard would be that amount of evidence which is necessary to convince the jury as to which time the witness lied. Some courts leave the amount of corroboration entirely to the jury even where contradictory oaths are not involved. Parham v. State, 3 Ga. App. 468, 60 S.E. 123 (1908).

[38] For a general discussion of alternative pleading, see Hankin, "Alternative and Hypothetical Pleadings," 33 YALE L.J. 365 (1924).

[39] Ibid.

[40] State v. Ellenstein, 121 N.J.L. 304, 2 A. (2d) 454 (1938), where a statute permitting use of the alternative in case of contradictory statements under oath was upheld.

[41] 2 RUSSELL, CRIMES AND MISDEMEANORS, 6th Am. ed., §652, note (a) (1850); Hankin, "Alternative and Hypothetical Pleadings," 33 YALE L.J. 365 (1924).

such a result would be highly unjust, in the case of contradictory statements this is the exact position that the accused has placed himself in whether the disjunctive is used or not. Without it his defense can only be: "I did not commit perjury on the occasion charged, but I did on the other occasion."[42] Paradoxically, the accused is forced to use perjury as a defense to perjury in any event, so this line of reasoning is hardly adequate ground to deny the use of the disjunctive in the case of contradictory statements. It might also be argued that by the use of the alternative the jury could find the accused guilty without actually coming to a unanimous verdict. Conceivably, part of the jury might think that the defendant was lying on one occasion and the rest of the jury find him guilty because they thought he was lying on the other. Even so, there is no injustice inasmuch as the whole jury would concur that the accused has committed perjury. The reasons usually put forth against the disjunctive therefore lose their persuasiveness when applied to the case of contradictory statements under oath. Correspondingly, the grounds for the requirement of corroborating circumstances become meaningless. Nonetheless, the rule still stands in the majority of American jurisdictions.

III. *Perjury as Grounds for Contempt*

In some instances these technical difficulties may be circumvented through the courts' summary power of contempt. The power of the federal courts to punish those acts tending to "obstruct the administration of justice" is stated in section 401 of the Criminal Code,[45] and, following the lead of the early bankruptcy cases, it is now generally recognized that in some circumstances perjury may constitute such an obstruction.[44] On the surface it might seem that every instance of perjury is an obstruction to the administration of justice insofar as our system of justice is dependent upon truthful evidence. Though some of the early cases used this approach,[45] the federal courts generally have been reluctant to go that far for fear that contempt would become a mere punishment for perjury without giving the accused his right to trial by jury,[46] or a "legal thumbscrew" to exact testimony as the judge

[42] It is assumed that all the other elements of perjury are present except the fact of falsity.

[43] 18 U.S.C. (1952) §401(1).

[44] For general discussion and collection of cases, see 11 A.L.R. 342 (1921).

[45] Chicago Directory Co. v. United States Directory Co., (C.C. N.Y. 1903) 123 F. 194; In re Ulmer, (C.C. Ohio 1913) 208 F. 461.

[46] In re Michael, 326 U.S. 224, 66 S.Ct. 78 (1945).

sees fit.[47] Thus, in the leading case of *Ex parte Hudgings*[48] it was decided that perjury is contumaceous only when it is procedurally obstructive so as to impede the mechanical functions of the court. Perjury merely tending to deceive is not sufficient.[49] It must in some way block the actual inquiry of the court, such as perjury by a juror on voir dire[50] or evasive and false testimony by a witness which is of such a nature as to thwart the whole trial.[51] Applying this standard to the hearing for a new trial in the *Jencks* case, there is considerable doubt whether Matusow's testimony actually impeded the administration of justice. It could be argued that his testimony simply misled the court or, at most, caused additional proceedings, which in effect is not different from any other act of perjury. The actual inquiry of the court in the procedural sense of the word has not been blocked. Could this be an instance, as several writers have suggested, where the summary power of contempt is used merely as a punishment for perjury?[52]

In sentencing Matusow for contempt, Judge Thomason concluded that Matusow's recantation was false and his testimony in the hearing for a new trial in *Jencks* case was motivated simply by a desire to publicize his book, *False Witness*.[53] This broad finding of fact raises an interesting question of evidence. The rule followed in many of the states is that there cannot be an obstruction of justice unless the falsity

[47] Nelles, "Summary Power to Punish For Contempt," 31 COL. L. REV. 956 at 969 (1931).

