

IN SEARCH OF TRUTH: A CASE FOR EXPANDING PERJURY'S RECATANTION DEFENSE

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* B.A. Syracuse University 1994; J.D. Candidate Touro College, Jacob D. Fuchsberg Law Center 1998. I wish to thank Professor Thomas A. Schweitzer of the Touro Law Center for his encouragement and thoughtful advice. In addition, special thanks are due to Stephen Kunken, Esq., of Commack, New York, whose research assignment on New York's retraction-defense statute, N.Y. PENAL LAW § 210.25 (McKinney 1988), spawned my interest in writing this Article. Finally, I wish to thank reference librarians Jill B. Selden, Esq., Dr. Gerard E. Giannattasio, Esq., and the rest of the Touro Law library staff for their invaluable research assistance.

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I. INTRODUCTION

The ultimate goal of all judicial proceedings must be the pursuit of the truth, for without it there can be no justice. Perhaps the greatest affront to justice is perjury.¹

The crime of perjury had its most public hour during the O.J. Simpson criminal trial when Detective Mark Fuhrman knowingly lied on the witness stand — as millions watched from the couches of their homes — in the most highly televised trial in history.² Possibly Detective Fuhrman's notorious lying or, as some cynics lament, a national decline in morals has led some commentators to believe

¹ Although the definition of perjury varies slightly from jurisdiction to jurisdiction, a general definition can be found in BLACK'S LAW DICTIONARY, which defines it as follows:

In criminal law, the willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being material to the issue or point of inquiry and known to such witness to be false. A false statement knowingly made in a proceeding in a court of competent jurisdiction or concerning a matter wherein an affiant is required by law to be sworn as to some matter material to the issue or point in question.

BLACK'S LAW DICTIONARY 1139 (6th ed. 1990) (citations omitted). Interestingly, most jurisdictions emphasize the *belief* element; that is, a testifying witness must *believe* his statement, when made, to be false in order to constitute perjury. Therefore, some courts will convict a declarant for making a statement that he believes to be false, even though he may have in fact spoken the truth. See *Gordon v. State*, 147 N.W. 998 (Wis. 1914); 2 WHARTON, WHARTON'S CRIMINAL LAW (11th ed. 1912); *Commonwealth v. Miles*, 131 S.W. 385 (Ky. 1910). Thus, in a prosecution for giving alcohol to a Native American (which, in the past, was a crime in Wisconsin), prosecution for perjury was appropriate where the accused testified that he had not given whisky to a Native American, and the recipient of the whisky was not a Native American, but she believed the recipient to be a Native American. Because at the time the statement was made the witness believed the whisky recipient was a Native American, the accused was guilty of perjury. See *Gordon*, 147 N.W. at 998. See generally ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 518-19 (3d ed. 1982); 2 JOEL P. BISHOP, BISHOP ON CRIMINAL LAW § 1044 c (John M. Zane & Carl Zollmann eds., 9th ed. 1923).

² See *People v. Simpson*, No. BA097211 (Cal. Super. Ct., L.A. County 1995).

perjury is more prevalent than ever today.³ On the other hand, some commentators note that widespread perjury has been with us for ages.⁴

Even though the existence of perjury can be traced back to antiquity,⁵ punishment for the crime has not been firmly established until fairly recently.⁶ Courts attempted to curtail perjury by administering an oath to witnesses. An oath, it was hoped, would compel a witness to testify truthfully, lest he face the wrath of a disgruntled supreme deity upon whom the witness had sworn falsely.

Divine intimidation alone was ineffective, as perjury still flourished.⁷ Hoping to decrease the occurrence of perjury through deterrence,⁸ criminal penalties for lying under oath were developed.⁹ In addition to punishment, legislatures have

³ See, e.g., Mark Curriden, *The Lies Have It*, 81 A.B.A. J. 68 (May 1995) ("Judges, lawyers and experts on the court system worry that perjury is being committed with greater frequency and impunity than ever before."); Lisa C. Harris, Note, *Perjury Defeats Justice*, 42 WAYNE L. REV. 1755, 1777 (1996) (stating that the offering of false testimony has become commonplace in the courts).

⁴ See, e.g., Anthony Salzman, *Recantation of Perjured Testimony*, 67 J. CRIM. L. & CRIMINOLOGY 273 (1976) ("Witnesses have violated their judicially administered oaths to tell the whole truth since the beginning of American jurisprudence . . ."); LUKE OWEN PIKE, *HISTORY OF THE CRIME OF ENGLAND* 123 (1883) ("[O]ur ancestors perjured themselves with impunity."). See also Brief for Appellant at 54, *People v. Ezaugi*, 141 N.E.2d 580 (N.Y. 1957) ("The tendency to lie even under oath is substantially the same now as it was three centuries ago.").

⁵ The crime of common law perjury has existed since at least the Seventeenth Century. See *United States v. Norris*, 300 U.S. 564, 574 (1937).

⁶ See 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF THE ENGLISH LAW* 242 (2d ed. 1911) ("Very ancient law seems to be not quite certain whether it ought to punish perjury at all. Will it not be interfering with the business of the gods?"); 3 JAMES F. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 242 (1883) ("The real singularity is, that for several centuries, no trace is to be found of the punishment of witnesses for perjury.").

⁷ See Harry Hirschman, "You Do Solemnly Swear!" or That Perjury Problem, 24 J. AM. INST. CRIM. L. & CRIMINOLOGY 901, 903 (1934) (arguing that the value of the oath in preventing witnesses from lying is negligible).

⁸ *Id.* at 901. However, in our increasingly secular society, an oath's power of encouraging truthfulness has diminished. *Id.* As a result, one author has noted the importance of another trial device better able to elicit the truth: "Cross-examination, — the rarest, the most useful . . . has always been deemed the surest test of truth and a better security than the oath." FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* vi (4th ed., rev. and enlarged 1936) (quoting Cox).

⁹ But see Harris, *supra* note 3, at 1777 (arguing that current perjury statutes are ineffective and need to be made harsher, in addition to adding new laws to facilitate swifter and certain prosecutions for this crime).

developed many other devices, including varying the statutory definition of perjury. Jurisdictions differ considerably on which, if any, of these devices to follow.

Aside from threatening a witness with penal consequences, there are other approaches to entice truth telling.¹⁰ This Article will discuss exclusively the recantation doctrine, which is just one of these approaches. Stated simply, recantation, also known as *retraction*, is a defense to perjury when a witness testifies falsely under oath, but later recants his false testimony and offers truth. By correcting a deliberate misstatement, a liar will be excused from a perjury prosecution. The policy behind the recantation defense is to encourage truth telling by barring a punishment for a witness who lied but might wish to purge his conscience by retracting his false testimony and providing the truth.

Surely laymen – and even some jurists – might consider the recantation doctrine an uninteresting, obscure area of the law about which to write. Because of this, it comes as no surprise that the subject of the recantation defense has failed to spawn much literature on the subject.¹¹ Yet, this doctrine is of paramount importance during the few occasions when it is applicable.¹² For instance, the difference between an innocent man being convicted or vindicated is sometimes determined depending on whether a well-formulated recantation defense exists in

¹⁰ See Harris, *supra* note 3, at 1759-62.

¹¹ Perhaps the only article dedicated to the recantation doctrine exclusively is Salzman, *supra* note 4.

¹² Admittedly, a witnesses recanting intentionally false testimony is a rarity, but it does occur on occasion. During such an exceptional occasion the recantation defense plays a pivotal role in ensuring that a court's justice is based, as much as possible, on truth rather than lies.

the accused's jurisdiction.¹³ The recantation defense plays a pivotal role in allowing the court to seek out truth and render justice.

On the one hand, some argue the recantation doctrine may actually contradict its purpose by encouraging a witness to lie.¹⁴ They reason, a witness will lie, keeping in mind that he can retract his testimony later if he wishes, and avoid the peril of a perjury conviction. Indeed many of the states feel this way as evidenced by the recantation defense's minority status in the United States.¹⁵ On the other hand, as this Article will show, a well-formulated recantation defense increases the likelihood of truth telling and has no danger of encouraging dishonesty. But a poorly formulated defense, as some courts and commentators

¹³ One may argue – though not necessarily prevail – that due process is compromised for litigants when testifying witnesses do not have a well-formulated recantation defense at their disposal if they lie but later wish to recant. This is even more true in a criminal trial where a defendant's life and liberty are on the line rather than just money in a civil proceeding. Moreover, the argument goes, due process demands that the truth come to light at the expense of absolving a liar of his crime of perjury.

Keep in mind, though, in no way does the lying witness have a constitutional right to a retraction defense. As this Article later argues, once a lie is made under oath, the liar has committed a crime, but public policy requires that the crime be excused in order to increase the chance that truthful testimony will come to light. See *infra* notes 145-46 and accompanying text. Therefore, as *United States v. Denison*, 663 F.2d 611 (5th Cir. 1981), explained, no right to a recantation defense exists to the witness, himself. See also Annotation, *Recantation As Bar To Perjury Prosecution Under 18 U.S.C.S. § 1623(d)*, 65 A.L.R. FED. 177, 184-86 (1983). But, as explained above, an argument can be made that not availing a witness the recantation defense diminishes due process rights of litigants in both civil and, especially, criminal proceedings.

¹⁴ See *United States v. Norris*, 300 U.S. 564, 574 (1937).

