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Richard H. Underwood
University of Kentucky College of Law, runderwo@uky.edu

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FALSE WITNESS: A LAWYER'S HISTORY OF THE LAW OF PERJURY

Richard H. Underwood*

I. ORIGINS

In the beginning, perhaps there was no guile in man. The nature of the first offense, or even the existence of an offense, has been debated down the ages, and the debate has spawned new cults and creeds. But all agree that Adam told the truth. He confessed immediately. He was an agreeable offender.

Hast thou eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the man said, The woman who thou gavest to be with me, she gave me of the tree, and I did eat.

*Genesis 3:11-12*

Once driven from the Garden, Adam and his offspring were forced to survive on their wits, and they became less cooperative. When Cain slew Abel, God was the only available investigating magistrate. Cain assumed that there were no witnesses.

And the Lord said unto Cain, Where is Abel thy brother? And he said, I know not: Am I my brother's keeper? And he said, What hast thou done? The voice of thy brother's blood crieth unto me from the ground.

*Genesis 4:9-10*

Cain responded with a lie—the American lawyer of today might characterize his response as the original "exculpatory no"—and then made matters worse by

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* Spears-Gilbert Professor of Law, University of Kentucky College of Law; B.S. 1969, J.D. 1976, The Ohio State University; Co-Authro, Trial Ethics (1988). This article was written as a chapter for a forthcoming book on the subject of the false witness and the law of perjury. This explains why I have not addressed everything the reader might have expected me to address at any particular point. I should also note that this is styled a "Lawyer's History" because I am not a historian by education, training, or experience.

1. Some contrarians even took the position that the snake was the good guy. See also Giorgio de Santillana & Hertha von Dechend, Hamlet's Mill: An Essay On Myth and the Frame Of Time (1977). See generally The Other Bible: Ancient Esoteric Texts (Willis Barnstone ed., 1984) (collecting the Manichaean creation myths).

2. For discussions of the "exculpatory no" defense see Sandra Turner, Note, Would I Lie To You? The Sixth Circuit Joins the "Exculpatory No" Controversy in United States v. Steele, 81 Ky. L.J. 213 (1992-93); Timothy Nicholson, Note, Just Say
making a sarcastic reference to his dead brother's occupation.  

It was not much of a trial by today's standards, even if we accept the primitive notion that the slain brother's blood could rise up and act out the role of accuser or surprise rebuttal witness. It was more in the nature of a charge, followed by a failure to defend, from which guilt was inferred. Apparently, such now familiar niceties as the "burden of proof," the "presumption of innocence," and the "right to remain silent" were not divine in origin.

After the Fall it was pretty much downhill as far as truth-telling is concerned. However, as mankind settled into an agricultural mode, populations expanded, and people became more interdependent, mankind at least had the sense to recognize that falsehood was a serious problem. As Sissela Bok puts it in her study of lying, "trust in some degree of veracity functions as a foundation of relations among human beings; when this trust shatters or wears away, institutions collapse." An ethic of loyalty to kith and kin may be enough for an extremely primitive sort of existence. "Defending one's own is the rule long before justice becomes an issue. It preceeds law and morality itself." But a really civilized existence demands more than a single commandment. People began to demand justice between strangers, and to invent rules of conduct to achieve it. They knew that justice could not be had without some degree of truth-telling.

The recurrent theme in these early rules or law codes was that law and


3. I am no theologian, and I am indebted, in this case, to David W. Amram and his The Murder of Abel, in Leading Cases In the Bible 34 (Rothman 1985) (1905). Some sociologists have interpreted this tale of murder as a representation of the rise of an agricultural society over that of the nomadic herdsman and hunter gatherer. It is clear that projectile points improved in quality at a point when cultivation and a settled life began to dominate, suggesting that the ancient "sod-buster," with his sense of territory, was the really serious killer. Warfare In the Ancient World 16 (John Hackett ed., 1989).

4. In the ancient world, the spilling of blood was often referred to in terms of pollution of the community, calling for the exile of the offender, in this case to the Land of Nod. According to Genesis 4:15, a mark was put on Cain, "lest any finding him should kill him." Compare William A. Robson, Civilisation and the Growth of Law 80-81 (1935) (discussing the theme of pollution, purification, exile, and the torment of the guilty by the ghost of the victim, from Aeschylus' Orestes to Macbeth).


7. Id. at 149.
judicial authority are divine in origin. The judge, be he elder, chief, priest, king, or professional, was a surrogate for divine intervention. Indeed, it was commonly believed that the deity descended and entered into the judge at the time of the judgment. Nevertheless, litigants were still pessimistic enough to fear that falsehood, like sorcery and bribery, might tip the scales, in addition to being blasphemous and even "dirty." So from the very earliest times, parties, and later witnesses, were expected to take oaths invoking the deity. The false witness was condemned to punishment, if not in this life, then in the next: "Beneath the belief in the divine command to forgo... lying at all cost is yet another belief: that some grievous punishment will come to those who disobey such commands."

It has been observed that much of the charm of the Old Testament stories involving the administration of justice—the "trial" of Cain, the judgment of Solomon, the story of Susanna and the Elders—comes from the emphasis the storyteller places on the method of establishing the truth and confounding the false witness. Some of the methods of truth detection are familiar, such as the separation of witnesses and cross-examination employed in Susanna's case. Other, more ancient, techniques seem quite odd to us today.

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10. The use of the scales as a symbol of objective judgment, and a means of ascertaining the truth, is found in Egyptian tomb writings as early as the third millennium B.C. See Noonan, supra note 9, at 7. Throughout his work, Noonan relates how bribery has been associated with physical and sexual soiling. In Zoroastrian teaching, truth-telling is wrapped up in the notion of cleanliness.
11. Bok, supra note 6, at 43.
12. Roberts, supra note 8, at 13: "The inherent drama of these stories has recommended them to people in later ages, far removed from the land of their origin. For example, the illustrations ... of Giotto, Michelangelo, Tintoretto, Rubens, and Dore."
13. The Oxford Annotated Bible with the Apocrypha 213-15 (Herbert May & Bruce Metzger eds., rev. standard ed. 1965). This story is usually referred to as Chapter 13 of Daniel, following the Latin Vulgate.
14. David W. Amram, The Judgment of Solomon, in Leading Cases in the Bible, supra note 3, at 157. Amram points out that Solomon does not employ cross-examination, but a stunt or perhaps a form of ordeal aimed at breaking one or the other of the contending parties. But an even more bizarre ordeal has been reported:

It so happened that after this a rumor went out that Mary was pregnant. ... Joseph, however, took an oath, swearing that he had never touched her ... . Then Mary, standing firm and intrepid, said, "If there is any pollution or sin, or if there was in me any concupiscence or lewdness, may the Lord expose me in view of all the people, so that I may be an
At first the law sought to settle the facts by some mechanical device, by some conclusive test which involved no element of personal judgment on the part of the magistrate and could not be challenged for partiality. At times and in places the oath has been relied on as a guarantee of the truth . . . . But the ideas which made an oath effective to assure the truth have at least lost much of their strength; and perjury, false testimony, and fabricated documents put serious obstacles in the way of thoroughgoing attainment of the end of law.15

There are many source documents, codes, and tales regarding the false witness, which attest to the universality of the ethic that one must not give false evidence.

II. THE EVIDENCE FROM EGYPT

The wisdom literature of Egypt contains many references reflecting concern that justice might be corrupted.16 The Instructions of Amen-Em-Opet (circa 650-550 B.C.) warns us that we must not "bear witness with false words . . . [D]o example for the correction of all." And she went to the altar of God confidently, drank the water of testing, went around the altar seven times, and no fault was found in her.

From The Book About the Origin of the Blessed Mary and the Childhood of the Savior (Latin text circa 800 or 900 A.D.), also known as The Infancy Gospel of Pseudo-Matthew, in Barnstone, supra note 1, at 395.

15. Roscoe Pound, Jurisprudence 356 (West 1959). See also Robson, supra note 4, at 150:

[Another] great function of the oath [there are promissory oaths, as well as purgatorial oaths of innocence or compurgation] has been to force people to tell the truth by making them fearful of the consequences of speaking falsely. As far back as we can go back in recorded history, the imprecation to supernatural powers to bring disaster on the head of him who invokes them if he bear false witness has been considered the most efficacious method of eliciting the truth.

Nowadays, there is no constitutional or statutory form of oath. See United States v. Ward, 973 F.2d 730 (9th Cir. 1992) (pledge to speak with "fully integrated Honesty" approved by the 9th Circuit, presumably to the chagrin of Assistant U.S. Attorney Robert Bork); Ferguson v. Comm'r, 921 F.2d 588 (5th Cir. 1991).

16. These Egyptian sources appear to have been freely borrowed by the authors of the Psalms and the Proverbs. See generally John Romer, Testament: The Bible and History (1988); James Breasted, The Dawn of Conscience (1934); In The African Origin of Morality, 1 Howard Scroll: The Social Justice Review 1 (1993) it is contended that the Egyptian (African) wisdom literature is the source of many Biblical passages, including the Ten Commandments. This finds support in Paul Johnson, A History of the Jews 35 (1988), although Johnson also states that the form of the Mosaic covenant follows that of a Hittite treaty. It's all very confusing.
not confuse a man in the law court, or divert the righteous man." In the *Book of the Dead*, the prayer of the deceased reflects a fear of the false witness even at the time of ultimate judgment: "May naught stand up to oppose at my judgment... nor that which is false be uttered against me before the great god." Something that looks very much like a witness-oath is included in the earliest records of criminal cases. For some curious reason witnesses were beaten before taking the oath and testifying. Some critics of overly aggressive cross-examination would say that nowadays we simply reverse the order.

The record of a criminal proceeding in the time of Rameses the IX (circa 1150 B.C.), styled variously *The Spoliation of Tombs* and *The Tomb Robbery Case*, is particularly interesting. Apparently monuments had been "pierced by the hands of thieves," and the magistrates were about getting to the bottom of things. A blindfolded man (a suspect) was brought to the *locus in quo*, and his blindfold was removed, whereupon he was directed to "Walk before us to the tomb of which you said: 'I took away some objects from it.'" He went to certain reserve tombs in which no one had yet been buried—tombs that had been empty in the first place. Here he was cross-examined in some fashion, and there is a reference to his having taken "an oath by the sovereign Lord, striking his nose and his ears, and with both hands upon a rod said: 'I do not know any place within the (funeral) abodes, with the exception of the tomb which is open...'." The gist of his testimony seems to be that he was not guilty of breaking into or looting any sealed tombs.