[48] 249 U.S. 378, 39 S.Ct. 337 (1919).

[49] United States v. Arbuckle, (D.C. D.C. 1943) 48 F. Supp. 537.

[50] Clark v. United States, 289 U.S. 1, 53 S.Ct. 465 (1933).

[51] United States v. Appel, (D.C. N.Y. 1913) 211 F. 495; United States v. McGovern, (2d Cir. 1932) 60 F. (2d) 880.

[52] 7 VAND. L. REV. 272 (1954); 21 CALIF. L. REV. 582 (1933); 18 So. CAL. L. REV. 284 (1945); McClintock, "What Happens To Perjurers," 24 MINN. L. REV. 727 (1940).

[53] "I am firmly convinced from the evidence of the witness, including that of Matusow, not only that the evidence offered, in support of the motion, is not worthy of belief, but that Matusow, alone or with others, wilfully and nefariously and for the purpose of defrauding this Court and subverting the true course of the administration of justice and obstructing justice, schemed to and actually used this Court of law as a forum for the purpose of calling public attention to a book, purportedly written by Matusow, entitled 'False Witness.' This Court finds the fact to be that as early as September 21, 1954, responsible officials of the International Union of Mine, Mill and Smelter Workers, under the guise of seeking evidence in Jencks' behalf, subsidized the writing and publication of this book by authorizing the expenditure of Union funds for that purpose. This at a time when, from the evidence, Matusow had no intention of writing any such book as was here exhibited or of changing his testimony given in the Jencks trial. I find that this subsidization was deliberately done the more easily to persuade Matusow to lend himself to the perpetration of a fraud on this court by means of the filing of his recanting affidavit and his testimony given herein. I find that Matusow wilfully and with full knowledge of the consequences, lent himself to this evil scheme for money and for notoriety." United States v. Matusow, (D.C. Tex. 1955) Crim. No. 60393.

of the oath is within the judicial knowledge of the court.[54] By requiring the equivalent of judicial notice, the falsity of the oath must either be admitted[55] or clearly beyond question.[56] If it is denied or the facts are in dispute, the matter is generally deemed a question for the jury.[57] If, as several writers have suggested,[58] the same standard is also required in the federal courts, Matusow might be able to attack the findings of Judge Thomason unless the record clearly shows that there can be no dispute as to the occasion on which he lied.[59] On the other hand, at least two federal cases have expressly stated that proof beyond a reasonable doubt is all that is needed,[60] suggesting that perjury should be treated the same as any other form of contempt.[61] In the majority of federal cases this question of what standard of evidence is required where perjury may be grounds for contempt is avoided by deciding the case on the issue of obstructing the administration of justice. In all likelihood the same procedure will be followed in the Matusow case. Regardless of what standard is followed, this much is certain: enough evidence was available in the *Jencks* hearing to convince Judge Thomason that Matusow's recantation was false. If the proof was sufficient for that judge, might not this same evidence be sufficient corroboration to convince a jury and sustain a conviction for perjury?

IV. *Proposed Legislation*

Amending legislation is the only feasible way to meet the problem of contradictory statements under oath while preserving the offender's constitutional right to trial by jury. There is ample cause for special legislation to cover this unique situation without modifying the whole law of perjury, and at least ten states have so recognized by enacting

[54] Ex parte Blache, 40 Cal. App. (2d) 687, 105 P. (2d) 635 (1940); People v. Tomlinson, 296 Ill. App. 609, 16 N.E. (2d) 940 (1938); Riley v. Wallace, 188 Ky. 471, 222 S.W. 1085 (1920); State v. Illario, 10 N.J. Super. 475, 77 A. (2d) 483 (1950).

[55] In re Caruba, 140 N.J. Eq. 563, 55 A. (2d) 289 (1947); People v. Freeman, 256 Ill. App. 233 (1930).