¹⁵ The following are recantation defense statutes that exist in a minority of jurisdictions: ALA. CODE § 13A-10-107 (1995); ALASKA STAT. § 11.56.235 (1996); ARK. CODE ANN. § 5-53-104 (Michie 1997); COLO. REV. STAT. ANN. § 18-8-508 (West 1986); DEL. CODE ANN. tit. 11, § 1231 (1995); FLA. STAT. ANN. § 837.07 (West 1994); HAW. REV. STAT. § 710-1064 (1993); ILL. COMP. STAT. ANN. ch. 720, para. 5/32-2 (c) (West 1993); IOWA CODE ANN. § 720.2 (West 1993); KY. REV. STAT. ANN. § 523.090 (Michie/Bobbs-Merrill 1990); ME. REV. STAT. ANN. tit. 17-A, § 451(3) (West 1983); MONT. CODE ANN. § 45-7-201(5) (1997); N.J. STAT. ANN. § 2C:28-1(d) (West 1995); N.Y. PENAL LAW § 210.25 (McKinney 1988); N.D. CENT. CODE § 12.1-11-04(3) (1997); 18 PA. CONS. STAT. ANN. § 4902(d) (1983); R.I. GEN. LAWS § 11-33-1(d) (1994); TEX. PENAL CODE ANN. § 37.05 (West 1994); WASH. REV. CODE ANN. § 9A.72.060 (West 1988).

The federal government adopted the recantation rule, which it codified in 18 U.S.C. § 1623(d) (1994). Section 1623(d) affords a recantation defense to statements made under oath only before a grand jury or court. On the other hand, 18 U.S.C. § 1621 (1994), which is applicable more generally to any statement given under oath, disallows the retraction defense. The disparity between these two statutes makes it, at times, unclear if a liar may invoke a recantation defense. As such, the federal retraction defense has drawn criticism from many commentators. See *infra* note 141.

rightfully fear, will indeed encourage lying.¹⁶ Likewise, a narrowly applied recantation defense, while not fostering untruthfulness, will lose the possible benefit of encouraging veracity.

Part II of this Article will discuss the evolution of the recantation defense in New York, where it was first born in America, and explain New York's current formulation of the law. The history of the recantation doctrine in New York is especially noteworthy because its influence on other courts, legislatures, and the Model Penal Code has been enormous. Moreover, the elements of New York's recantation defense have been the model for all other jurisdictions. Although other jurisdictions do not necessarily use each element in their defenses, those that do have recantation defenses take all of their elements from New York.

Part III of this Article will look at the completed-crime rule, which is the rejection of the recantation defense. In addition, this part will examine the rationale that compels these jurisdictions to vehemently reject the recantation defense and embrace the completed-crime rule, which at present is the majority standard.

Part IV examines the elements of New York's recantation defense. Of those elements, this Article discusses which ones various courts and legislatures throughout the country have embraced and which have been rejected. And in doing so, this Article examines the reasoning behind the decision to choose some elements over others.

Part V of this Article begins by denouncing the competed-crime rule's inflexibility, which hinders the pursuit of truth. Moreover, this part critically examines the different variations of the recantation defense that exist throughout the United States. Next, Part V criticizes courts and commentators who advance certain formulations that have one of two faults: (1) they are ineffective in encouraging repentance and truthfulness; or (2) as a result of a poor formulation, they actually promote perjury. Finally, keeping in mind the ultimate function of a judicial proceeding, this Article proposes an ideal formulation of the recantation defense, which it is urged, more legislatures and courts should adopt.

II. NEW YORK'S RECONTATION STATUTE

The development and history of New York's recantation defense is an especially important background for understanding the different variations of the doctrine nationwide. The defense as we know it today was born in New York, and

¹⁶ See 2 SARA S. BEALE & WILLIAM C. BRYSON, *GRAND JURY LAW AND PRACTICE* § 11:10 (1986) (noting that "making the recantation defense too broad can have the opposite effect of encouraging perjury"); Salzman, *supra* note 4, at 279; Recent Case, *Criminal Law - Perjury - Correction of False Testimony*, 76 U. PA. L. REV. 751, 752 (1927). See, e.g., *United States v. Norris*, 300 U.S. 564, 574 (1937).

all the elements that other states and federal courts include in their recantation defense are, in part or whole, adopted from New York.

A. *History of New York's Recantation Defense*

Before the State of New York codified it in 1965,¹⁷ recantation was a common law defense to perjury whose origins can be traced back to ancient Anglo-Saxon jurisprudence.¹⁸ The first American case to enunciate the doctrine was *People v. Gillette*.¹⁹ In *Gillette*, the defendant, Walter R. Gillette, was accused of giving misleading statements to a grand jury concerning the ownership of a bank account.²⁰ Immediately after making those statements and before leaving the witness stand, Mr. Gillette told the entire truth concerning the bank accounts.²¹

1. Testimonial Correction to Show Absence of Willful Perjury

Judge McLaughlin, writing the opinion of the court, believed the actions of the defendant in *Gillette* did not constitute perjury in the first place. Judge McLaughlin noted that the prosecution "had failed to prove that [Mr. Gillette] committed perjury in testifying as he did. When the defendant's entire testimony is considered, it seems to me one cannot but be satisfied that [defendant] fully and frankly testified"²² In other words, perjury cannot be ascertained by one's words or sentences viewed in isolation. A witness's testimony, when considered in its entirety, must be examined to determine if he "willfully, knowingly, and

¹⁷ N.Y. PENAL LAW § 210.25 (McKinney 1988) (effective Sept. 1, 1967, codified 1965).

¹⁸ Cf. *King v. Jones*, 1 Peake 51, 53 (1791) (citing *King v. Carr*, 82 Eng. Rep. 1191 (1669)). But see *United States v. Norris*, 300 U.S. 564 (1937) (citing *Edwards v. M'Leay*, 35 Eng. Rep. 316 (1813); *Reg. v. Holl*, 45 L.T.R. 69 (Q.B.D. 1881)) (arguing that there is doubt that *Carr* held or intended to hold that a witness's retraction of his false testimony absolves him of perjury in light of later English case law).

¹⁹ 111 N.Y.S. 133 (N.Y. App. Div. 1908).

²⁰ See *id.* at 134. Mr. Gillette was subpoenaed to testify before a grand jury in a proceeding entitled "The People of the State of New York v. John Doe et al." *Id.*

²¹ *Id.*

²² *Id.* at 138.

corruptly” testified falsely.²³ Hence, if a witness corrects his testimony, this is indicative that he did not “willingly” commit perjury.²⁴

This premise expressed in *Gillette* has acted as a stepping-stone doctrine that leads us to today’s recantation defense. Although Judge McLaughlin cited no authority in *Gillette* for this principle, he was not the first to conceive of it. In fact, 217 years earlier, Lord Kenyon, in probably the first English-language case on the subject,²⁵ wrote of a similar rule:

The whole of the Defendant’s evidence on the former trial should be proved, for if in one part of his evidence he corrected any mistake he had made in another part of it, it will not be perjury. Courts have gone so far as to determine, that where a mistake has been committed in answer to a bill in Chancery, if the Defendant set it right in a second answer, it will save him from the perils of perjury.²⁶

In addition, other English²⁷ and American²⁸ courts have subscribed to this school of thought before *Gillette*, and at present it is the prevailing view.²⁹

²³ *Id.* at 139.

²⁴ For the general definition of perjury *see supra* note 1.

²⁵ *King v. Jones*, 1 Peake’s Reports 51 (1791) (citing *King v. Carr*, 82 Eng. Rep. 1191 (1669)). The *Carr* case, which *Jones* cited, was written in law French as was the practice in England at that time period.

²⁶ *Id.* at 53.

²⁷ *See, e.g., Reg. v. Holl*, 45 L.T.R. 69, 70 (Q.B.D. 1881) (“[a]n indictment for perjury could not be sustained on an answer afterwards corrected or explained.”).

²⁸ *See, e.g., Henry v. Hamilton*, 7 Blackf. 506, 507 (Ind. 1845) (approving a trial court’s instruction that a witness’ corrected statement may be considered to negate the willfulness element necessary for a perjury conviction).

²⁹ *See* MODEL PENAL CODE § 241.1cmt. 7, 130-31 (1980) (“Under prevailing law . . . a prompt retraction . . . [can be used] to bolster the assertion that the original misstatement was inadvertent or due to a misunderstanding.”); Salzman, *supra* note 4, at 275 (“[C]ourts generally agree that an offer of testimonial correction is relevant to show that the inaccurate testimony was not deliberately false and that no perjury was therefore ever committed.”).

2. The Birth of the Recantation Defense

Although convinced that Mr. Gillette's statements were not perjurious (in light of his entire testimony viewed altogether), Judge McLaughlin, by way of *dictum*, assumed, for argument's sake, that Mr. Gillette intentionally testified falsely.³⁰ He then formulated a two-part test to determine if one who first lies but later recants his willfully false testimony is barred from perjury prosecution. First, a witness must have given intentionally false statements while testifying; and, secondly, "immediately thereafter he fully [and truthfully] explained" his testimony.³¹

The recantation defense, the court reasoned, is necessary to ensure the most noble objective of judicial proceedings – rendering justice by eliciting truth.³² Moreover, the court said:

A judicial investigation or trial has for its sole object the ascertainment of the truth, that justice may be done. It holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not. This inducement would be destroyed if a witness could not correct a false statement except by running the risk of being indicted and convicted for perjury.³³

Therefore, the court held, if one first lies on the witness stand – such as the *Gillette* defendant – but later recants his false statement and offers the truth, he should be absolved of perjury for public policy reasons.³⁴ Hence, the recantation defense in America was born.