We also have the *Inscription of Mes* (circa 1300 B.C.), the record of a private "civil" case involving the ownership of land, which might be styled *Mes v. Khay*. The translators describe the evidence as consisting of "sworn depositions" of the parties and their witnesses. One of the witnesses, the goatherd Mesmen, swears "By Amon and by the Prince, I speak of Pharaoh, and I speak not falsely; and if I speak falsely, may my nose and ears be cut off, and may I be transported to Kush." This oath is repeated by other witnesses, including a priest of the temple of Ptah, a honey-maker, the chief of a stable, and several dwellers in the towns of Peihay and Pipuenuia. One gets the sense that noses and ears might actually have been cut off as a penalty for perjury, and we may assume that Kush (possibly a reference to the Kerma culture of rival and hostile Nubia?) was not considered a very hospitable place.

The most endearing and enduring "case" to come down to us from Egypt that
involves a false witness is contained in the *Orbiney Papyrus*. This records the XIX Dynasty: Tale of Two Brothers, in which Bata, the younger brother, is solicited by the wife of Anubis, the older brother. The wife had been sitting around braiding her hair and watching the men working, and had been attracted by Bata's muscular body. Bata rejected her advances, and she retaliated by denouncing him to her husband—accusing him of being the sexual aggressor. Bata escaped his brother's wrath, but became so incensed at the conduct of the false witness that he cut off his own penis and threw it into the river.22 It does not pay to get too excited, even about false accusations.

Despite its rather horrific ending, this story (minus the radical vasectomy) was appealing to later generations. It is a timeless tale of human nature and human psychology, in which false accusation, sexual misconduct, and taboo overlap. We encounter it again in *Genesis* 39:1, 7-8, 12, 16-20:

And Joseph was brought down to Egypt; and Potiphar, an officer of Pharaoh, captain of the guard, an Egyptian, bought him of the hands of the Ishmeelites, which had brought him down thither . . . .

And it came to pass after these things, that his master's wife cast her eyes upon Joseph; and she said, Lie with me.

But he refused, and said unto his master's wife, Behold, my master wotteth not what is with me in the house, and he hath committed all that he hath to my hand; . . . .

And she caught him by his garment, saying, Lie with me: and he left his garment in her hand, and fled, and got him out . . . .

And she laid up his garment by her, until his lord came home.

And she spake unto him according to these words, saying, The Hebrew servant, which thou has brought unto us, came in unto me to mock me.

... And it came to pass, as I lifted up my voice and cried, that he left his garment with me, and fled out.

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22. Werner Keller, *The Bible As History* 97-98 (2nd rev. ed. 1981); Romer, *supra* note 16, at 52-53. According to the E.A. Wallis Budge translation in *XXI An Egyptian Hieroglyphic Reading Book* (Dover 1993) (1896), the mutilation was preceded by an "oath." The story follows a bad news, good news pattern. "The severed penis was eaten by a nar fish, after which Bata (predictably) "became weak and fainted from exhaustion." The good news is that the false witness got her just deserts. She was slain and thrown to the dogs. *Id.*
And it came to pass, when his master heard the words of his wife, which she spake unto him, saying, After this manner did thy servant to me; that his wrath was kindled.

And Joseph's master took him, and put him into the prison, . . . .

Centuries later, when Dante was cruising for characters to people his Inferno, he picked up Potiphar's Wife, and dropped her off at the Eighth Circle of Hell, even further down than the places where the violent criminals are kept.23 Her roommate in Hell is Sinon, the agent provocateur who persuaded the Trojans to bring the Wooden Horse indoors. "Bethink thee, perjurer, of the horse, . . . and be it a torture to thee that all the world knows thereof."24 Perjury and deceit are serious business.

III. THE EVIDENCE FROM MESOPOTAMIA

Moving a bit northeast from Egypt to the "land between the rivers," we find some spectacular legal developments taking place that might have made some impression on the descendants of Abraham, hailing as he did from the City of Ur.25 Law codes begin to appear, among them the Summerian Code of Lipt-Ishrar of Idi, and the much later Code of Qalat Shergat (Ashur), perhaps contemporary to the Mosaic Code.

The unification of Babylonia and the victory of Semite over Summerian was accomplished by Hammurabi, an Akkadianized Amorite.26 Hammurabi probably lived from 1728 to 1686 B.C.27 While his empire did not last long, he was immortalized by his great law code, which was dug up by the French in 1901.

While these early codes are generally known for their references to oxes goring this and that, and for various circumstances calling for trial by ordeal (usually involving immersion in water),28 the Code of Hammurabi contains several entries that seem to relate to the false witness. The lead entry on the famous basalt stela, which now stands in the Louvre, states: "If a man make a false accusation against a man, putting a ban upon him, and cannot prove it, then the accuser shall be put to death." It is tempting to read this as a general

24. Id. at 162-63 n.6.
27. The Patriarch narratives of the Old Testament might be placed between the period of Ur-Nammu and Hammurabi, or anywhere from between 2100-1550 B.C., or in the Middle Bronze Age. This is according to Johnson, supra note 16, at 11.
28. I am using translations reprinted in 2 Kocourek & Wigmore, supra note 8, at 387-442.
reference to false accusation, and a sort of primordial Rule 11.29

The link between the crime of perjury and other offenses such as maintenance and barratry is strong in English law. But the better view is that the "ban" has to do with spell-weaving or witchcraft.30 Indeed, the very next entry of the Code of Hammurabi relates to the trial, by water ordeal, of those accused of sorcery. The more pertinent inscriptions of the Code read as follows:

If a man (in a case pending judgment) threaten the witness, or do not establish that which he has testified, if that case be a case involving life, that man shall be put to death.

... If a man offer as a bribe grain or money to a witness, he himself shall bear the sentence of the court in that case.

It is reported that the Babylonians held court at the "gate" (the city gate) with witnesses who took an oath,31 and that temples were built in such locales so that the oath might be taken in sacred surroundings. Judges and other officials also rode circuit. There are vague references to similar practices in Biblical accounts.32

IV. BIBLICAL REFERENTS

The corresponding laws in the Old Testament may be familiar to the reader:

Thou shalt not bear false witness against thy neighbor. Exodus 20:16

Thou shalt not raise a false report; put not thine hand with the wicked to be an unrighteous witness. Exodus 23:1

And thou shalt take no gift; for a gift blindeth them that have sight, and perverteth the word of the righteous. Exodus 23:8


30. Compare Exodus 22:18: "Thou shalt not suffer a witch to live." The linkage between "Curses, Blessings, and Oaths" is explored in a chapter by the same name in Robson, supra note 4, at 140-60.


32. Id. at 661. Compare Ruth 4:1-2. Job 29:7-25 may refer to judicial proceedings held at the city gate, at which Job, in his better days, was a regular and an honored participant. 1 Samuel 7:16 has Samuel going "from year to year in circuit to Bethel, and Gilgal, and Mizpeh, ... judg[ing] Israel in all those places." On the other hand, the "judges" of Israel's iron age were, more properly, military leaders.
This latter command, like its Babylonian counterpart, is directed at the selling of testimony and the suborning of perjury. It is also one of the foundations of our modern anti-bribery ethic, and in modern times it is reflected in our instructions to judges. In executing judgment, God "regardeth not persons, nor taketh reward." A judge must avoid any appearance of partiality and may not accept gifts. In the United States, a judge swears an oath to administer justice "without respect of persons"—without regard to the status of the litigant.

More details regarding the false witness are provided in Deuteronomy 19:16-19:

If an unrighteous witness rise up against any man to testify against him of wrong doing; then both men, between whom the controversy is, shall stand before the Lord, before the priests and the judges who shall be in those days; and the judges shall make diligent inquisition; and behold, if the witness be a false witness and hath testified falsely against his brother; then shall ye do unto him, as he had thought to do unto his brother.

John Noonan points out that "when culpable miscarriages of justice are reported in the Bible they are due to false witnesses." He cites as examples I Kings 21:8-14, in which Naboth is stoned because of false testimony suborned by Jezebel, and Daniel 13:1-43, in which the innocent Susanna is falsely accused by two lecherous elders. The preliminary proceedings against Christ, as described in Matthew 26:59-62, also refer to false witnesses.

In Acts 5:1-10 the Apostles worked one crowd so effectively that many were moved to sell land and possessions and to turn the proceeds over to Peter—"and distribution was made unto every man according as he had need." One Ananias

33. Noonan, supra note 9, at 14.
34. Deuteronomy 10:17.
36. For a dramatic invocation of the oath see Marbury v. Madison, 1 Cranch 137, 180 (U.S. 1803). Noonan, supra note 9, at 428, tells us this language was written into the oath of the Chancellor of the Commonwealth of Virginia in 1777 by George Wythe to "invoke[ ] Jewish and Christian tradition and an exemplar, the mighty and impartial God of Deuteronomy."
37. A Syro-Roman Lawbook of the Fifth Century provides the penalty for one who would give false evidence: "As he (the accuser) would do unto his companion, so shall it be done unto them." Bruns & Sachau, Syrisch-Romisches Rechtsbuch aus dem funften Jahrhundert (Liepsig 1880), cited in 2 Kocourek & Wigmore, supra note 8, at 666.
38. Noonan, supra note 9, at 24. See also note 13 and accompanying text.
39. Acts 4:35. Marx did not get his inspiration from the Bible. He got it from Louis Blanc, who may have gotten it from the Bible—a point that I am swiping from Paul Johnson. Paul Johnson, Intellectuals 56 (1988).
tried to hold out on the Apostles, and lied about how much he had taken in. So did his wife, Sapphira. After being rebuked by Peter, both were struck dead by God. In the language of the *King James Bible*, they "gave up the ghost." This is fundraising with a vengeance. The story is relevant to the present discussion only because Jeremy Bentham, of all people, suggested that paintings of the unhappy couple—"capitally punished on the spot by divine justice for mendacious testimony of the self-investive or self-exonorative kind"—ought to be hung in every courtroom.40

As if immediate capital punishment were not enough to worry about, the fate of the perjurer in the next life is proclaimed in *Revelations* 21:27 and 22:15:

And there shall in no wise enter into it [Heaven] any thing that defileth, neither whatsoever worketh abomination, or maketh a lie . . . . For without are dogs, and sorcerers, and whoremongers, and murderers, and idolators, and whosoever loveth and maketh a lie.