[56] Thus, judicial knowledge has been found where affidavits by a party set up conflicting sets of facts in the same proceeding. Sachs v. High Clothing Co., 90 N.J. Eq. 545, 108 A. 58 (1919). See also Blankenburg v. Commonwealth, 272 Mass. 25, 172 N.E. 209 (1930), where uncontrovertible documentary evidence was available.

[57] Edwards v. Edwards, 87 N.J. Eq. 546, 100 A. 608 (1917).

[58] 7 VAND. L. REV. 272 (1954); 21 CALIF. L. REV. 582 (1933).

[59] If the contradictory statements are in the same proceeding, the judge does not have to know which one is false. In re Bronstein, (D.C. N.Y. 1910) 182 F. 349; In re Fellerman, (D.C. N.Y. 1906) 149 F. 244. But where the contradictory statements are not in the same proceeding, as in the Matusow case, the witness would only be obstructing justice in that proceeding where his testimony is falsely given.

[60] In re Meckley, (3d Cir. 1943) 137 F. (2d) 310, cert. den. 320 U.S. 760, 64 S.Ct. 69 (1943); Jones v. United States, (7th Cir. 1913) 209 F. 585.

[61] Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492 (1911).

modifications of one form or another.[62] The Arizona statute,[63] for instance, simply provides that one who makes contradictory statements under oath is guilty of perjury, and the prosecution need not show which one was true or false. The accused is also permitted to assert as an affirmative defense that at the time he made each statement he believed it to be true. Though there have been no cases as yet to interpret this type of statute, it appears to shift the burden of proof from the prosecution to the defendant, and may be objectionable on this ground. Under the Illinois-type statute,[64] on the other hand, contradictory statements constitute only a presumption of falsity in favor of the prosecution. Thus the accused has the burden of going forward with the evidence, but the ultimate burden of persuasion remains on the prosecution. New York provides for a combination of these two types by making conflicting oaths a presumption of falsity for first degree perjury and the equivalence of perjury for second degrees of the offense where materiality is no longer required.[65] Tennessee appears to require the prosecution to set forth one statement in the indictment as being the false one, but then aids the prosecution with a presumption of falsity when the contrary statement is brought in as evidence.[66] All these statutes, either expressly or by implication, do away with the corroborative evidence rule, and most[67] would appear to permit disjunctive indictments.

In an attempt to keep in step with this corrective legislation, the attorney general last year proposed to the 83d Congress that a change be effected in the Federal Criminal Code, but nothing to that end was accomplished. Following the Matusow incident, there was proposed a second and broader amendment[68] which is now pending in both the House and Senate.[69] This new section 1263 would read:

[62] Ariz. Code Ann. (Supp. 1954) §§43-4201(a) and (c); Ark. Stat. Ann. (1947) §41-3008; Cal. Penal Code (Deering, 1949) §118(a) (prima facie evidence of falsity where testimony contradicts prior affidavits); Ill. Stat. Ann. (Smith-Hurd, 1935; Supp. 1954) c. 38, §475; La Rev. Stat. (1950) tit. 14, §124 (perjury), §126 (false swearing); Md. Code Ann. (Flack, 1951) art. 27, §533; 2-A N.J. Stat. Ann. (1953) §§131-5, 131-6; N.Y. Consol. Laws (McKinney, 1944) §1627(a); Tenn. Code Ann. (Williams, 1934) §11077; Utah Code Ann. (1953) tit. 76, §§76-45-11, 76-45-12.

[63] Ariz. Code Ann. (Supp. 1954) §43-4201(a).

[64] Ill. Stat. Ann. (Smith-Hurd, 1935; Supp. 1954) c. 38, §475. For interpretation of this provision see 44 ILL. L. REV. 112 (1949); 39 J. CRIM. L. AND CRIM. 629 (1949).

[65] N.Y. Consol. Laws (McKinney, 1944) §§1627, 1627(a).

[66] Tenn. Code Ann. (Williams, 1934) §11077.

[67] Tennessee excepted.

[68] The amendment suggested last year did not include testimony before either House of Congress or congressional committees. A bill similar in text, H.R. 799, was also introduced in the 84th Congress by Congressman Keating and is now pending before the House Committee on the Judiciary.