Forty-nine years after the *Gillette* decision, New York's highest court, the court of appeals, had its first occasion to visit the recantation doctrine in *People v. Ezaugi*,³⁵ which has become an important and influential American decision on the subject. In *Ezaugi*, a grand jury was investigating Detective Ezaugi and his partner,

³⁰ See *People v. Gillette*, 111 N.Y.S. 133, 139 (N.Y. App. Div. 1908).

³¹ *Id.*

³² See *id.*

³³ *Id.*

³⁴ See *id.*

³⁵ 141 N.E.2d 580 (N.Y. 1957).

both members of the New York City Police Department's Narcotics Squad, to ascertain whether they conspired with a drug informant to sell narcotics.³⁶

Prior to the grand jury hearing, however, Detective Ezaugi's informant complained to the public defender's office that Detective Ezaugi and his partner were demanding profits from his narcotics sales in return for police protection.³⁷ The informant was referred to the Office of the District Attorney's Rackets Division, which outfitted him with a concealed recording device to use during his next meeting with Detective Ezaugi and his partner.³⁸ As expected, Detective Ezaugi and his partner met with the informant to discuss, among other things, the payments of money.³⁹ Unknown to the two detectives at the time, the entire conversation was being recorded for the district attorney.⁴⁰

While testifying to the grand jury, Detective Ezaugi denied that the conversation with the informant took place and, furthermore, he gave other deliberately false answers and even fabricated a conversation.⁴¹ After testifying, Detective Ezaugi had an out-of-court conversation with his partner that convinced him that the District Attorney knew all along of the true content of his conversation with the informant.⁴² Moreover, he knew that his testimony before the grand jury failed to deceive.⁴³ After pondering the implications of what had transpired, Detective Ezaugi testified at a subsequent hearing. This time, he admitted he lied the first time on the witness stand.⁴⁴

As a result of the grand jury fiasco, Detective Ezaugi was now named defendant in a criminal perjury action. Defendant Ezaugi's attorneys then attempted to invoke the defense of recantation, as articulated in *Gillette*. In doing

³⁶ See *id.* at 582.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 582 & n.1.

⁴⁰ *Id.* at 582.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

so, they urged the court of appeals not to adopt *United States v. Norris*,⁴⁵ which recently became binding authority to all federal courts, and Defendant's counsel feared it might be persuasive to some state courts such as New York.⁴⁶

In *Norris*, the United States Supreme Court chose to subscribe to the complete-crime rule of perjury;⁴⁷ that is, where "the telling of a *deliberate* lie by a witness completes the crime [of perjury] defined by law."⁴⁸ In other words, the court rejected the recantation doctrine for federal courts.

Ultimately, *Ezaugi* reaffirmed the recantation doctrine, despite *Norris*'s unequivocal rejection of it. However, in doing so, *Ezaugi* also addressed the reasons that the Supreme Court believed necessitated recantation's abolition – the concern that witnesses may deceive courts, and if they are caught, recant their lies to escape punishment.⁴⁹ As the Supreme Court observed in *Norris*,

[h]owever useful that rule [recantation] may be as an aid in arriving at testimonial truth, it does not follow that it should be made a rule of universal application, for to do so might just as surely encourage perjury, especially in those situations where a witness does not recant until he becomes convinced that his perjury no longer deceives.⁵⁰

⁴⁵ 300 U.S. 564 (1937).

⁴⁶ Although a federal decision on perjury recantation is not binding on state courts, Detective Ezaugi's attorneys feared the *Ezaugi* court would find *Norris* persuasive and, thus, argued vehemently against New York adopting it:

[E]ven if the Federal Courts *limit* the doctrine [sic] of recantation as last enunciated in *People v. Gillette* [] there is no reason for this Court to renounce the *Gillette* case. . . . Even if the *Norris* rule completely and without exception discredited the *Gillette* rule, which it does not, it would not be the first time that the United States rule of policy was different from the state rule in a particular instance. A most notable illustration is that in the United States Courts, a constitutional prohibition against unlawful search and seizure is rigidly observed, whereas in our Courts we do not have the enforcement of such a prohibition despite a similar state constitutional provision.

Brief for Appellant at 53-54, *People v. Ezaugi*, 141 N.E.2d 580 (N.Y. 1957) (citing *People v. Defore*, 150 N.E. 585 (N.Y. 1926), *cert. denied*, 270 U.S. 657 (1926)).

⁴⁷ See *infra* note 65 and accompanying text.

⁴⁸ *Norris*, 300 U.S. at 576 (emphasis added).

⁴⁹ See *id.* at 574.

⁵⁰ *Ezaugi*, 141 N.E.2d at 583.

Clearly, the *Ezaugi* defendant recanted his false testimony only after being convinced that his perjury was no longer believable. Realizing this, the court of appeals considered Detective Ezaugi's recantation "not a demonstration of penitence to purge the torments of a guilty conscience, but a calculated effort to escape the dire consequences of admitted false swearing."⁵¹

Taking these concerns into consideration, the *Ezaugi* court then limited the application of the recantation doctrine to the following circumstances: (1) when a perjurer corrects knowingly false testimony; (2) if it is done "promptly"; (3) if it is done "before the body conducting the inquiry"; (4) if it is done before the inquiry has been deceived or misled to the detriment of its investigation; (5) and, finally, if no reasonable likelihood exists that the perjurer has learned his untruths have been or will be discovered.⁵²

The fourth and fifth elements were entirely new to New York (the fifth was identical to a concern expressed in *Norris*) and caused one dissenting justice to fear the demise of the defense's utility in light of the majority's decision.⁵³ All other elements the *Ezaugi* court listed were inherited from *Gillette*.

B. *The Current Recantation Law in New York*

In 1965, the New York legislature codified the recantation doctrine based on the *Ezaugi* decision in section 210:25 of the New York Penal Law.⁵⁴ In doing so, the legislature made it an affirmative defense and adopted substantially the language of the Model Penal Code's retraction statute.⁵⁵ Unlike New York's common law recantation defense, New York Penal Law Section 210.25 called the defense "retraction," rather than "recantation," and required that a witness retract his false statement "in the course of the proceeding in which it was made," rather than "promptly," as was held in *Ezaugi*.⁵⁶

⁵¹ *Id.*

⁵² *See id.*

⁵³ *Id.* at 583 (Desmond, J., dissenting) (stating that the new elements, "while appearing to reaffirm the ancient and sound recantation rule, (citation omitted) actually so limits and hedges that rule as to leave it without any utility").

⁵⁴ *See* New York State Commission on Revision of the Penal Law and Criminal Code, PROPOSED NEW YORK PENAL LAW, COMMISSION STAFF NOTES 135 (1964).

⁵⁵ MODEL PENAL CODE § 241.1(4) (1967). *See infra* note 116 and accompanying text for the full text of this statute.

⁵⁶ *See Ezaugi*, 141 N.E.2d at 583.

The codified retraction defense, which to present has never been amended, reads as follows:

In any prosecution for perjury, it is an affirmative defense that the defendant retracted his false statement in the course of the proceeding in which it was made before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed.⁵⁷

1. New York Penal Law Section 215.25 is Unclear

Probably the most ambiguous part of the statute is the term “in the course of the proceeding.” Does this mean during the course of an entire criminal trial? That is, from grand jury to sentencing hearing, or just during the grand jury hearing?⁵⁸ Or in a civil trial, from discovery until all post-trial appeals have been exhausted?

Unfortunately, New York lawmakers left no legislative history – and the courts have generated little precedent – to explain the duration of the *locus poenitentiae*,⁵⁹ which, in the context of a recantation rule, refers to the time period in which one may correct his misstatement in order to be pardoned from a perjury prosecution. To complicate matters, the little precedent that exists is pre-1967 (before the statute was codified and enacted); thus, it interprets the common law recantation defense, which uses the word “promptly,” from *Ezaugi*, rather than “in the course of the proceeding.” Lastly, though the statute has been in effect and good law for over thirty years, no court has rendered a published decision commenting on the duration of the *locus poenitentiae* in reference to the codification’s language.

Needless to say, it is unclear how applicable the pre-1967 recantation case law is to today’s statute. Keeping this in mind, this Article will now examine the few New York decisions that define the *locus poenitentiae*.

Early in the century, one court held the recantation defense to be viable when one corrects false testimony “before the submission of the case.”⁶⁰ Oddly

⁵⁷ See N.Y. PENAL LAW § 210.25 (McKinney 1988).

⁵⁸ The retraction statute is equally applicable to civil trials, but it *may* have stronger due process implications for criminal trials. See *supra* note 13.

⁵⁹ For a more detailed discussion of *locus poenitentiae*, see *infra* notes 96-116 and accompanying text.

⁶⁰ *People v. Brill*, 165 N.Y.S. 65, 71 (N.Y. Ct. of Gen. Sessions, N.Y. County 1917) (citing *People v. Gillette*, 111 N.Y.S. 133 (N.Y. App. Div. 1908)).

enough, the same court later barred the recantation defense for one who recanted a four-month-old misstatement before the termination of the proceeding.⁶¹ The most recent case, decided in 1959 (which is the only one to comment on the pre-codification *Ezaugi* standard), said a correction of testimony over two weeks after a witness first lied to a grand jury did not automatically preclude the use of the recantation defense.⁶²

From a plain reading of the statute, “in the course of the same proceeding” – if not constituting the *entire* proceeding – is at least a longer period of time than “done promptly.” The few commentators that discuss this distinction concur:

In place, however, of the *Ezaugi* requirement that the retraction be “done promptly,” §210.25 provides a defense if the retraction is made “in the course of the proceeding.” If there is a temporal difference between the making of the false statement and a retraction thereof by the defendant, §210.25 recognizes that the purposes of justice are equally well served if the retraction is something less than “promptly” made, provided however, that when the false statement is retracted, it has not substantially affected the proceeding and has not been or was not then likely to be exposed.⁶³

As mentioned previously, to date no New York court has discussed this distinction in the context of New York’s retraction statute. But a few other jurisdictions have either by statute or case law defined “procedure” within the context of their recantation defense.⁶⁴ Perhaps one of these cases might be persuasive to a New York court pondering this distinction.