V. THE EVIDENCE FROM INDIA

We know that from about 2500 B.C. peoples that we now refer to as Indo-Europeans (the historic Aryans, as opposed to the mythical Aryans of the Nazis) began to push south into Mesopotamia; around roughly 2000 B.C. over the Alps into Italy; at about the same time into the riverine areas of the Indus and the Ganges; around 1400 B.C. into Greece.41 We are told that early Indo-European

40. 1 Jeremy Bentham, Rationale of Judicial Evidence 399-400 (1827). This strikes me as an odd idea coming from a fellow who "reject[ed] religion, including belief in God . . ." and who called for the abolition of the death penalty. Bertrand Russell, A History of Western Philosophy 776 (1945). In the late 18th century a zealous cleric by the name of Finch went so far as to call for the death penalty for perjury in a tract styled *Consideration upon the Use and Abuse of Oaths Judicially Taken Particularly in Respect to Perjury* (1781) cited in Michael Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts*, 24 Am. J. Legal Hist. 145, 151 (1980).

41. Arthur Banks, Atlas Of Ancient and Medieval Warfare 3-4 (1973). See also J.P. Mallory, In Search of the Indo-Europeans: Language, Archeology and Myth (1989); Donald Redford, Egypt, Canaan, and Israel in Ancient Times 136 (1992), alluding to the appearance in the Middle East of the names of the principal Vedic gods Mithra, Indra, and Varuna, the latter appearing in our excerpts from the *Laws of Manu*, quoted in text at p.225; Jonah Blank, Arrow of the Blue-Skinned God: Retracing the Ramayana Through India 216-17, 247-48 (1992) (placing the Aryan invasion at about 1500 to 1200 B.C.); Robert Graves, *The Greek Myths*, (Penguin 1992) entry 3, *The Olympian Creation Myths*, at 32, n.1 ("Uranus' marriage to Mother Earth records an early Hellenic invasion of Northern Greece, which allowed Varuna's people to claim that he had fathered the native tribes he found there . . . [Uranus being identified with Varuna."); and entry 7, *The Dethronement of Cronus*, at 43, n.6 ("The brotherhood of Hades, Poseidon, and Zeus recalls that of the Vedic male trinity—Mitra, Varuna, and
beliefs included an injunction against lying. The same sources suggest that this prohibition against lying was "pre-ethnic," and was "absorbed" into the Indian sutras, into the teachings of the crusading Zarathustra (Zoroaster) in Iran, and into the teaching of the ancestors of the Greeks and the Romans. All of this sounds pretty fuzzy, but as we shall see, the Greeks did honor the "Commandment," if only in the breach, and the Romans included it in their earliest law codes.

The early compilations of Hindu laws are quite detailed. The *Laws of Manu* (circa 200 B.C.) cover everything from court procedure to the price of boat hire (the cab fares of the day). Despite the fact that it is thought to represent a Brahmin ideal of "what the law should be," and may not have actually been administered, it is nevertheless instructive. For according to such codes, there is no higher virtue than truth; and there is no greater crime than false witness.

Either the court must not be entered, or the truth must be spoken; a man who either says nothing or speaks falsely, becomes sinful.

A witness who speaks the truth in his evidence, gains [after death] the most excellent regions [of bliss] and here [below] unsurpassable fame;

Indra . . . who appear in a Hittite treaty dated to about 1380 B.C. . . . 

42. 2 Kocourek & Wigmore, *supra* note 8, at 481-82. These authors translate and reprint a German source published in the 1890s which refers to a "Fifth Manava precept." Something of the spirit of these peoples can be gleaned from Robert Elegant's novel, *The Seeking* (1982), which deals with a later, but similar expedition from the Indo-Aryan Kingdom of Kamardol in about 100 B.C.

43. 2 Kocourek & Wigmore, *supra* note 8, at 483.

44. Gore Vidal's historical novel *Creation* (1981) contains many entertaining passages in which the narrator, the son of Zoroaster, exalts the truthful Persian over the deceitful Greek.

45. Henry Maine, *Ancient Law*, *reprinted in* 2 Kocourek & Wigmore, *supra* note 8, at 170-71. Was it rather like the curriculum at institutions like Yale Law School? Actually, the *Laws of Manu* still survive, and in a very real sense are in service. *See*, e.g., Blank, *supra* note 41, at 83, 128, 140. For a discussion of the origins of the *Laws of Manu or Manu-smriti*, and the earlier manuals of the Manava school, *see* Robert Lingat, *The Classical Law of India* (J. Duncan & M. Derret trans., 1973). The *Laws of Manu* are presumably much older than is suggested by the date associated with the version I have quoted. All of this is confusing, because Manu is also the name of the First Man (who plays, among other parts, the roles of both Adam and Noah), and is, indeed, the Indic word for Man. Mallory, *supra* note 41, at 130, 140.

46. A later code, or more properly a law book, *The Institutes of Narada [*post-Manu*] also stresses truth-telling in the giving of testimony. *See generally* Lingat, *supra* note 45. Lingat's book includes a short discussion of the law of perjury in which he notes that the witness had to take an oath and had to be "reminded of the torments that await him in the other world if he does not tell the truth. False evidence is in any case punished by a public admonition and an even graver sanction." *Id.* at 69.

47. Again I am using a translation from 1 Kocourek & Wigmore, *supra* note 20, at 169-499.
such testimony is revered by Brahman [himself].

He who gives false evidence is firmly bound by Varuna's fetters, helpless during one hundred existences; let [men therefore] give true evidence.

Let no wise man swear an oath falsely, even in a trifling matter; for he who swears an oath falsely is lost in this [world] and after death.

As if this were not enough to get the attention of the pious, the code carries on in exquisite detail. Indeed, it gets a bit extreme after a while.

Naked and shorn, tormented with hunger and thirst, and deprived of sight, shall the man who gives false evidence, go with a potsherd to beg food at the door of his enemy.

Headlong, in utter darkness shall the sinful man tumble into hell, who being interrogated in a judicial inquiry answers one question falsely.

Learn now, O friend, from an enumeration in due order, how many relatives he destroys who gives false evidence in several particular cases [which are subsequently enumerated].

Other portions of the Manu code are more down to earth, being both practical and procedural. Rules of thumb are given for the weighing of conflicting testimony. Particular fines are suggested for the giving of false evidence, depending on the motive of the offender (covetousness, distraction, terror,

48. When witnesses cannot be had the oath and the ordeal are available as alternatives to trial. This use of the oath, or compurgation, as a substitute for the ordeal, or for witness proof, was common in all societies at one time or another. Henry C. Lea, The Duel and the Oath (Arthur C. Howland & Edward Peters eds., 2nd ed. 1974). It was alluded to in the Manava Dharma Sutras, which are older than the Laws of Manu. Quoting from Lea, supra at 25:

In cases where there is no testimony, and the judge cannot decide upon which side lies the truth, he can determine it fully by administering the oath . . . .

Let not the wise man take an oath in vain, even for things of little weight; for he who takes an oath in vain is lost in this world and the next.

Let the judge swear the Brahman [Priest, by caste] by his truth; the Kshatriya [Warrior] by his horses, his elephants, or his arms; the Vaisya [Merchant] by his cows, his corn and his gold; the Sudra [Laborer] by all crimes.
friendship, lust, wrath, ignorance, and childishness). Perjury looks very much like a crime, at least in this "ideal" code. There are sections suggestive of the separation of witnesses, or perhaps they are meant to inhibit improper coaching (they are addressed to one who "converses with the witness in a place improper for such conversation"); sanctions (nonsuit) for improper refusal to answer questions; rules of competency disqualifying "interested witnesses" as well as any witness formerly convicted of perjury; and a provision authorizing the reversal of any judgment gained as a result of perjury. But there are also exceptions for pious lies, and the truth need not be told if it would cost the life of a person sufficiently worthy in caste.

VI. THE EVIDENCE FROM GREECE

There is much in the literature to suggest that the early Greeks considered it acceptable, indeed clever, to gain by way of deceit. In the stories of Homer,

49. Compare the grading of offenses contained in the ninth century Penitential of Cummian. See discussion infra note 116 and accompanying text.

50. There are always exceptions. The history of such exceptions in Western philosophy and religion is traced by Bok, supra note 6.

51. The author relies on Gustave Glotz, Etudes Sociales et Juridiques Sur L'antiquité Grecque (1906), portions of which are reprinted in 2 Kocourek & Wigmore, supra note 8, at 609-37. Glotz relates a favorite anecdote from ancient Greece, in which a crook who has taken money in trust hides it in a hollow staff. When it is demanded that he has kept that which is not his, he hands the staff to the plaintiff momentarily and then swears the "literal truth"—that he has already delivered the plaintiff his due! 2 Kocourek & Wigmore, supra note 8, at 634. Glotz refers to an identical passage in Don Quixote, but the author has been unable to find it in available editions.

An illuminated Florentine 15th century book in Greek script, MS 50 of the Spencer Collection of the New York Public Library, reprinted and available as The Medici Aesop (Harry N. Abrams 1989), contains a fable (Folios 16v-17r) styled The Two Boys and the Butcher, which reflects considerably more sensitivity to substance:

Two young boys went to buy meat at a butcher's shop. Seeing that the butcher was busy helping a customer, one of the boys grabbed a piece of beef and stuffed it down the shirt of the other. The butcher, having finished serving his customer, came over to where the boys were standing and immediately noticed that some beef was missing. He accused the boys of theft, but the one who had taken it said that he didn't have it, and the one who had it said that he hadn't taken it. The butcher understood their trickery and warned them: "You may think that you can get away with this bit of double-talk here, but the gods won't be deceived by such sophistry." The moral of this fable is: Sometimes lying and telling the literal truth can amount to the same thing.

Compare modern day notions of "literal truth" as evidenced by Bronston v. United States, 409 U.S. 352 (1973).
which some call the "Greek Bible," some call the "Greek Bible,"52 Ajax (the lesser) took a false oath,53 and Odysseus lied regularly for fun and profit.54 Euripides flirted with an extreme variation of the concept of mental reservation ("'Twas but my tongue, 'twas not my soul that swore.") in his Hippolytus.55 The Sophists were accused of running schools for perjurers in Aristophanes' The Clouds.56 The Romans referred sarcastically to "Greek honor," and the Athenians referred to their fellow Greeks as perjurers—especially the Cretans.57 In his Laws58 Plato proposed that the ancient procedure for the resolution for disputes by simple oath-taking be abolished on the theory that one or the other of the litigants must be lying.59 As Cicero would do later in the Roman Republic, Plato decried the morals of the day, and called for law reform:

52. On the influence of Homer, see Bernard Knox, The Oldest Dead White European Males: And Other Reflections on the Classics 94 (1993): "The Greeks had no sacred ethical or religious text, no Bible; the authorities to which they customarily appealed on questions of conduct and belief were the poets, especially Hesiod and Homer."