[69] S. 1554 was introduced by Senator Wiley on March 28, 1954. An identical bill, H.R. 5264, was introduced in the House on the same day by Congressman Reed.

> "Whoever willfully makes oath or affirmation to a statement on a material matter before a grand jury, during the trial of a case, or before either House of Congress or a congressional committee or subcommittee, and does within any three-year period willfully make oath or affirmation to a contradictory statement on a material matter before a grand jury, during the trial of a case, or before either House of Congress or a congressional committee or subcommittee, is guilty of perjury, and shall be punished as provided in section 1721. Such perjury may be established by proof of the willful making of such contradictory statements without alleging or proving which one thereof is false."

In covering only proceedings before grand juries, courts, or congressional bodies, this amendment is narrower than many of the statutes already enacted.[70] It avoids the pitfall of shifting the general burden of persuasion to the accused, for the government must still prove materiality, willfulness, and the oath before the proper tribunal. The effect is simply to remove the burden of proving which of the two statements is false when of necessity one of them must be so. The proposed change might be challenged, however, on the ground that technically it is possible to trap the innocent along with the guilty. The word "willfully" would probably protect most of the innocent contradictory slips that an honest, but nervous, witness might make. Yet if the witness should "willfully" make contradictory statements and each time believe they are true, he would still fall within the literal wording of the statute. This could be avoided by expressly providing that belief in the truth of the statements when made is an affirmative defense.[71] If the proposed section is not so amended, it is likely the courts will construe it to mean that proof of belief in the truth of the statement is a negation of willfullness. Such an interpretation would leave the ultimate burden of proof on the prosecution. Yet even if this belief were made an affirmative defense by statute, so as to shift the burden of persuasion, the end to be gained far outweighs the added burden placed on the honest witness in this one situation.

V. *Conclusion*

It is impossible to draw a definite conclusion on the particular facts of the Matusow case. Any number of factors could be influenc-

[70] Most of the statutes cover any contradictory statements under oath without limitation as to the type of tribunal before which they were made. See the Arizona, Arkansas, Illinois, and New Jersey statutes cited, in note 62 supra.

[71] See Ariz. Code Ann. (Supp. 1954) §43-4201(a); La. Rev. Stat. (1950) tit. 14, §§124, 126.

ing the Justice Department to withhold a perjury indictment. This incident has served, however, to focus attention on some of the problems involved, and solutions possible, in the usual case of contradictory statements. As long as the corroborative evidence requirement and the rule against the use of the disjunctive remain in the law, and the accused has given contradictory statements and nothing more, the prosecution is stymied. It seems highly unjust that a person, guilty by his own admission, should be allowed to take cover behind procedural technicalities which no longer have support in sound policy. Amendatory legislation will cut down the incentive for recantation. It might also be argued that punishment here is repugnant to the fundamental tenets of Christianity, the original source of testimony under oath, insofar as that religion encourages repentance. It cannot be denied that there are policy and moral arguments against this type of legislation. On the other hand, there is also the practical necessity of discouraging others from violating their oaths. Is there any reason why the perjurer who recants should be given any different treatment than the murderer who subsequently confesses his crime? In both instances the crime against society is complete and the offender should be made to answer for his misdeed if for no other reason than to prevent others from following in his path. Recantation, therefore, might be a mitigating factor in weighing the punishment, but should not result in complete absolution. Moreover, where, as in at least two cases within recent months,[72] there is reason to believe the recantation itself is false, the need for corrective measures appears even stronger. It has been estimated that on a national scale perjury is committed in as many as 75 percent of the criminal cases coming before the courts.[73] Of course, the best answer to this problem would be a closer screening of witnesses by counsel before they even reach the court or committee room. But until the proper persons are willing to assume this responsibility for themselves, there is a need for legislation. The proposed amendment offers one step in the right direction.

Richard M. Adams, S. Ed.

[72] The Matusow case and the indictment against Mrs. Marie Natvig. See note 6 supra.

[73] Hibschman, "'You Do Solemnly Swear!' Or That Perjury Problem," 24 J. CRIM. L. AND CRIM. 901 (1934).