⁶¹ See *People v. Markan*, 206 N.Y.S. 197, 199 (N.Y. Ct. of Gen. Sessions, N.Y. County 1924).

⁶² See *People v. Ashby*, 195 N.Y.S.2d 301, 304 (N.Y. App. Div. 1959), *rev’d on other grounds*, 168 N.E.2d 672 (N.Y. 1960).

⁶³ N.Y. PENAL LAW § 210.25, Arnold D. Hechtman, Practice Commentaries, 488, 489-90 (McKinney 1975); N.Y. PENAL LAW § 210.25, Richard G. Denzer & Peter McQuillan, Practice Commentary, 710, 712 (McKinney 1967). The preceding commentaries, by different authors writing on the same statute, are identical. Interestingly, the subsequent McKinney commentary included in N.Y. PENAL LAW § 210.25, William C. Donnino, Practice Commentaries, 515, 521 (McKinney 1988), makes no mention of this distinction. Perhaps the last author, Mr. Donnino, because of a lack of controlling authority, disbelieves the distinction asserted by his predecessors to the McKinney commentaries.

⁶⁴ See *infra* notes 104-07 and accompanying text.

Ambiguity still remains, however, and liars deciding whether to correct a lie have no clear-cut answer to whether their *locus poenitentiae* has expired.

III. THE COMPLETED-CRIME RULE: THE REJECTION OF THE RECANTATION DEFENSE

Jurisdictions that reject the recantation defense consider the act of making willful and knowingly false statements to be criminally culpable behavior. "Deliberate material falsification under oath constitutes the crime of perjury, and the crime is complete when a witness's statement has once been made," said the Supreme Court in *United States v. Norris*.⁶⁵

The key element to completing the crime of perjury is willfulness. Thus, a witness whose conscience compels him to subsequently correct lies he has offered while under oath is still a perjurer who deserves punishment, according to the complete-crime rule. In fact, as the *Norris* court said, a witness's first willful misstatement is considered culpable conduct from the instant it was uttered; therefore, he cannot escape the penal consequences by invoking a defense.⁶⁶

The *Norris* Court, an ardent supporter of the completed-crime rule, expressed its distaste for the recantation defense:

[The recantation defense] ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross examination, by extraneous investigation[,] or other collateral means.⁶⁷

Proponents of the completed-crime rule, such as the *Norris* Court, feel its deterrent value most effectively optimizes truthfulness of initial statements by deterring

⁶⁵ 300 U.S. 564, 574 (1937).

⁶⁶ See *id.* Keep in mind, the key elements for perjury culpability are that the false statement was known to be false and made willfully. Without these elements, perjury cannot be predicated. But, also remember, a witness threatened with perjury can argue that a subsequent statement to correct or clarify previous testimony is indicative that one did not willfully and knowingly lie from the start. In such an instance, a crime has not been committed. See *supra* notes 1, 22-29 and accompanying text.

⁶⁷ *Norris*, 300 U.S. at 574.

fabrication in the first place,⁶⁸ in addition to punishing liars for culpable behavior regardless of their subsequent corrections, if any. In other words, retributive theory favors punishment for an offered lie, regardless of any retraction made by the liar.⁶⁹

The completed-crime rule became known as the federal rule on recantation, as a result of the Supreme Court's adoption of it in *Norris*.⁷⁰ Ironically, use of this term today would be an anachronism since Congress substantially rejected the completed-crime rule in the perjury section of its Organized Crime Control Act in 1970.⁷¹ Despite Congress's adoption of the recantation rule, the majority of states still adhere to the completed-crime rule. In fact, one completed-crime jurisdiction expressly rejects the recantation rule by statute.⁷²

IV. A SURVEY OF THE RECANTATION DOCTRINE NATIONWIDE

All recantation defenses in the United States, whether they be court made or statutory,⁷³ derive their basic elements from the defense as set forth in *Ezaugi* and later codified by New York's legislature (which adopted substantially the language of the Model Penal Code⁷⁴). Although other jurisdictions' elements are borrowed from New York, not all recantation defenses are the same. For instance, some states use only a portion of New York's elements, while others use them all; hence, they follow what has been known as the "New York rule."⁷⁵ Of those elements that are

⁶⁸ See *id.* at 574. See also *Loubriel v. United States*, 9 F.2d 807 (2d Cir. 1926); *Martin v. Miller*, 4 Mo. 39 (1835).

⁶⁹ See *Norris*, 300 U.S. at 574.

⁷⁰ See W.M. Moldoff, Annotation, *Recantation as Defense in Perjury Prosecution*, 64 A.L.R.2D 276, at 278 (1959).

⁷¹ See 18 U.S.C. § 1623 (1994).

⁷² See WIS. STAT. § 946.31 (1996).

⁷³ Today, almost all recantation defenses are statutory.

⁷⁴ The American Law Institute codified the *Ezaugi* decision in MODEL PENAL CODE § 241.1(4) (1967), changing the language slightly, which, in turn, New York's legislature adopted in its codification of the recantation defense in N.Y. PENAL LAW § 210.25 (McKinney 1988). Since then, most states with recantation defenses have adopted the *Ezaugi* decision, as enunciated in the Model Penal Code's language.

⁷⁵ See *Norris v. United States*, 86 F.2d 379 (8th Cir. 1936), *rev'd*, 300 U.S. 564 (1937); *Salzman*, *supra* note 4, at 280; W. M. Moldoff, Annotation, *Recantation as Defense in Perjury Prosecution*, 64 A.L.R.2D 276, at 278 (1959).

borrowed, some jurisdictions use differing language. Such language variations may be only subtle, yet they have an impact on the defense's application. But all jurisdictions that subscribe to the defense are the same in that all the elements used, in part or whole, come from New York. In other words, states have not created new elements that are unique to their jurisdiction.

There are three basic elements, which include (A) motive or *mens rea*, (B) *locus poenitentiae*, and (C) effect on party and/or proceeding.

A. *Motive or Mens Rea Element*

Motive is the "cause or reason that moves the will and induces action."⁷⁶ The first recantation defense, formulated by *People v. Gillette*,⁷⁷ made no mention of a motive requirement for the recanter. Other subsequent decisions, however, heavily criticize the *Gillette* court's failure to mention the motive element; they insist that without one, the incentive to perjure oneself would actually increase.⁷⁸

Today, most jurisdictions and the Model Penal Code have expanded on *Gillette* and now look to the liar's *mens rea* to determine if he deserves a defense. Keep in mind, however, that motive, in the context of this Article, does not refer to the reason the witness originally lied on the stand. Rather, in the context of the recantation doctrine, motive refers to the liar's reasons for recanting his misstatements. In particular, a court would look to see if a recanter's motivation for correcting his lies is to avoid prosecution by authorities who are aware or will become aware of the lies. Although this goal is universal to most recantation-rule jurisdictions, the language jurisdictions employ to achieve this goal is sometimes different. Additionally, some jurisdictions – like the *Gillette* opinion – still disregard motive entirely.⁷⁹ Below this Article will discuss the different language jurisdictions use to determine whether the liar's motive for recanting entitles one the shelter of a recantation defense. In addition, the Article shall look at recantation

⁷⁶ BLACK'S LAW DICTIONARY 1014 (6th ed. 1990).

⁷⁷ 111 N.Y.S. 133 (N.Y. App. Div. 1908).

⁷⁸ See *United States v. Norris*, 300 U.S. 564, 575 (1937) (criticizing *Gillette*'s precedential value because it was not rendered by the court of appeals, New York's highest court, and because a subsequent case, *People v. Markan*, 206 N.Y.S. 197 (N.Y. Ct. of Gen. Sessions, N.Y. County 1924), refused to follow *Gillette* where a contradictory statement was not part of the same examination at which the first statement was uttered); *People v. Ezaugi*, 141 N.E.2d 580, 582-83 (N.Y. 1957) (implying that the recantation defense should not be universally applied in situations where the liar has a tainted motive for recanting).

⁷⁹ See, e.g., COLO. REV. STAT. ANN. § 18-8-508 (West 1986); N.J. STAT. ANN. § 2C:28-1 (d) (West 1995).

statutes that disregard motive altogether and how motive, or a lack thereof, affects application of the recantation defense.

1. Objective-View-of-Motive Standard

Most recantation defense language requires a false statement to be corrected “before it became manifest that the falsification [of one’s prior statement] was or would be exposed.”⁸⁰

This type of language, semantically, does not look exclusively at a “pure motive” – that is, the subjective reason the liar recants. The language aims to preclude the recantation defense to a witness who fears he will soon be caught and hopes to escape punishment by recanting, because the authorities have discovered or will discover his untruths.