53. Graves, supra note 41, entry 168.f., The Sack of Troy, at 700-01.

54. Among other things, Odysseus coached Sinon, who you will remember ended up in Dante's Inferno, supra note 23, for his perjury. See Graves, supra note 41, entries 167.g. & h., The Wooden Horse, at 694-95.

55. Euripides, Hippolytus, in Fifteen Greek Plays 516 (Gilbert Murray trans., Lane Cooper ed., 1943). It is of interest that this play presents a sort of twisted variation of the "Potiphar's Wife" theme. Like the bunny in the flashlight battery commercials, she keeps making one comeback after another.

56. 1 Aristophanes, The Clouds (Benjamin Rogers trans., Loeb Classical Library, 1982).

57. Actually, what is most frequently cited as a put down of Cretans came from the mouth of a Cretan (Epimenides) which gave rise to the so-called "Cretan Paradox." See Titus 1:12-13: "One of themselves, even a prophet of their own, said, The Cretians are always liars, evil beasts, slow bellies. This witness is true. Wherefore rebuke them sharply, that they may be sound in the faith; . . ." (emphasis added). Paul apparently didn't find Epimenides' contribution the least bit paradoxical.

58. Plato, Laws XII, at 948. Regarding reliance on the oath, consider the Oedipus of Sophocles in which Creon denies plotting against the king by taking an oath. We are to believe that such an oath-taking "must have seemed conclusive to a Greek audience." Robson, supra note 4, at 146. A curious line in Plato's Apology has Socrates swear to tell the truth "by the dog of Egypt." F.J. Church, The Trial and Death of Socrates 43, (1908). Glotz argues that Socrates (or rather Plato) does this to draw attention to the rampant abuse of the oath, and thereby to show honor to the gods. Glotz alludes to other "contemporary" critics of "oath-taking," including the Pythagoreans and the playwright Aeschylus. In the trial scene in the Oresteia Trilogy, proof by naked oath is rejected. Eumenides, in Fifteen Greek Plays, supra note 55, at 140-42. Or as Diana opined, "Tis not the many oaths that makes the truth . . . ." William Shakespeare, All's Well That Ends Well act 4, sc. 2.

59. Professor of Greek and lawyer Robert Bonner says that Plato was referring to the requirement that both parties swear to their pleadings. Robert Bonner, Lawyers and Litigants in Ancient Athens: The Genesis of the Legal Profession 51 (1927).
[Today, ... men either do not believe that the gods exist or believe that the gods do not interfere in human affairs, or, most of all and worst of all, believe that the gods, on receiving petty sacrifices and flatteries, will become their accomplices in chicanery and will save them from punishment ... And so, since men's beliefs about the gods have altered, the law [regarding the oath] too must be altered.]

It is generally assumed that there was no crime of perjury in Greece. However, the same has been said regarding the criminal law of ancient Rome, and of the criminal law of England prior to the perjury Statute of 1563. Even so, as in the case of bribery prior to the time when it was made the subject of meaningful criminal penalties, perjury was punished by public disgrace. Other punishment was left to the gods. And contrary to Plato's self-righteous rant, the Greek man-in-the-street probably did believe that the gods punished perjury. Herodotus believed that the fate of Glaucus the Spartan, who swindled a rich Milesian out of a fortune and then sought to cover up the game with a false oath, was not unlike that of the perjurer and his seed under the regime of Manu. Hippolytus, too, probably did not help his case with the vengeful gods by breaking his oath, and Ajax was either drowned or zapped by a thunderbolt. The Thinkery of the sophists collapses in flames after being assaulted by the mob in the finale to The Clouds:

Strike, smite them, spare them not, for any reasons, But most because they have blasphemed the gods!

60. Plato, supra note 58.
61. See generally Noonan, supra note 9.
62. Herodotus, 6 Persian Wars 86, cited in 1 Francis Godolphin, The Greek Histories 367-69 (1942). See also a quotation attributed to Demosthenes: "the party who has sworn such an oath [in making a murder charge against another] ... in case he should be convicted of untruth, he will carry away the curse of perjury upon his children and his family ..." Robson, supra note 4, at 151. If a messenger rushing to get reinforcements before a great battle had reported meeting a god along the way, the Greeks would not have thought the messenger in the least bit crazy. See Gene Wolfe's novel, Soldier Of The Mist xiv (1987).
63. Graves, supra note 41, entry 101, Phaedra and Hippolytus, at 356-60, and entry 168.f., The Sack of Troy, at 700-01. No doubt some would attribute Hippolytus' death in a chariot wreck to the youngster's reckless driving and failure to wear a seat belt.
64. 1 Aristophanes, supra note 56, at 401, lines 1505-10. Now I'll make the counterargument. This was a comedy. I.F. Stone points out that it took the Athenians a quarter century after the play to get around to killing Socrates. Wouldn't they have acted more quickly if they were really concerned with his alleged impieties? Doesn't this suggest that the Athenians were rather cynical about the gods? Irving F. Stone, The Trial of Socrates 200 (1989). See also Blank, supra note 41, at 259 ("In Homer's day the gods were revered, but by the time of Aristotle and Anaxagoras they had become a pathetic joke. Aristophanes practically made a career out of poking fun at
The Athenians were known for their lawsuits. Their procedures became relatively sophisticated. The third party oath began as a form of compurgation, but ultimately developed into something like the modern witness oath. That is to say, co-swearing or side-taking seems to have been replaced by witness proof, at least to some extent. Nevertheless, when witness evidence was presented in written as opposed to oral form (by way of deposition or affidavit), which was common, there was no cross-examination. When oral testimony was taken the procedures were also rudimentary, although there is some reference in the popular literature of the day to cross-examination of live witnesses. This might have occurred when a party was called and questioned by his opponent. We are told that "in homicide cases witnesses were sworn," and that "in other cases the oath was administered only when the other side demanded it." The law of evidence was "meager," and the principal tactic involved shameless ingratiation of the jury. Litigants' speeches were often prepared by logographoi — the progenitors of today's trial lawyers. The speeches were not confined to the evidence, in any modern sense, and the diecasts (jurors) "were at liberty to base their verdict on the unconfirmed statements of a speaker if they deemed them trustworthy, or upon their own independent knowledge of the case."

It may be true that there was no criminal sanction for perjury. But there were remedies for perjury, and some practical disincentives beyond public disgrace. Indeed, it has been argued that "perjury trials were much more frequent than in modern times."

A relatively large number of "perjury suits" were lodged against witnesses by disappointed litigants. This procedure was popular because there was no appellate review of cases, and a successful "prosecution" for perjury might result in a new trial. Some amount of vexatious litigation may have been deterred by a requirement that the would-be challenger had to announce his intention to prosecute a witness before the verdict was rendered in the underlying case.

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67. *Id.* at 52.

68. *Id.* at 184-87.


70. However, these speech-writers could not "appear" in court on behalf of the litigants.


73. *Id.* at 107-08, 196.

74. *Id.* at 196. Sanctions were levied for unsuccessful prosecutions (but apparently not for perjury prosecutions), see Cyril Robinson, *A History of Greece* (9th ed. 1957);
the other hand, an aggrieved litigant, as a "plaintiff" in a perjury case, could reargue the underlying lawsuit in the context of the perjury case, and could drop the perjury suit at any point. Accordingly, a loser had every incentive to bring such an action for tactical purposes, to extort some post-verdict concession out of the winner. In light of the frequently stated assumption that there was no crime of perjury, it is particularly worth noting that Professor Bonner reports that "a person convicted of perjury was fined; three convictions entailed loss of civil rights." Perhaps the difference can be written off as a matter of semantics. In any event, this sort of disagreement is also reflected in the history of English law, as we shall soon see.

VII. THE EVIDENCE FROM ROME

"Are you the king of the Jews?" Pilate asked.
Responding as usual with another question, Jesus replied, "Is that your idea, or have others suggested it to you?"
"What?" snorted the prefect with derision. "Am I a Jew? Your own nation and their chief priests have brought you before me. What have you done?"
"My kingdom does not belong to this world," answered Jesus. "My authority comes from elsewhere."
"You are a king then?"
"'King' is your word. My task is to bear witness to the truth."
"And what," muttered Pilate in exasperation and possibly with a touch of bitter humor, "is truth?"

This representative of Imperial Rome (Pilate was a cronie of the infamous Sejanus) is more than a little cynical; but all of the Romans of history are not so. They started out with a serious, and indeed, a religious point of view at the founding of their city-state. Insofar as the law was concerned, the Romans have been described as having been "down-to-earth" folk, with much gravitas (as opposed to the levitas of the "abstract" Greeks).

and the tactical use of the countersuit was raised to a fine art. Bonner, supra note 59, at 197-99. Perhaps these devices were a matter of self-defense. The term "sycophant" is a transliteration of the Greek word for the self-appointed professional accusers who made a living bringing extortionate lawsuits supported by false witnesses. Bonner, supra note 59, at 59, 63; Humphrey D.F. Kitto, The Greeks 216-19 (1957).
75. Bonner, supra note 59, at 196.
76. Id.
77. "Are you then the Son of God?" the High Priest Caiaphas had asked earlier. Jesus avoided answering this trick question by neither confirming nor denying the charges against him. "You say that I am," was his reply. Matthew 26:63-64.
79. Roberts, supra note 8, at 13-14. See also Knox, supra note 52, at 79-81.
The Roman historian Livy tells us that Roman criminal statutes date from 450 B.C., in the form of the Twelve Tables. According to one authority, this document "stereotypes procedure at the moment of transition from the rule of private vengeance to that of state adjudication." The same author reports that in "rare cases" "private suits" could result in the death penalty. These cases included "false witness and . . . theft committed by a slave caught red-handed . . . the offender was flung from the Tarpeian Rock."

On the other hand, at some point the notion of criminal punishment for perjury, if it ever really existed in practice, must have been abandoned. "Perjury by a private man [was] a matter which from first to last [was] left to the vengeance of the gods, and the law never threaten[ed] secular penalties against the offender . . . ." Cicero gives as the penalties for perjury destruction from Heaven, but from man only blame and contempt.

One might have thought that the Romans had a professional class of lawyers who would have sufficient self-interest in "fair" litigation to motivate them to urge the adoption of legislation on the subject of perjury. Apparently they did not. For one thing, the orator, even at this late date, was not a lawyer-advocate in the fully modern sense. Detailed rules of evidence still had not been developed, and the orations (the arguments) often would have offended modern sensibilities and rules of ethics. Moreover, the Roman advocate "was not expected to do even lip-service to the testimony before the court . . . ."

However, the Roman orators had a handle on some of the conventions of the worst elements of today's bar. Even before the death of the Republic, the Roman political and legal world had sunk to the level of "the sewer"—"Romulus' refuse." Cicero suggested that other leading lights of the Roman bar prevailed

80. Robson, supra note 4, at 35. These are also referred to as the Twelve Decemviral Tablets, after the council of ten (decemviri) who wrote them up; they were considered to have, in some sense, a religious origin. 2 Kocourek & Wigmore, supra note 8, at 104, 162. For a scholarly discussion of the origins of the Twelve Tables see 3 Remains of Old Latin xxvi-xxxiii (E.H. Warmington ed., Loeb Classical Library 1938). Cicero holds forth on the origin of "just" laws in his dialogues with Quintus in volumes 1&2 of De Legibus. Marcus Tullius Cicero, De Re Publica; De Legibus (Clinton Walker Keyes trans., Loeb Classical Library 1959).

82. 1 id. at 41-42. "Qui falsum testimonium dixisse convictus esset, e saxo Tarpeio deiiceretur." The Tarpeian Rock was a cliff on the Capitoline Hill, and the ride would certainly have been bumpy.

84. 1 Strachan-Davidson, supra note 81, at 49, citing Cicero, De Legibus, II.9.22.
85. Compare Noonan, supra note 9, at 32-33.
86. 2 Strachan-Davidson, supra note 81, at 121-24.
87. 2 id.
88. Noonan, supra note 9, at 31.
through the use of politics, influence peddling, and the bribing of judges, rather than as a result of their legal ability. Lawyers, perhaps trained in such black arts as were catalogued in the handbooks of the day, abounded. Cicero recorded how some of the more successful paraded with entourages. The streets swarmed with scruffy barrators willing to work for a little dried-up ham or a few onions, envious of the flashy high rollers who sported purple robes, fancy chariots, and big shiny rings (all of which tended to bring in the business). It was, in many ways, a time very like our own.

The same crude techniques employed by the Greeks were still in use. Orators played shamelessly on the sympathies of the fact-finder. Claquerers were employed to applaud speeches at appropriate times. The grinding delay of the law courts rivaled that later described by Dickens.

One would think that things could not have gotten worse; but they did, according to Gibbon, whose comments on the subsequent progress of the legal profession in the Byzantine state are even more depressing. Before moving on to the Middle Ages, and the invention of the modern perjury law in Tudor England, we might look at some "non-western" sources.

VIII. OTHER SOURCES

The beliefs and procedures of more contemporary, and so-called "primitive" groups also demonstrate the virtual universality of the ethic condemning the

89. Cicero, Against Verres, 105, 107 (Loeb Classical Library 1978). The principal complaint may have been, in some small measure at least, sour grapes, directed as it was at a rival—the highly successful Hortensius. For an historical survey of the training and technique of the Roman advocate see Martin L. Clarke, Rhetoric at Rome (Cohen & West 1953).
90. See, e.g., Rhetorica Ad Herennium (Loeb Classical Library 1977).
93. 2 Quintillian, Institutio Oratio, VI.1.40-44, 409 (H.E. Butler trans., Loeb Classical Library 1966): "We are also familiar with the story of what happened to Glyco, nicknamed Spiridion. He asked a boy who he produced in court why he was crying [in the hope of obtaining testimony that the boy cried for the loss of his parent]; to which the boy replied, that his paedagogus was pinching him."
97. The word primitive is often used in a derogatory sense (uncivilized), but it also means primary, basic, or original. The philosopher with a sense of irony may wish to compare de Santillana & von Dechend, supra note 1, at 7, 327: "[t]here is also wonderfully preserved archaic material in 'secondary' primitives, like American Indians and West Africans . . . . Too much primitiveness lies in the eyes of the
false witness. Needless to say, all generalizations are hazardous, but it is also fair to say that some of the suggestions in the older literature that lying is acceptable in "primitive" societies can be attributed to questionable methodology or worse. A couple of examples should suffice.

In the Americas, the Cheyenne did not make much of such crimes as petty theft, relying on shame rather than a criminal sanction. However, when offenses were deemed sufficiently serious to call for severe penalties, an offender who wished to testify was required to take "an oath on a pipe." This was a serious matter, for "perjury meant death by ill luck." In all "early" systems, the notion that the gods and ancestors would actively intervene or punish the perjurer in the afterlife was central. As in all "early" systems, the notion that the gods and ancestors would actively intervene or punish the perjurer in the afterlife was central. A report of an Ashanti trial has been preserved, which grew out of a fight between two men. One suspects that the reporter, Rattray, may not have understood everything that was going on. The process would have been confusing, even to a western lawyer. Nevertheless, the proceeding is fairly sophisticated, and is worth outlining briefly.

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98. In The Point Barrow Eskimo, an old tract prepared for the Smithsonian by John Murdoch, reprinted in 1 Kocourek & Wigmore, supra note 20, at 238, the suggestion is made, or the impression is recorded, that "they are in the main truthful, though a detected lie is hardly considered more than a good joke . . . ." This observation was founded on the experience in which one particular woman tried to sell the author or one of his acquaintances a can of seal-oil for lamp use, and the can was mostly filled up with ice with a layer of oil on top. This seems a rather poor basis for a sociological generalization.

99. See, e.g., the comments of a Mr. Warner in A Compendium of Kafir Laws and Customs, dated 1856, reprinted in 1 Kocourek & Wigmore, supra note 20, at 314, which suggests that the parties in proceedings the author presumably observed "are allowed to tell as many lies as they like, in order to make the best of their case; they have no judicial oaths; and there is consequently no punishment for perjury . . . ." The same author did applaud the excellent cross-examination techniques the "native" judges used to detect falsehood, in the same breath as he applauded the ability of "counsel" to cover it up. This suggests a fairly high level of sophistication as well as concern for the truth. Insofar as the author is concerned with the fog generated by the advocate, it seems fair to point out that the same sort of comments have been made concerning the Anglo-American legal system.


101. Id. at 253.

102. Id. at 245f.

103. My recapitulation of Hoebel's retelling of Rattray's account probably makes the trial too "western." I have almost certainly oversimplified the matter. Hoebel, for example, seems to find the proceedings quite exotic. He gathers, perhaps from the original account by Rattray, that all this focus on a single witness was a feature of all
After swearing ritual oaths, the parties stated their cases, which were then summarized by a speaker, the Okyeame. This summary probably helped make some sense of what otherwise might have been confusing accounts, and also served to commit the parties, and identify points of difference. According to Hoebel, the essence of the offense under scrutiny was less the original fight "than one of perjury on a great oath. This was the deadly sin and capital crime." It was assumed that one or the other of the parties must be a liar.\textsuperscript{104}

The truth was sought by cross-examination, which could be conducted by the elders or by the parties themselves. The role of advocates, if any, was unclear. According to the observer, Rattray, one of the parties then called a single witness, presumably to corroborate his version or break the deadlock. Since the other side did not object, this witness was sought out and brought to the trial under the additional oath or injunction that he "would not carry on any conversation at the place to where you are going." This promise was presumably meant to insure that the witness would come into the trial cold and uncoached, without hearing the testimony that had already been given—for the same reasons that a trial lawyer might call for a separation of witnesses. That is not to say that such witnesses were not arranged for and prepared ahead of time, as they are in modern trials.

By the time the witness arrived in court the speaker would have set up or restated the parties' cases so as to identify some critical fact or issue. The witness' testimony on this point would decide who was the guilty party. The witness was called and again swore an oath, and the gods were called upon to kill the witness if he lied. The witness was ordered "to speak the great forbidden name that he would not lie." The witness testified to what he knew about the matter, and then the elders decided which party's case was supported by the testimony of this witness. The party found guilty would be sentenced by the king or be allowed to "buy his head" from the king.

The Ashanti were not so naive as to believe that witnesses never lied. But beliefs were apparently so strong that "any witness who died shortly after a trial was suspect." Moreover, our source reports that as late as 1946 a village ambassador to the royal court "became ill forty days after testifying as witness in a homicide case. In the twenty-eighth day of his illness he confessed perjury. Subsequently he died."

If a witness died without confessing, an oracle would be consulted [by whom?], and if the obosom, or god, speaking through its priest, declared that the man lied under oath, his body was thrown into the bush, for burial was denied him. His personal property was confiscated and such trials. He argues that the system worked only because of the "force of the religious premises underlying the Ashanti system." My interest was piqued solely because of the ethic condemning the false witness, and the implementation of rudimentary cross-examination.

104. Hoebel, supra note 100, at 247. Plato had the same view. See supra note 58 and accompanying text.
divided between the chief and the temple of the gods whose names had been used in perjury. If the condemned man was still alive, the original judgment was reversed. Had he bought his head, he got his money back. If he was already dead, it was just too bad.¹⁰⁵

IX. THE DARK AGES TO TUDOR ENGLAND

Unless one is a specialist, it is difficult enough to find, let alone make generalizations about, the law relating to perjury after Rome "declined and fell." They do call this period the "Dark Ages" for a reason. There were some law codes, partly adaptations of Roman compilations¹⁰⁶ and partly Gothic and Germanic, such as the Codex Euricianus and the Breviarum Alaricianum.¹⁰⁷ The Lex Salica of Clovis I, king of the Franks (A.D. 481-511), is another example.¹⁰⁸ It's not very interesting stuff—mostly pig and chicken law. The code is designed for a simple rural folk, and there is lots of emphasis on wergild—payment to the victim or his or her family of a specified sum for a particular injury. Similarly, there are allusions to perjury, as well as oath-helpers, trespassing livestock, and lots more wergild, in the tenth century Welsh Laws of Howel DDA:

Though the raith of a person, concerned as an accessory [to theft] fail; he shall only be liable to dirwy (fine); unless it be minded to prosecute him for perjury . . . . [A]nd send the priest along with the informant to church door, and let him charge him to beware of being guilty of perjury.¹⁰⁹

This code has a really hair-raising list of injuries and amputations together with the price of peace for each.¹¹⁰ It is almost as chilling as the "schedule of benefits" in the offers for accident insurance that children used to bring home from American elementary schools in the 1950s and 1960s.¹¹¹

The Lex Frisia (Law of the Frisians, circa A.D. 800) contained an interesting variation in which the one who made an accusation of homicide had to swear on the relics of the saints. Thereafter, the accused had to swear with the support of

¹⁰⁵. Hoebel, supra note 100, at 250.
¹⁰⁶. There was a "revival of jurisprudence" in the 12th century that was linked to "the full accessibility of the Corpus Juris Civilis" which we associate with Justinian (A.D. 527-65). The Legacy of Rome 399-420 (Richard Jenkyns ed., 1990).
¹⁰⁸. For a specimen, see 1 Kocourek & Wigmore, supra note 20, at 500-11.
¹⁰⁹. Id. at 540-41.
¹¹⁰. Id. at 547-49.
¹¹¹. The "schedules" noted cheerily that $ ___ would be paid for the loss of one arm; $ ___ for one leg; $ ___ for one arm and one leg; $ ___ for one eye, one arm and one leg, and so forth—until every hideous permutation was accounted for.
oath-helpers (compurgators) and then submit to an ordeal of boiling water. If found guilty, the offender had to pay the appropriate wergild, and his oath-helpers had to pay a "fine for perjury" which also consisted of wergild. 112 Nowadays we allow character witnesses to play the role of oath-helpers. It is unfortunate that we cannot fine them.