The term “objective-view-of-motive” standard is more accurate because a sensible interpretation of the language “it becomes manifest” does not require courts to look only to the liar’s *mens rea*. If the authorities merely have discovered the lie or will discover the lie in the future, then the defense is barred. Admittedly, however, few courts have discussed this distinction. In fact, some courts in interpreting “it becomes manifest” have flatly stated the opposite; that is, that this language looks only to the subjective *mens rea* of the liar.⁸¹ Thus, this language, as

⁸⁰ MODEL PENAL CODE § 241.1 (4) (1997). See also the following state recantation statutes, which use the same or similar language: ALA. CODE § 12A-10-107 (1995); DEL. CODE ANN. tit 11, § 1231 (1996); FLA. STAT. ANN. § 837.07 (West 1994); HAW. REV. STAT. § 710-1064 (1993); ILL. COMP. STAT. ANN. ch. 720, para. 5/32-2 (c) (West 1993); KY. REV. STAT. ANN. § 523.090 (Michie/Bobbs-Merrill 1990); ME. REV. STAT. ANN. tit. 17-A, § 451 (3) (West 1983); MONT. CODE ANN. § 45-7-201(5) (1997); N.D. CENT. CODE § 12.1-11-04 (3) (1997); N.J. STAT. ANN. § 2C:28-1 (d) (West 1995); N.Y. PENAL LAW § 210.25 (McKinney 1988); OR. REV. STAT. § 162.105 (1995); 18 PA. CONS. STAT. ANN. § 4902 (d) (West 1983); R.I. GEN. LAWS § 11-33-1 (d) (1994); WASH. REV. CODE ANN. § 9A.72.060 (West 1988).

⁸¹ See *United States v. Clavey*, 578 F.2d 1219, 1222 n.5 (7th Cir. 1978); *State v. Hanson*, 302 N.W.2d 399 (N.D. 1981). Both the *Clavey* and *Hanson* cases hold that their recantation statutes are based on N.Y. PENAL LAW § 210.25 (McKinney 1988), which is based on the rule enunciated in *People v. Ezaugi*, 141 N.E.2d 580 (N.Y. 1957). One part of the original *Ezaugi* rule, the *Hanson* court pointed out, is that a successful retraction defense is viable “when no reasonable likelihood exists that the witness has learned that his perjury is known or may become known to the authorities.” *Hanson*, 302 N.W.2d at 403 (quoting *Ezaugi*, 141 N.E.2d at 583) (emphasis added). This, essentially, is the good-faith standard, which is discussed later. See *infra* 87-88 and accompanying text. Thus, the *Hanson* court believes

that the exposure of the perjury becomes “manifest” when the defendant knows or has reason to know that the authorities are or will be aware of the falsification . . . it may be important to know whether or not the authorities have already discovered, or are certain to discover, the falsification when we are assessing the defendant’s state of mind, but that alone does not determine the validity of the

interpreted by these courts, is really a good-faith motive, which is discussed in the following section.⁸²

Despite these interpretations, this Article contends that a plain reading of the language instructs courts to look to the outside circumstances that exist at the time of a liar's recantation to determine if he had the proper motivation to recant — namely, whether authorities have discovered or will discover the lies before the liar recants.⁸³ Thus, it is possible for a lying witness who is convinced of the secrecy of his misstatements to repent and offer a retraction and still face a perjury conviction. For instance, if, unknown to a now-recanting witness, authorities learn through other means (or it is manifest that they will subsequently learn through other means) that the witness lied when first testifying, the witness's recantation defense is divested and he will face a perjury conviction. In order to fulfill this element's language, the recantation must have been done "before it became manifest that the falsity of one's prior statement was or would be exposed."⁸⁴ This means manifest to the authorities, or, presumably, the liar, himself, believes it has become manifest to the authorities.⁸⁵ Therefore, if the authorities discover the lie,

retraction defense. It is not the state of mind of the authorities that controls.

Hanson, 302 N.W.2d at 403.

The federal judiciary shares similar sentiments and interprets this language as applying to the witness, himself. *See, e.g.*, *United States v. Denison*, 663 F.2d 611 (5th Cir. 1981); *United States v. Serimgeour*, 636 F.2d 1019 (5th Cir. 1981); *United States v. Tucker*, 495 F. Supp. 607 (E.D.N.Y. 1980); *United States v. Swainson*, 548 F.2d 657 (6th Cir. 1977); *United States v. Mazzei*, 400 F. Supp. 17 (W.D. Pa. 1975). *See generally* Annotation, 65 A.L.R. FED. 177, 191-95 (1983).

⁸² *See infra* notes 87-88 and accompanying text where this Article discusses the good-faith motive.

⁸³ This Article later advocates this type of motive standard for an ideal recantation defense. *See infra* notes 138-53 and accompanying text.

⁸⁴ The element would also be fulfilled if at the time of the trial for perjury it comes to light that the lying subsequently came to the attention of the authorities.

⁸⁵ Again, we *presume* that this language applies to the liar's subjective belief that the authorities have or will discover his lies. There is little, if any, case law to contradict this hypothesis. Assuming, however, this language is inapplicable to the liar's *mens rea*, there would be a different outcome under the following hypothetical: A witness, who happens to be nervous and perhaps a bit paranoid, convincingly lies on the witness stand. The witness subjectively believes the authorities have or will discover his falsehoods, but in reality there is no prospect of the disclosure. Because of this fear, he says to the court, "I know the prosecution learned my testimony was intentionally false; therefore, I would like to retract it now and replace it with the truth," which he does. If we interpret the language as *not* applying to the liar's beliefs, the witness will have successfully fulfilled the objective-view-of-motive element under this interpretation of the language, and he would be protected from perjury prosecution. (Only if the authorities have or will possibly catch the lie can the witness be prosecuted.)

it is irrelevant what the recanter believes. In summary, under the objective-view-of-motive standard, if either the authorities discover the lie, or the liar subjectively believes the authorities have discovered or will discover the lie (even if the authorities had not and will not discover the lie),⁸⁶ the recantation defense is unavailable under the objective-view-of-motive.

2. Good-Faith Motive Standard

Jurisdictions that follow a good-faith standard provide that “a recantation must take place before the discovery of the falsification became known to the witness, himself.”⁸⁷ Though the policy goal for this type of language is identical to that of the objective-view-of-motive language discussed previously,⁸⁸ the outcome of its application is not always the same. With this purely subjective language, it is irrelevant whether the authorities ever learn of the lie. To invoke the defense, it only matters that the liar himself has no knowledge that the authorities have or will have learned of his lie before he retracts it. Thus, as long as a witness believes his untruths are secret, he may invoke the defense. Needless to say, once the authorities have made public their knowledge of the lies or commenced a perjury prosecution against the liar, the discovery of the lie is known to the liar and the defense is divested.

This good-faith motive is better understood by contrasting it with the objective-view-of-motive standard in a hypothetical: A witness testifies falsely, but later decides to clear his conscience by offering the truth to the court. Unknown to the witness and before his recantation, the district attorney obtains documents that incontrovertibly prove the witness willfully lied while testifying. Using an objective-view-of-motive, the witness must be convicted of perjury because it became manifest that the falsification was or would be exposed. For an objective-view-of-motive standard, the liar’s beliefs are usually irrelevant.

However, with a defense that requires a goodfaith motive, this element is satisfied because the witness subjectively believes his false statements were secret

It would be irrelevant that his *mens rea* is guilty, in that he believes he will soon be caught.

⁸⁶ See *supra* note 85.

⁸⁷ The language quoted above is fictitious; no statute uses precisely the same language, but the following statutes have similar language: ALASKA STAT. § 11.56.235(b)(1) (1996); HAW. REV. STAT. § 710-1064(1)(a) (1993). In addition, OR. REV. STAT. § 162.05(a) (1997) has similar motive language, which provides a retraction to be made “in a manner showing complete and voluntary retraction of the prior false statement.” *Id.*

⁸⁸ See *supra* notes 80-85 and accompanying text.

at the time of recantation. Therefore, under a good-faith motive requirement, the witness's retraction excuses his former perjury.

3. Motive Irrelevant

A small number of jurisdictions have no motive requirement for their recantation defenses.⁸⁹ For these jurisdictions, it is important only that the statement was retracted – the reason why is purely irrelevant. As long as a liar recants, he may still invoke the defense so long as all other requisite elements of the defense are satisfied.

Jurisdictions with this type of defense are few in number and have elicited criticism from courts and commentators alike;⁹⁰ even some among those who are ardent supporters of the recantation doctrine dislike a no-motive recantation defense.⁹¹ Clearly, those who subscribe to the complete-crime rule believe that disregarding the motive of a recanter perverts justice by encouraging perjury.⁹²

Nonetheless, the motive-irrelevant standard does have its advocates who reason as Judge Desmond does below:

[S]ince the recantation rule's purpose is not to reward or punish the liar but to get the truth into the record, the perjurer's motive for recanting has nothing to do with it at all.

⁸⁹ COLO. REV. STAT. ANN. § 18-8-508 (West 1986); ILL. COMP. STAT. ANN. ch. 720, para. 5/32-2 (c) (West 1993); IOWA CODE ANN. § 720.2 (West 1993). *See also* *People v. Ezaugi*, 141 N.E.2d 580, 584 (N.Y. 1957) (Desmond, J., dissenting) (arguing that motive element should not be considered for deciding the availability of the recantation defense); *Commonwealth v. Irvine*, 14 Pa. D. & C. 275 (1930). Today, the *Irvine* court's adoption of the no-motive standard is not followed because Pennsylvania's retraction statute, 18 PA. CONS. STAT. ANN. § 4902(d) (1983), specifically provides for a motive requirement.

⁹⁰ *See Ezaugi*, 141 N.E.2d at 582-83. In addition, this Article is critical of the no-motive standard.