For the most part, references to perjury in such secular laws as existed seem to be directed at the sort of oath-taking that was a substitute for the ordeal, and not a form of witness proof in the modern sense. 113 Some would say that for the truly pious, the oath was a form of the ordeal, since it was widely believed that God would immediately punish a perjurer. But the number of truly pious must have been on the decline even then. Oath-taking on relics became a popular method of dispute resolution, which inevitably led to abuse. 114 As the reader will recall, this sort of thing was Plato's pet peeve.

There are some references to what looks like criminal punishment for perjury in the secular laws. It is said that mutilation was a punishment for perjury during the reign of Charlemagne (A.D. 768-814). 115 However, "the main duty of preventing and punishing perjury was placed by the secular law on the Church; and the penitentials of Christendom dealt with the matter faithfully and at length." 116 In other words, secular law was a sort of back-up for those who refused penitential discipline, and this was true regarding punishment for a great number of offenses. 117 Bok refers to the ninth century Penitential of Cummean:

He who makes a false oath shall do penance for four years. But he who leads another in ignorance to commit perjury shall do penance for seven years. He who is led in ignorance to commit perjury and afterward finds it out, one year. He who suspects that he is being led into perjury and nevertheless swears, shall do penance for two years, on account of his consent. 118

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114. Lea, supra note 48, at 28-29. One may recall that Harold Godwinson succeeded, for a very short time, to the throne of Edward the Confessor. But to his very great misfortune, he had given an oath over a concealed (he was tricked!) bit of Saint Edmund, to the effect that he would yield to the claims of William, Duke of Normandy. At least this is the Norman (the victor's) version of history. 1 Winston Churchill, A History of the English Speaking Peoples: The Birth of Britain 156-57 (Dorset Press 1990) (1956). This was a royal screw-up.

115. Robson; supra note 4, at 158.

116. Id. Extensive reference to the various penitentials, and some of the abuses associated with oaths, are made in Lea, supra note 48, at 29 ff.

117. Robson, supra note 4, at 78-79.

118. Bok, supra note 6, at 160, citing James McNeill & Helena Gamer, Handbooks
Bok suggests that the greater punishment for one who leads another into perjury ought to draw the attention of members of the legal profession. She has a point. The thing could have been written by a lawyer from the Justice Department. It is also of interest that the Middle Ages provided lawyers with a patron saint:

Sanctus Ivo erat Brito, Advocatus, et non latro, Res miranda populo.
St. Ivo [Ives] was a Breton and a lawyer, but not dishonest—an astonishing thing in people's eyes!

Bok also informs us that the casuists of the period worked up some popular dodges that are still with us today. The penitentials graded lies, and even Aquinas rated some as less serious than others in his Summa Theologica. Moreover, since oaths were commonly required, but scary things, the idea caught on that a "mental reservation" or "inward disclaimer," a sort of crossing of the fingers, would allow the hard-pressed but pious party to take a false oath and yet save his or her soul. Bok traces the doctrine to some language in the writings of


119. The "Just-Us Department" according to lawyer Wilkes in Winston Schoonover, Wilkes, His Life and Crimes (1991). Compare 18 U.S.C. § 1512, discussed below; John Hall, Jr., Defensive Defense Lawyering or Defending the Criminal Defense Lawyer from the Client, 11 U. Ark. Little Rock L.J. 329 (1988-89). This theme has been sounded throughout history. See, e.g., Information v. Johnes and Thomas, in J. Hawarde, Les Reportes del cases in Camera Stellata 81 (W.P. Baildon ed. 1894) (1606) (Chief Justice, Lord Anderson asserting that attorneys had a duty to reveal falsities and "were perjured if they did not do this"); William A. E. Purrington, The Frequency of Perjury, 8 Colum. L. Rev. 67, 73 (1908) (quoting the president of the State Bar as having opined that "[i]f the lawyers of this State would positively discourage false swearing on the part of their own clients and honestly endeavor to have it punished when committed by the clients or their adversary, the crime would suddenly grow less").

120. 2 Butler's Lives of the Saints 352 (Herbert Thurston & Donald Attwater eds., 1956).

121. Bok, supra note 6, at 34. Aquinas was inspired by Augustine, who was for absolute truthfulness, but who also graded the relative sinfulness of lies.
Augustine, but it seems to go back much further. Allusions to it can be found to this day in the form of certain oaths.

Having disposed of great swaths of time we turn to England, that "little world," that "precious stone set in a silver sea," that incubator for the common law lawyer, that birthplace of "modern" perjury law.

X. PERJURY LAW IN TUDOR ENGLAND

So far our examination of the history of perjury is consistent, more or less, with the observations of the nineteenth century authority James Tyler, who observed that:

[the history of Perjury, considered as a crime against the state, and therefore to be punished by the civil magistrate, is full of interest. It is however, at the same time, surrounded by many difficulties, and involved in much doubt. For that punishments have been, in various ages and countries, enacted against perjury, and have been actually inflicted, there can, I conceive, be no question: and yet, against the clear evidence of history, we are repeatedly told, not in learned dissertations only, but on the testimony of practical men, that the false-swearer and perjurer was left in former days entirely to the vengeance of the Diety, whose majesty he had insulted, and whose anger he had invoked.]

We might add to this view the fact that during the Middle Ages, God's "representatives" on Earth got into the act, and the secular authorities made occasional guest appearances. According to the very late Sir James Fitzjames

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122. Id. at 35. Compare Onslow's Case, Dyer 242 (7 & 8 Eliz.) ("to punish a man for his oath upon a secret intent would be hard"). The expedient of "mental reservation" was attractive to at least some English Catholics, who were hard-pressed by the repression of Elizabeth I under the Act of Supremacy. See Johnson & Toulmin, supra note 118, at 195-215. The dilemma faced by them under questioning by "unjust interrogators" is echoed in Shakespeare's Macbeth. William Shakespeare, Macbeth act 2, sc. 3 & act 4, sc. 2. See also George W. Keeton, Shakespeare and His Legal Problems 183-192 (ch. XIV, Henry Garnet, The Equivocator) (Adam & Charles Black 1930). Spanish casuists were likewise inspired by the Spanish Inquisition. Johnson & Toulmin, supra note 118, at 199.

123. See supra note 55 and accompanying text.

124. Bok cites, as an example, the oath taken by candidates for citizenship. Bok, supra note 6, at 36.


Stephen, a Judge of the High Court of Justice, the pattern in pre-Tudor England was similar to that recited in the immediately preceding section and in the quotation from Tyler; that is, that while there were occasional references to perjury as a public offense, the references were invariably to cases involving something other than perjured testimony by witnesses, in the modern sense. For example, the references are to "perjury to arbitrators, perjury as a compurgator, . . . perjury in relation to a will, perjury in not making payment according to oath," etc.

Perjury thus appears in very early times to have been not so much a lie told about a specific matter of fact in a witness box, as a false oath taken in a case in which the matter at issue was decided by the oaths of the persons interested and their compurgators.

The minute examination of testimony as to facts stated in detail was not the method by which questions were in those days investigated. Hence the kind of offence to which we in the present day give the name of perjury differs entirely from the perjury which is mentioned in the early laws.

Along the same lines, Stephen alluded to the process of attaint, pursuant to which jurors might be charged with perjury in order to set aside a verdict. In the period after the Conquest the jury emerged, but jurors were more like witnesses than disinterested fact-finders selected because of their ignorance of the facts.

Stephen contended that "[t]here is no instance in which perjury as a witness in a lay court is treated as an offence . . . ." Perjury was regarded as a spiritual offense which could, in some cases at least, be prosecuted in ecclesiastical courts. It is suggested that this led to a sort of rivalry between the common law courts and the spiritual courts. "Indeed, two cases occur in the Year-books in which a prohibition went to the spiritual court to restrain them from inquiring into breaches of promissory oaths relating to temporal matters, upon the ground that such an inquiry was an indirect way of determining temporal questions."

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127. 1 Stephen, supra note 83.
128. 1 id. at 54, citing Edw. 3; Eth. v. 25; vi. 28, & c. Hen. 1, xi. 6; Thorpe i. 521.
129. 2 id. at 408.
130. 3 id. at 241.
131. 3 id. at 240. See also 2 William Holdsworth, A History of English Law 366 (3rd ed. 1923), 3 Holdsworth, supra, at 400, 4 Holdsworth, supra, at 516-19, 9 Holdsworth, supra, at 193.
132. 3 Stephen, supra note 83, at 241.
133. 2 id. at 408.
134. 3 id. at 243.
135. 2 id. at 408.
Stephen remarked that "this strange defect in the law [the absence of a crime of perjury] may have had an influence upon the prevalence of perjury" during the period. Indeed, the conventional wisdom, exemplified by Maitland, was that prior to the Perjury Statute of 1563 "our ancestors perjured themselves with

136. 3 id. at 244.
137. The Statute of 1563 ["An Act for Punishment of such as shall procure or commit any willful Perjury"] provided in part:

II. Sithence the Making whereof [of the earlier Statute of Henry VIII, which punished subornation of perjury], for that the said Penalty is so small towards the Offenders in that Behalf, the said Offence of Subornation, and sinister Procurement of false Witnesses, hath nevertheless greatly increased and augmented . . .

III. Be it therefore enacted . . . That all and every such Person and Persons . . . shall unlawfully and corruptly procure any Witness or Witnesses . . . to commit any willful and corrupt Perjury [in designated matters, Courts, and so on] . . . that then every such Offender or Offenders shall for his, hers or their said Offence, being thereof lawfully convicted or attainted, lose and forfeit the Sum of forty Pounds.

IV. [And if the offender was unable to pay the fine] that then every such Person so being convicted and attainted of any of the Offences aforesaid shall for his or their said Offence suffer Imprisonment by the Space of one half Year, without Bail or Mainprise, and to stand upon the Pillory the Space of one whole Hour, in some Market-Town next adjoining to the Place where the Offence was committed.