⁹¹ *See id.* at 583; Salzman, *supra* note 4, at 280.

⁹² *United States v. Norris*, 300 U.S. 564, 574 (1937); Recent Case, *Criminal Law – Perjury – Retraction of False Testimony Held No Bar to Prosecution*, 51 HARV. L. REV. 165 (1937) ("Since, however, a perjurer will not usually retract unless his falsehood has been demonstrated, retractions thus induced will be of little value in furthering the administration of justice.").

The high public purposes and policy behind the recantation rule should constrain us to uphold and implement it, not destroy it by limitations [such as a motive].⁹³

Even the American Law Institute, which advocates a motive standard in its Model Penal Code,⁹⁴ concedes that there is "some possibility that the defense may be unfairly denied if the courts apply too rigidly the requirement that recantation precede exposure of the falsehood."⁹⁵ Nevertheless, the no-motive standard is still regarded as unsound and followed by very few jurisdictions.

B. Locus Poenitentiae or Time Period

Locus poenitentiae,⁹⁶ Latin for "opportunity to repent," refers to the time period in which one may recant false testimony and avoid a perjury prosecution. Like all other recantation defense elements, a subtle difference in language affects the defense's application significantly. The *Ezaugi* court first required a liar to recant his statement "promptly" before it became manifest that the falsity was or would be exposed and before the proceeding was prejudiced.⁹⁷ Following the Model Penal Code's lead,⁹⁸ New York codified *Ezaugi* using the language "in the course of the proceeding in which it was made,"⁹⁹ instead of "promptly."¹⁰⁰ The vast majority of jurisdictions use language that is largely synonymous to the Model Penal Code. A smaller number of courts use language that is similar, but more

⁹³ *Ezaugi*, 141 N.E.2d at 584 (Desmond, J., dissenting).

⁹⁴ See MODEL PENAL CODE § 241 (4) (1962). This code section provides that a retraction must be made "before it became manifest that the falsification was or would be exposed." *Id.*

⁹⁵ MODEL PENAL CODE § 241 cmt. 7 (1980).

⁹⁶ Justice Roberts in *United States v. Norris*, 300 U.S. 564, 572 (1937), uses this term to describe the time period in which one has to recant his false statement.

⁹⁷ *Ezaugi*, 141 N.E.2d at 580.

⁹⁸ MODEL PENAL CODE § 240.1 (4) (1962). See *infra* note 116 and accompanying text for the full text.

⁹⁹ N.Y. PENAL LAW § 210.25 (McKinney 1988).

¹⁰⁰ *Ezaugi*, 141 N.E.2d at 583.

defined, such as during the "same continuous trial,"¹⁰¹ "before completion of the testimony at the official proceeding,"¹⁰² and before the case is "submitted to the ultimate trier of fact."¹⁰³

But for the Model Penal Code, and other statutes like it, what does "proceeding" mean? As mentioned earlier, for over thirty years that New York Penal Law section 210.25 has been on the books, New York's judiciary has never commented on its recantation defense statute.¹⁰⁴ Other jurisdictions have at least received interpretations from their judiciaries: "Without question," a New Jersey court said, "the term 'proceeding,' standing alone, is broad enough to cover each step or all steps in a criminal action from commencement to final legislation."¹⁰⁵

Other courts have given the term "proceeding" a narrower reading than New Jersey.¹⁰⁶ In addition, some state lawmakers have, themselves, expressly defined what "proceeding" means by statute.¹⁰⁷

The definition of such words is of paramount importance. For example, if "proceeding" is construed narrowly, it could mean before the testifying witness leaves the stand. In this instance, one who recants after leaving the stand may not have caused harm to the parties or proceeding, and he may have even retracted before it became manifest that his falsity has or would be discovered; yet because his retraction was after the mandated *locus poenitentiae* (which in this instance is the same "proceeding," interpreted to mean before he leaves the witness stand), his

¹⁰¹ ILL. COMP. STAT. ANN. ch. 720, para. 5/32-2 (c) (West 1993). See also FLA. STAT. ANN. § 837.07 (West 1996) (using the language "in the same continuous proceeding or matter").

¹⁰² TEX. PENAL CODE ANN. § 37.05 (West 1995).

¹⁰³ OR. REV. STAT. § 162.105(c) (1997).

¹⁰⁴ See *supra* notes 59-64 and accompanying text.

¹⁰⁵ State in the Interest of J.S., 642 A.2d 430 (N.J. Super. Ct. Ch. Div. 1994).

¹⁰⁶ See *People v. Valdez*, 568 P.2d 71 (Colo. 1977). Although Colorado's statute codifying the recantation defense already had defined the word "proceeding" by statute, the *Valdez* court further defined it as including various stages of a trial, but not a mistrial. *Id.*

¹⁰⁷ ARK. CODE ANN. § 5-53-104 (Michie 1995) provides: "Statements made in separate hearings at separate stages of any official proceeding shall be deemed to have been made in the course of the same proceeding." But this is limited by *Brown v. State*, 707 S.W.2d 313 (1986), which held in the context of Arkansas' recantation statute, that a hearing plea withdrawal and the hearing on the accepted guilty pleas were not part of the same "proceeding" when the previous phase ended. COLO. REV. STAT. ANN. § 18-8-508 (West 1986) in part, provides: "Statements made in separate hearings at separate stages of the same trial or administrative proceeding shall be deemed to have been made in the course of the same proceeding." *Id.*

recantation defense will fail. By contrast, jurisdictions that interpret "proceeding" broadly, might award a recantation under these circumstances.

Another important distinction is that jurisdictions employ one of the three different forms of *locus poenitentiae*. Some use a fixed or independent time period to determine whether a liar deserves a pardon. Others make the *locus poenitentiae* contingent upon the motive and/or prejudice to a party or proceeding. Lastly, most jurisdictions use a combination of both of these two.

In the absence of accepted terminology to describe these variations, this Article takes the liberty of coining terms for them: (1) "fixed *locus poenitentiae*," (2) "contingent *locus poenitentiae*," and (3) "hybrid *locus poenitentiae*" respectively. Each variation is discussed in turn.

1. Fixed *Locus Poenitentiae*

A small number of jurisdictions require a liar to recant before a finite period of time, which is defined by the language comprising the defense.¹⁰⁸ Unlike the other *locus poenitentiae* variations, this time period is not contingent upon any other events. An example of such language can be found in Colorado's retraction statute: "No person shall be convicted of perjury in the first degree if he retracted his false statement in the course of the same proceeding in which it was made."¹⁰⁹ Note that the only time-period requirement is that a witness retract his falsehood "in the course of the same proceeding in which it was made."¹¹⁰

2. Contingent *Locus Poenitentiae*

After a careful reading of the language of some recantation statutes, it becomes apparent that the *locus poenitentiae* is not always a finite period of time that is the same under all circumstances. Instead, most recantation defenses have variable time periods that are contingent upon another factor or factors.¹¹¹ For

¹⁰⁸ Although there may be language defining the period of time, it is often not clear what that language means, unless there is adequate case law to explain it further.

¹⁰⁹ COLO. REV. STAT. ANN. § 18-8-508 (West 1990).

¹¹⁰ *Id.* Although Colorado defines "procedure" within the context of its retraction defense, many other states have not developed a specific definition.

¹¹¹ Although most the *locus poenitentiae* for most defenses have an event upon which it is contingent, the vast majority are hybrid *locus poenitentiae*. In other words, they require that one recant before a contingent event (e.g., before the parties and procedure are prejudiced), in addition to having to follow a finite period of time (e.g., before the conclusion of the proceeding).

instance, usually one may recant before the parties or proceeding are prejudiced, and some defenses require a lie to be retracted before it becomes manifest that the falsity of their testimony has or will be known.¹¹² Additionally, some jurisdictions require a full recantation before both of these. The following recantation statute is an example of a contingent *locus poenitentiae*:

§ X Recantation – Defense to Perjury

It is a defense to perjury that a witness recant a knowingly false statement before it becomes manifest that the falsity has been or will be discovered or the lie has substantially prejudiced any party or the proceeding.¹¹³

Accordingly, for a recanter to successfully invoke a section X defense, he must recant before the lie has been or will be exposed or a party or the proceeding has been prejudiced.

Few courts, if any, have discussed the advantages or disadvantages of one *locus poenitentiae* over another. One commentator, however, has considered the distinction and, though not using this Article's terminology, expresses his fondness for the contingent *locus poenitentiae*, while criticizing a fixed time period:

[T]he immediacy with which testimony must be corrected in order for the perjury to be excused should be construed to require measurement not by an inflexible rule which perfunctorily rejects any correction made after an arbitrarily determined period of time. Instead, immediacy should be determined primarily by the measure

¹¹² The following are some defenses that require one to recant before one or both of these contingencies: ALA. CODE § 12A-10-107 (1995); DEL. CODE ANN. tit 11, § 1231 (1995); FLA. STAT. ANN. § 837.07 (West 1994); HAW. REV. STAT. § 710-1064 (1993); ILL. COMP. STAT. ANN. ch. 720, para. 5/32-2 (c) (West 1993); KY. REV. STAT. ANN § 523.090 (Michie 1990); ME. REV. STAT. ANN. tit. 17-A, § 451 (3) (West 1983); MONT. CODE ANN. § 45-7-201(5) (1997); N.D. CENT. CODE § 12.1-11-04(3) (1997); N.J. STAT. ANN. § 2C:28-1(d) (West 1995); N.Y. PENAL LAW § 210.25 (McKinney 1988); OR. REV. STAT. § 162.105 (1997); 18 PA. CONS. STAT. ANN. § 4902(d) (1983); R.I. GEN. LAWS § 11-33-1 (d)(1994); WASH. REV. CODE ANN. § 9A.72.060 (West 1988).

¹¹³ Section X is a fictitious statute. At present, no jurisdictions employ a solely contingent *locus poenitentiae*. (Most employ one that is both contingent and dependent on a fixed time period, which this Article calls a hybrid *locus poenitentiae*.) This Article later advocates an ideal reformulation of recantation statutes and employs the contingent *locus poenitentiae* type of *locus potentate*. See *infra* notes 151-53 and accompanying text.

of inconvenience or prejudice which the witness's false testimony has caused.¹¹⁴

Despite this commentator's endorsement, recantation defenses that employ a purely contingent *locus poenitentiae* element are few, if any.

3. Hybrid *Locus Poenitentiae*

A hybrid *locus poenitentiae* has both a fixed period and a period that is contingent upon other events. Of all the jurisdictions that advance the recantation rule, the hybrid *locus poenitentiae* enjoys the most popularity. This is due, no doubt, to New York's *Ezaugi* standard,¹¹⁵ which the American Law Institute promulgates in its Model Penal Code:

Retraction. No person shall be convicted of an offense under this [perjury] Section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.¹¹⁶

Notice there is both a fixed time period in which one must recant and a variable one that depends upon either the falsification being exposed or a party or the proceeding being prejudiced. In the majority of recantation defenses, like the Model Penal Code above, both of these preconditions are required before the opportunity to recant expires.

Thus, one may retract during the fixed period, but if the other event or events upon which the *locus poenitentiae* is contingent occurs, the opportunity to recant is divested. This is so even though the fixed time period, which is "in the course of the same proceeding" for the Model Penal Code, may not have passed. Likewise, if the fixed time period expires, one may not successfully recant if the events upon which the contingency depends have not occurred.

¹¹⁴ Salzman, *supra* note 4, at 279-280.

¹¹⁵ See *People v. Ezaugi*, 141 N.E.2d 580, 583 (N.Y. 1957).

¹¹⁶ MODEL PENAL CODE § 240.1 (4) (1962).

C. *Effect on Party or Proceeding*

The next element is the effect a recanter's original lie has on the party or proceeding. Again, with regard to this element, most jurisdictions follow the Model Penal Code, which drafted its language based on New York's Recantation defense. The Model Penal Code provides that a recantation defense is viable if, besides satisfying all other requisite elements, the retraction is made "before the falsification substantially affected the proceeding."¹¹⁷

Most other jurisdictions that subscribe to the recantation rule require this element,¹¹⁸ but some disregard it completely.¹¹⁹ Again, like the term "proceeding" discussed earlier,¹²⁰ it is not entirely clear what "substantially affected the proceeding" means. Does this mean a burden litigants face from having to hear a witness testify a second time, this time truthfully? Does this mean irreversible harm, such as a need for a new trial after a witness died? Or perhaps it means something simpler like the burden of selecting a new jury? To date, there is little case law to answer these questions.¹²¹ Even the Model Penal Code leaves no indication of what these words mean in its comments.¹²²

¹¹⁷ *Id.*

¹¹⁸ See ALA. CODE § 13A-10-107 (1995); DEL. CODE ANN. tit. 11, § 1231 (1995); FLA. STAT. ANN. § 837.07 (West 1994); KY. REV. STAT. ANN. § 523.090 (Michies 1990); MONT. CODE ANN. § 45-7-201(5) (1997); N.Y. PENAL LAW § 210.25 (McKinney 1988); N.D. CENT. CODE § 12.1-11-04(3) (1997); 18 PA. CONS. STAT. ANN. § 4902(d) (West 1983); WASH. REV. CODE ANN. § 9A.72.060 (West 1988).

¹¹⁹ See, e.g., COLO. REV. STAT. ANN. § 18-8-508 (West 1986); ILL. COMP. STAT. ANN. ch. 720, para. 5/32-2 (c) (West 1993); ME. REV. STAT. ANN. tit. 17-A, § 451 (3) (West 1983); TEX. PENAL CODE ANN. § 37.05 (West 1994). See also N.J. STAT. ANN. § 2C:28-1 (d) (West 1995), which provides similar language: "[W]ithout having caused irreparable harm to any party." Arkansas provides "any person who in making a retraction causes termination of any official proceeding by reason of prejudice to a legal right of party to the proceeding shall be guilty of a Class A misdemeanor." ARK. CODE ANN. § 5-53-104 (Michie 1997).

¹²⁰ See *supra* notes 17-64 and accompanying text.

¹²¹ But see, e.g., *United States v. Anfield*, 539 F.2d 674 (9th Cir. 1976); *United States v. Slawick*, 408 F. Supp. 190 (D.C. Del 1975); *United States v. Crandall*, 363 F. Supp. 648 (W.D. Pa. 1973); *United States v. Krogh*, 366 F. Supp. 1255 (D.C. Dist. 1973); Annotation, 65 A.L.R. FED. 177, 189-91 (1983).

¹²² See MODEL PENAL CODE § 241.1 cmt. 7 (1980).

This effect-on-party-or-proceeding element, while not being clearly defined, has been advocated by commentators,¹²³ but it has also had its critics.¹²⁴

V. A CASE FOR THE ADOPTION AND THE REFORMULATION OF THE RECANTATION DEFENSE

All but the most tyrannical of people believe a judicial proceeding's chief function is to bring forth truth. Therefore, it is disturbing that the recantation defense is unavailable in most jurisdictions throughout the United States. It is also unfortunate that of those states that have adopted recantation defenses, almost all of them need reformulation. An overhaul of these defenses would cure one of the two prevailing problems: first, the defense is inept at accomplishing its function of encouraging recantations; or secondly, it needs improvement to fully maximize its truth-enticing potential while discouraging lying.

A. *More Jurisdictions Should Adopt a Recantation Defense*

Although the recantation doctrine has been slowly gaining acceptance, the majority of states still remain completed-crime jurisdictions. This gives a potentially repentant witness no way to redeem himself and avoid the peril of a perjury conviction and, most important, provides no incentive for the witness to speak the truth after he has lied.

Completed-crime advocates advance two schools of thought for their rejection of the recantation doctrine. First, they believe that once the crime is committed, the "crime is complete"¹²⁵ – that is, the witness has engaged in culpable behavior for which he *must* be punished – and this punishment is deserved from the instant he utters the lie under oath. This proposition pays homage to *retributivism*, the view that society should inflict punishment on a wrongdoer because of his moral culpability.¹²⁶ Secondly, completed-crime advocates believe a liar's punishment

¹²³ Harris, *supra* note 3, at 1792.

¹²⁴ ALA. CODE § 12A-10-107 commentary (1996) (arguing that the vagueness on what "substantially affects a proceeding is undesirable").

¹²⁵ United States v. Norris, 300 U.S. 564, 574 (1937).

¹²⁶ See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §2.03 (c) (1987); WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5 (a) (6) (2d ed. 1986); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 99-107 (J. Ladd trans., 1965).

serves as both *specific* and *general deterrence* to the crime of perjury.¹²⁷ Because of this, advocates argue, the completed-crime rule actually decreases perjury by deterring witnesses from lying when first testifying.

Arguably, the first of these contentions, retributivism, has some merit in that the act of lying on the witness stand deserves punishment. It is unnecessary, however, to engage in the age-old debate on the merits of retributivism to see the unsoundness of the completed-crime rule.

If a liar knows the law will punish him for retracting a previously made lie, he will surely be hesitant to do so. This is especially true in the absence of proof that the authorities have discovered or will discover his lie.¹²⁸ Instead, he will most probably keep his lie a secret. The result of this is terribly ironic: Completed-crime advocates will fail to accomplish their retributivist goal of punishing the perjurer because the lie will never likely be discovered in the absence of a recantation defense.

The second school of thought is that the completed-crime rule's deterrence value will decrease the incidence of perjury over the recantation rule. In order to disprove this theory, it is necessary to discuss some basic criminology. Based on empirical studies, criminologists universally agree that the two strongest factors in deterring crime are, first, the severity of the penalty and, secondly, the crime's risk of apprehension and conviction.¹²⁹ The latter of the two criteria has proven most effective for deterring crime, but ironically it is the most difficult to implement.¹³⁰

Applying these two factors to the recantation rule, it is apparent that the recantation defense does not decrease deterrence, as completed-crime advocates claim. This is because a well-formulated recantation defense¹³¹ is available to liars only when there is little, if any, prospect of discovering the lie and therefore almost no chance of obtaining a conviction. As for a penalty, jurisdictions vary on

¹²⁷ For information on *specific* and *general deterrence* see generally SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 115 (6th ed. 1995).

¹²⁸ See *infra* notes 138-50 and accompanying text where this Article discusses this factor in greater detail, in addition to advocating that motive for recanting be the most important element of a recantation defense.

¹²⁹ See FRANKLIN ZIMRING & GORDON HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 158-72 (1973).

¹³⁰ See generally KADISH & SCHULHOFER, *supra* note 127, at 101-31.

¹³¹ See *supra* notes 128-53 and accompanying text.

punishment, but most are fairly harsh.¹³² Because, as most criminologists believe, the risk of being caught and convicted is the most important criterion to indicate whether one will commit a crime, the deterrence value of the completed-crime rule remains doubtful at best.