V. And that no Person or Persons being so convicted or attainted, to be from thenceforth received as a Witness to be deposed and sworn in any Court of Record within any of the Queen's Highness Dominions of England, Wales, or the Marches of the same, until such Time as the Judgment given against the said Person or Persons shall be reverted by Attaint or otherwise; . . .

VI. And be it further enacted by the Authority aforesaid, That if any Person or Persons . . . either by the Subornation, unlawful Procurement, sinister Persuasion or Means of any others, or by their own Act, Consent or Agreement, willfully and corruptly commit any Manner of willful Perjury, by his or their Deposition in any of the Courts before mentioned . . . that then every Person or Persons so offending, and being thereof duly convicted or attainted by the Laws of this Realm, shall for his or their said Offence lose and forfeit twenty Pounds, and to have Imprisonment by the Space of six Months without Bail or Mainprise; and the Oath of such Person or Persons so offending, from thenceforth not to be received in any Court of record within this Realm of England, Wales, or the Marches of the same, until such Time as the Judgment given against the said Person or Persons shall be reversed by Attaint or otherwise; . . .

VII. And if it happen the said Offender or Offenders so offending not to have [the twenty pounds] . . . that then he or they to be set on the Pillory in some Market-place within the Shire [or wherever] . . . and
impunity." In other words, as the oath ceased to serve its intended purpose (shades of Plato again), a stronger deterrent was needed.

Solicitors and barristers do enjoy their argot and arcana. As Reginald Hine observed, it's hard to beat lines like "Il ject un brickbat a le dit Justice que narrowly mist." But for the rest of us, many British opinions are opaque at best, even when they are written in English. This is dangerous ground.

However, it does seem that some contemporaries thought that the Perjury Statute of 1563 was something other than a restatement of the common law. In Onslow's Case, which was decided not long after this statute was enacted, the

de claim that the Court could peremptorily dismiss the jurors: there to have both of his Ears nailed, and from thenceforth to be discredited and disabled for ever to be sworn in any of the Courts of Record aforesaid, until such Time as the Judgment shall be reverted . . . .

5 Eliz. c. 9. I have consistently referred to this statute as the Statute of 1563, since it appears so dated in most of the literature, including that of Stephen and Gordon. It appears dated 1562 in 2 The Statutes At Large 541-43 (London, Woodfall & Strahan 1770), and in 9 Holdsworth, supra note 131, at 185, as The Act of 1562-1563. I have attempted to "translate" it from the Elizabethan, without modification of spelling, but when the letter "s" looks like "f," and so on, I can provide no guarantee. For another translation and commentary see 5 William F. Finlason, Reeves' History of the English Law 351-53 (Philadelphia, Murphy 1880). Section X of the Act required the judges to make open proclamation of the penalties of perjury—to spread the word.

[T]he Justices of Assize of every Circuit within this Realm, and elsewhere within the Queen's Dominions, shall in every County within their Circuits, twice in the Year, that is to say, in the Time of their Sittings, make open Proclamation of this Estatute or of the Effect thereof, to the Intent no Person or Persons shall be ignorant or miscognizant of the Penalties herein contained.

5 Eliz. c. 9. Even more important was section XII, which provided for compulsory process, for it has been said that:

[h]is statute begins a new epoch in the law of evidence. Now that witnesses could be compelled to attend and testify, questions soon arose about their competency . . . . It was inevitable, also, that the more extensive use of the oral testimony of witnesses would soon bring into prominence the conditions under which this testimony should be admitted.

9 Holdsworth, supra note 131, at 185.


140. Anon. (1631) Dy. 1886, cited in Hine, supra note 139, at 8. This is an early case involving direct contempt. The judge had the offender's right hand cut off and fixed to a gallows (gibbet), after which the rest of the offender was hanged. See Ronald Goldfarb, The Contempt Power 15 (1963).

141. See supra note 122. The case is oft quoted for such maxims as "it is not to be thought that a Christian would be perjured," and "the law intends the oath of every man to be true."
Justices opined, inter alia, that perjury had not been a crime before the statute. Edward Coke disagreed violently with this view, calling it the product of "grosse ignoraunce, fruites of abredgemente men that neuer read the bookes at large."\textsuperscript{142} Stephen countered with the observation that "Coke's account of the law of perjury is a good illustration of the unintelligent patchwork way in which he [Coke] writes on all subjects."\textsuperscript{143} This is the way that scholars communicate with one another, even across the ages.

One modern authority, Professor Gordon, sides somewhat with Coke. Gordon traces the history of perjury in the English courts both before and after the enactment of the Statute of 1563, and reaches the following conclusions:

False testimony by witnesses was under the jurisdiction of ecclesiastical or conciliar courts only if it had occurred in proceedings before such courts. There was no perjury which encompassed false testimony by witnesses in common law proceedings, but such testimony was punishable as maintenance . . . . Both sides [the Justices in Onslow\textquotesingle s Case on the one hand, and Coke on the other], then, were correct . . . . At the heart of this dispute was a confusion over semantics; between "perjury" in its traditional elastic meaning of a lie under oath and "perjury" in its more recent and narrow meaning of a willful assertion made by a witness in a judicial proceeding upon oath and known by such witness to be false. The traditional concept was being redefined as it was applied to the actual development of the jury. And this process of redefinition was confused by the fact that there were terms and crimes such as maintenance which had traditionally been applied to these developments . . . . This confusion was not clarified by the Perjury Statute of 1563 . . . . [a]nd the statute which emerged showed no awareness of being one which created a "new" crime.\textsuperscript{144}

\textsuperscript{142} See Gordon, supra note 126, at 147. See also 2 Joel Prentiss Bishop, Commentaries On the Criminal Law 587 (Boston, Little Brown 6th ed. 1877) (quoting Pollock, supra note 138, for the proposition that perjury was always a common law offense, but that the Statute of 1563 "defined it" and increased its punishment).

\textsuperscript{143} 2 Stephen, supra note 83, at 248. See also Kenneth Sears & Henry Weihofen, May\textquotesingle s Law Of Crimes 112 (4th ed. 1938) ("So far as perjury of witnesses is concerned there appears to have been no such common law crime in England. The origin of this offense is statutory.") This work relies on Charles Curtis, Jr. & Richard Curtis, The Story of a Notion In the Law of Criminal Contempt, 41 Harv. L. Rev. 51, 59 (1927) for this proposition.

\textsuperscript{144} Gordon, supra note 126, at 150. 3 Stephen, supra note 83, at 244 refers to earlier statutes, such as 32 Hen. 8, c. 9, s. 3 (1540) (in certain types of cases, subornation of perjury, but not perjury itself, was punishable by a fine of 10 pounds). Stephen accounts for the emphasis on subornation, here and in 5 Eliz. c. 9, by arguing that these crimes were akin to the more general offenses of "maintenance or oppression by iniquitous lawsuits." \textit{Id.}
Gordon's contention seems to be that Stephen overstated his case, and that the Justices in Onslow's Case were "wrong" on several grounds. His arguments are persuasive (although his point may not be earthshaking), they reconcile all of the available authorities (Stephen was somewhat selective), and they are supported by the language of the statute.\textsuperscript{145} Moreover, any referee who can convince both sides in a fight that they are both correct and should make peace has to be given a great deal of credit.

In any event, the bottom line seems to be that "the Perjury Statute of 1563 [and the case law that followed] remained the primary basis for the law of perjury [up to and] throughout the nineteenth century;"\textsuperscript{146} although Gordon contends that it should be said that the historical confusion "compounded by the Statute of 1563" allowed the courts to, in effect, invent a common law crime of perjury in the late sixteenth and seventeenth centuries.\textsuperscript{147}

In the cases that followed its enactment, it was ultimately determined that the crime of perjury "consisted in giving upon oath, in (or for the purposes of) a judicial proceeding, before a competent tribunal . . . , evidence which was material to some question depending in the proceeding and was false to the knowledge of the deponent, or was not believed by him to be true."\textsuperscript{148} This is, essentially, the modern definition, which was codified, with some modifications, in the (British) Perjury Act of 1911.\textsuperscript{149} It is a somewhat constricted definition, which balances our interest in truth-telling against the risk that a more expansive definition would make any intelligent person reluctant to testify,\textsuperscript{150} and possibly lead to abuse of prosecutorial authority.

\textsuperscript{145} Gordon, \textit{supra} note 126, at 158.
\textsuperscript{146} \textit{Id.} at 151.
\textsuperscript{147} \textit{Id.} at 169. R. v. Rowland ap Eliza, 10 Jas. (1613) seems to have been a leading case. \textit{See} 3 Coke, Institutes 164.
\textsuperscript{148} 1 James W. Cecil Turner, Russell On Crime 291 (12th ed. 1964), \textit{citing} R. Aylett, 1 T.R. 63, 69 (1785) (per Lord Mansfield). \textit{See also} Gordon, \textit{supra} note 126, at 153-54 ("Of the several components of the modern definition of perjury, essentially all were developed by the courts during the reign of Elizabeth"). Gordon collects the Elizabethan cases and authorities.
\textsuperscript{149} 1 Turner, \textit{supra} note 148, at 291. \textit{Compare} Seymour Harris, Principles of Criminal Law (M.F. Force ed.) (Cincinnati, Robert Clarke & Co. 1883) ("The crime committed by one who, when a \textit{lawful} oath is administered to him in some proceeding \textit{in a court of justice of competent jurisdiction}, swears \textit{willfully}, \textit{absolutely}, and \textit{falsely} in a matter \textit{material} to the issue or point in question"). Justin Miller, Handbook of Criminal Law 468 (1934) ("Perjury, at common law, is the willful and corrupt giving, upon a lawful oath, or in any form allowed by law to be substituted for an oath, in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry. Perjury is a misdemeanor. Subornation of perjury is the procuring by one person of another person to commit perjury"). The Perjury Act of 1911, as amended by the Criminal Justice Act of 1948, and crimes related to perjury, are discussed in 11(1) Halsbury's Laws of England 299f (1990).
\textsuperscript{150} \textit{Compare} Damport v. Sympson, Cro. Eliz. 520, no. 8 (1596) ("if this action lye, all testimonies would be terrified to speak the truth").
XI. THE EARLY AMERICAN LAW

The English definition of perjury was, in the main, embraced by the colonists. Many of the new states adopted the common law as a birthright, some by statute and some by constitutional provision. Of course, other states, and the United States, rejected the common law of crimes. But even in these states, the common law was used as a source of definitions, which were often omitted from the statutes. Bishop observed that the common law cases overshadowed the old Statute of 1563 in both England and America, although in Pennsylvania the judges at one time viewed the Statute itself as part of the inherited law.

In England, the crime had been a misdemeanor, although one authority asserts it had been a capital offense at one time. In America, the crime was a felony. Here are a few of the early statutes of the United States:

Willfully and corruptly committing perjury.
— If any person shall willfully and corruptly commit perjury, or shall by any means procure any person to commit corrupt and willful perjury, on his or her oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the United States or in any deposition taken pursuant to the laws of the United States, every person so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding eight hundred dollars, and shall stand in the pillory for one hour, and be thereafter rendered

151. Miller, supra note 149, at 28-32; Sears & Weihofen, supra note 143, at 1 (most states).
152. Miller, supra note 149, at 31; Sears & Weihofen, supra note 143, at 2; Harris, supra note 149, at 5-6 (referring to the law of Ohio, Indiana, and Iowa).
153. Miller, supra note 149, at 29; Sears & Weihofen, supra note 143, at 3.
155. Bishop cites the English authority Hawkins for the proposition that "[p]rosecution under the statute, being more difficult than by indictment at common law, are very seldom brought." Bishop, supra note 142 at 587-88.
156. Id. at 587.
157. Harris, supra note 149, at 75. See also 2 John Reeves, History of the English Law 353 (reprinted ed. Augustus M. Kelly 1969) (Dublin, Luke White 2nd ed. 1787) ("Perjury which affected the life of a man was punished, as in the time of Edward I, with a mortal judgment," to the example, says the book, "of apparent murders"; "but perjury of a less heinous intent was punished with banishment, either for a time, or for ever. The woods, meadows, gardens, and houses of the perjured man were to be razed and destroyed, but his heirs were not to be disinherited"). Compare the Code of Hammurabi, and the Biblical references, discussed supra notes 29-32, 37 and accompanying text.
158. Harris, supra note 149, at 75.
incapable of giving testimony in any of the courts of the United States, until such time as the judgment so given against said offender shall be reversed. (Act of April 30, 1790, section eighteen).\textsuperscript{159}

\textbf{Knowingly and willfully swearing or affirming falsely.}

— If any person in any case, matter, or hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly swear or affirm falsely, every person so offending shall be deemed guilty of perjury, and shall, on conviction thereof, be punished by fine not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence. And if any person or persons shall knowingly or willfully procure any such perjury to be committed, every person so offending shall be deemed guilty of subornation of perjury, and shall, on conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence. (Act of March 3, 1825, section 13).\textsuperscript{160}

\textbf{Section 125 [Perjury].}

— 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, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years. (Act of March 4, 1909, section 125).\textsuperscript{161}

\textbf{Section 126 [Subornation of Perjury].}

— Whoever shall procure another to commit any perjury is guilty of subornation of perjury, and punishable as in the preceding section

\textsuperscript{159} See 2 Wharton, \textit{supra} note 154, at 287.

\textsuperscript{160} 2 id.

\textsuperscript{161} See George Tucker & Charles Blood, The Federal Penal Code (in force Jan. 1, 1910) 106-14 (1910). These statutes are identical to earlier United States Revised Statutes §§ 5392 and 5393, except that § 5392, like the 1790 statute, but unlike the new § 125, had a final sentence, "and shall, moreover, thereafter be incapable of giving testimony in any court in the United States until such time as the judgment is reversed." The full citation to §§ 125 and 126 are Act of March 4, 1909, ch. 321, §§ 125, 126, 35 Stat. 1111.
prescribed. (Act of March 4, 1909, section 126).162

The 1790 statute, in particular, is like the Statute of 1563 in that it includes punishment by way of public humiliation as well as imprisonment (although no one's ears were "nailed"),163 and subsequent disqualification as a witness in any future case.164

From a very early time, New York had a provision in its perjury laws authorizing a "Court of Record" to commit summarily any witness "whose testimony before the court appeared probably to be false."165 This power was also exercised in England under authority of statute law.166 However, the power was not utilized in New York, much to the chagrin of various "reform-minded" persons.167

XII. THE MODERN AMERICAN STATUTES

In the Fall of 1991, Senator Arlen Specter made the following charge:

Judge Thomas, I went through that in some detail, because it is my legal judgment, having had some experience in perjury prosecutions, that the testimony of Professor Hill in the morning was flat out perjury and that she specifically changed it in the afternoon when confronted with the possibility of being contradicted. And if you recant during the course of a proceeding, it's not perjury.168

There is no need for me to take sides on the merits of the charge.169 I
simply want to point out that Senator Specter was wrong on at least two counts that are pertinent to our history. There is a federal perjury statute that allows a prosecutor to build a prima facie case on the inconsistency of two statements, but it does not apply in Congressional hearings.170 Furthermore, recantation may save a witness under this statute, but it will not necessarily save a witness under the more general perjury statute.171 This only goes to show that Congress can be expected to contribute little, other than confusion, to our discussion anyway.172

The current prosecutorial arsenal—a virtual family of laws—includes 18 U.S.C. sections 1621 (Perjury), 1622 (Subornation of Perjury) and 1623 (False Declarations before Grand Jury or Court); a recent addition, section 1512 (Tampering with a Witness, Victim, or an Informant); and finally a close cousin, 18 U.S.C. section 1001 (Fraud and False Statements).

Section 1621. Perjury generally
— Whoever (1) 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; or (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true 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.

Section 1622. Subornation of perjury
— Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.
Section 1623. False declarations before grand jury or court
— (a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) 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.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) 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. 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.

(d) 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.

(e) 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.

This is the statute that Senator Specter must have been thinking of, although it obviously did not apply to the confirmation hearings. It is sometimes said that this statute eliminated the "two-witness rule" of the common law, but that is something of an overstatement. The real advantage of the statute is that it

173. The "two-witness rule" is a safeguard of ancient origin. However, it had
permits the prosecutor to make out a prima facie case based on two inconsistent statements under oath, without having to prove which statement was false.\textsuperscript{174} However, materiality is still an element of the offense, literal truth is a defense, and a timely retraction is a complete defense.\textsuperscript{175} There will be times when a prosecutor will-be tempted to choose to charge the defendant under the old "general" statute, since recantation is not a "defense" under that statute.\textsuperscript{176}

Modern lawyers are uncommonly suspicious people, by nature and by training. They seem to think that a great deal of perjury takes place. At the turn of the century Francis Wellman complained: "Perjury is decidedly on the increase, and at the present time in our local courts scarcely a trial is conducted in which it does not appear in a more or less flagrant form."\textsuperscript{177} In the 1930s, Edwin Borchard's classic survey of injustice in the criminal courts attributed much of the blame to outright perjury by prosecuting witnesses.\textsuperscript{178} Much more recently, commentary appeared in which the following observation was made: ". . . [A]lthough modern American law . . . prohibits false swearing, difficulties in proving the mental state and overcoming common law safeguards against conviction of the innocent prevent frequent enough conviction to deter the offense."\textsuperscript{179}

It is true that sections 1621 through 1623 incorporate many of the common law safeguards.\textsuperscript{180} It is less clear that it is necessary or desirable that we convicit
degenerated into a "one-witness-plus-other-corroborating-evidence rule" long before the "new" perjury statute was enacted. Harris, supra note 149, at 75. However, § 1623(e) does explicitly reject any such requirement—indeed, it rejects even the vestiges of it, which still cling to § 1621. See Devitt et al., supra note 170, at 572.\textsuperscript{174} See generally Devitt et al., supra note 170.

175. Id.


178. Edwin Borchard, Convicting the Innocent (1932). For an earlier work with the same theme, see S.M. Phillips, Famous Cases of Circumstantial Evidence (New York, James Cockcroft 1874). The later work inspired Janet Lewis' novel The Trial of Soren Qvist (1986), a classic case of conspiracy and false witness from 17th century Denmark. For a turn of the century sketch in poetry of a wrongful conviction reversed and a false witness foiled, see Edgar Lee Masters, Spoon River Anthology (Epitaph of Roy Butler) (Barnes & Noble 1993) (1915).

179. See Campion & Hamilton, supra note 176, at 22. Although the attorney-client privilege is frequently justified on the ground that it is needed so that clients will provide lawyers with the whole truth, many lawyers assume that their clients lie to them. See, e.g., Scott Turow, Presumed Innocent 170 (1987); Monroe Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966).

180. Monarchs from the time of Elizabeth I (remember the Statute of 1563?) all
a few more innocents in order to deter the guilty. In any event, it is hard to see how anything could be more Draconian than the False Statements Act, Title 18, United States Code, section 1001, which was visited upon an unsuspecting polity as part of the 1970 Omnibus Crime Control Act, or the more recent section 1512, a chilling piece of work that was slipped into the U.S. Code in 1982.

Section 1001. Statements or entries generally  
Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 1512. Tampering with a witness, victim, or an informant . . . .  
(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—(1) influence, delay, or prevent the testimony of any person in an official proceeding; (2) cause or induce any person to—(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding; (B) alter, destroy, mutilate, or conceal an object with intent to impair the object’s identity or availability for use in an official proceeding; (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or (D) be absent from an official proceeding to which such person has been summoned by legal process; or . . . . shall be fined by not more than $250,000 or imprisoned not more than ten years, or both . . . .

(d) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant’s sole intention was to encourage, induce, or cause the other person to testify truthfully.181

These are two truly worrisome statutes. The former flies in the face of human nature.182 The latter seems to be designed for the purposes of trapping the way up to the present have played the bully from time to time, but they almost always possessed the virtue of inefficiency. One may well ask if we are headed for a greater or lesser degree of freedom as we rush into the 21st century.

182. This point takes us almost back to the beginning, to the story of Cain and Abel, supra notes 3-4 and accompanying text.
and intimidating defense lawyers—or lawyers generally.\textsuperscript{183}

Perhaps we can take some comfort in the thought that as a society we are concerned enough about the false witness to have so many laws aimed at him or her.\textsuperscript{184}


\textsuperscript{184} Compare Noonan, supra note 9, at xiv: "Where accusations abound . . . where laws multiply . . . the idea of bribery [the ethic that it is wrong] is being put to work. . . . The reality of the concept in the society is indicated by its invocation, even though the extent to which the idea affects official conduct cannot be closely calculated." Or consider, perhaps, the Roman Gellius in 3 The Attic Nights of Aulus Gellius 427 (John C. Rolfe trans.) (New York, Putnam 1928):

Or do you suppose, Favorinus, that if the penalty provided by the \textit{Twelve Tables} for false witness had not become obsolete, and if now, as formerly, one who was convicted of giving false witness was hurled from the Tarpeian Rock, that we should see so many guilty of lying on the witness stand? Severity in punishing crime is often the cause of upright and careful living.