While the arguments for the completed-crime rule are precarious, the recantation rule's sound public policy of bringing forth the truth demands its adoption by all jurisdictions. Even if, for argument's sake, completed-crime proponents' goals of retributivism and deterrence *are* obtainable in a completed-crime jurisdiction, public policy demands that courts take every measure to bring forth the truth. This is true even at the expense of letting a liar get away with perjury. Although such a witness deserves punishment for his initial lie, this punishment should not be at the expense of litigants whose stake in a trial is often great.¹³³ Bringing out the truth is even more crucial in a criminal trial where life and liberty are on the line.

This balancing of public-policy interests is known in philosophy as utilitarianism.¹³⁴ Put simply, utilitarianism means that ends must justify the means; or, stated differently, one may do a "wrong" if its ultimate effect is "good" or best for society. Applying this to the recantation rule, we except the "wrong" of letting a witness's lies go unpunished if his later recantation provides the better effect of producing something "good," which is speaking the truth to the court.

Today, utilitarianism is manifest in much of our jurisprudence.¹³⁵ Indeed, much of the policy and reason behind an array of today's legislation is strictly utilitarian. Interestingly, some states have employed utilitarianism in such a way that has resulted in a slightly different recantation defense.

Some states only allow a recantation defense to a witness in a felony or other high-level case and not to a low-level trial.¹³⁶ Perhaps the reasoning for this

¹³² See, e.g., MICH. COMP. LAWS ANN. § 750.423 (West 1996) (providing a felony punishment not more than fifteen years in state prison).

¹³³ Cf. *Bussey v. State*, 64 S.W. 268, 269 (Ark. 1901).

¹³⁴ Classical utilitarianism was formulated over two centuries ago by Jeremy Bentham. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789). See generally DRESSLER, *supra* note 126, § 2.03.

¹³⁵ See, e.g., H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE (1984).

⁸ See, e.g., COLO. REV. STAT. ANN. § 18-8-508 (West 1996) (retraction defense available only against charges of perjury in the first degree); DEL. CODE ANN. tit 11, § 1231 (1995) (retraction defense available only for perjury, not for misdemeanor of making a false written statement); TEX. PENAL CODE ANN. § 37.05 (West 1994) (retraction defense only available for felony of aggravated perjury, not for

is the belief that excusing the "wrong" of perjury can only benefit society if a greater "good" is accomplished; that "good" being a fair trial of a felony or other high-level crime based on truth.

Thus, applied to a basic utilitarian balance, these states presumably reason that it is more important to punish a liar for perjury than it is to improve the chances of the truth coming to light in an insignificant low-level trial, such as for a speeding violation. Because perjury is a greater offense than, for instance, speeding, society should punish the perjurer without giving him a recantation defense, which would ultimately aid the defendant or prosecution in a speeding violation hearing. This also includes other low-level trials where crimes or issues less serious than perjury are being litigated. Some jurisdictions presumably reason that this gives the greatest benefit to society by punishing a greater crime.

Although the intent of making a distinction between high-level trials and low-level ones is noble, the logic is ultimately flawed for the same reason that the goal of retributivism is impossible in a completed-crime jurisdiction.¹³⁷ Witnesses in these low-level trials will simply not recant their testimony when the lie has not been or will not be discovered. Hence, the goal of punishing a greater crime at the expense of a lesser one will not occur, as lying witnesses will remain unrepentant for fear of prosecution.

B. *The Ideal Recantation Defense*

A well-formulated recantation defense increases the likelihood of veracity and, contrary to what critics believe, has no risk of encouraging dishonesty. But a poorly formulated defense, as some courts and commentators rightfully fear, will indeed encourage lying.¹³⁸ Likewise, a narrowly applied recantation defense, while not fostering untruthfulness, will lose the benefits of encouraging truthful witnesses.

1. Eliminate Ambiguity in the Language of Most Defenses

The first step to formulating a model recantation statute is to eliminate ambiguity. Like New York's retraction statute,¹³⁹ discussed earlier,¹⁴⁰ most

misdemeanor of simple perjury).

¹³⁷ See *supra* note 126 and accompanying text.

¹³⁸ See *United States v. Denison*, 663 F.2d 611 (5th Cir. 1981).

¹³⁹ N.Y. PENAL LAW § 210.25 (McKinney 1988).

¹⁴⁰ See *supra* notes 54-57 and accompanying text.

recantation defenses on the books today are adulterated with a lack of specificity in the language of their terms. As a result, a witness considering retracting a previously made lie is bedeviled by the question, "Is a defense available to me?" With the recantation defense, as with all criminal statutes, ambiguity should be avoided like the plague. Penal consequences are too great to be left to the capricious nature of a judge's interpretation of legislatures' written memorial – the statute. Therefore, legislatures must expressly define all terms in their recantation statutes. In the absence of unequivocal language, a potentially repentant witness will be hesitant to recant because he lacks knowledge of his fate for doing so.¹⁴¹

Some judicial-activist proponents might argue that these ambiguities can be left to the courts to decipher. Unfortunately, however, because a witness will hesitate to admit he lied if he is unclear of the recantation defense's availability, he will likely elect not to recant. This disincentive to truth telling has resulted and will result in a barrier to case-law development to correct this ambiguity. Empirical evidence of this judicial inertia can be seen in New York, where no published case has commented on the vague terms of New York's retraction statute in the thirty years that the statute has been in existence. Presumably, potential recanters in New York do not know whether their recantation was in the same "proceeding" or whether it harmed the party or proceeding, both of which are necessary to invoke the retraction defense in New York.¹⁴² In summary, case law defining vague recantation statutes will be extremely slow to develop as potential recanters will be hesitant to use the defense and take their chances in the appeals process. Therefore, it is imperative that lawmakers overhaul today's recantation statutes to define all terms within the language of their respective recantation defenses.¹⁴³

¹⁴¹ The retraction provision of the federal perjury statute, 18 U.S.C. § 1623(d) (1994), has received criticism because of the doubt over whether it or 18 U.S.C. § 1621 (1994), another perjury statute that disallows the retraction defense, is applicable. Although both are perjury statutes, only the former contains a recantation defense in sub-part (d). Thus, if unsure which statute is applicable to them, witnesses will likely choose not to recant. For a detailed discussion of this see George W. Ayccock, III, Note, *Nothing But the Truth: A Solution to the Current Inadequacies of the Federal Perjury Statutes*, 28 VAL. U. L. REV. 247 (1993). See generally Harris, *supra* note 3, at 1792; 65 AM. JUR. 2D *Perjury* § 107 (1988); SUSAN W. BRENNER & GREGORY G. LOCKHART, FEDERAL GRAND JURY PRACTICE §13.17 (1993); THE GRAND JURY PROJECT INC. OF THE NATIONAL LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES § 15.3 (d) (3d ed. 1993); Salzman, *supra* note 4, at 280-86.

¹⁴² The ambiguity of New York's recantation defense was discussed in detail earlier above. See *supra* notes 58-64 and accompanying text.

¹⁴³ As mentioned earlier, some state statutes have defined important terms within their statutes, and this is indeed wise. See *supra* note 107. More jurisdictions should do so as well.

2. Motive or *Mens Rea* Element is Paramount

The single most important element for an effective recantation defense is motive. Disregarding motive, as some recantation defense statutes do, is terribly foolish as it will likely encourage perjury. Witnesses will lie freely, and later if it becomes manifest that their lie has or will be discovered, recant their testimony. As a result, this Article advocates the objective-view-of-motive standard,¹⁴⁴ which affords a defense to a liar only if the authorities have not discovered or will not discover the lie.

In applying this motive standard, there should be no leniency. This means any indication that the lie has been or will be discovered, however slight, should preclude a defense to the liar. If the motive standard is viewed strictly, as this Article suggests, there is no chance that the availability of a recantation defense will encourage perjury, as some courts and commentators fear. However, any lesser standard of motive very well might encourage perjury.

One may suggest that a recantation defense should employ the good-faith motive requirement, which allows a defense to a liar who recants before he, himself, believes that the lie has been or will be discovered. The good-faith exception is an unwise choice for two reasons. First, it is a difficult task for any court or jury to determine one's subjective mind. Secondly, and most important, the lie is culpable conduct that deserves punishment. The only reason for excusing the lie in the first place is utilitarianism;¹⁴⁵ that is, offering the defense contributes to the greater public policy of fostering truthfulness in judicial proceedings. In the absence of any possible benefit for doing so, the lie should be punished. For instance, if the authorities know of the lie, but the liar himself believes his lie will remain secret for eternity, the court has discovered the lie and the truth will come to light, despite any recantation. Because of this, there is no benefit for pardoning the liar from perjury, which is a culpable act. In the absence of any benefit, the lie must be punished. As the Supreme Court stated in *United States v. Norris*, the lie is culpable behavior from the instant it is uttered.¹⁴⁶ Thus, the objective-view-of-motive standard more appropriately obtains the optimal benefit of fostering truthfulness while not needlessly excusing perjurers whose recantations fail to offer the court the greater benefit of veracity; after all, such information has or will become known without a later-repentant liar's recantation.

¹⁴⁴ See *supra* notes 80-86, where the objective-view-on-motive element is discussed in detail.

¹⁴⁵ See *supra* notes 134-35 and accompanying text.

¹⁴⁶ 300 U.S. 564, 574 (1937).

Judge Desmond, in his dissenting opinion in *Ezaugi*, reasoned that “since the recantation rule’s purpose is not to reward or punish the liar but to get the truth into the record, the perjurer’s motive for recanting has nothing to do with it at all.”¹⁴⁷ This argument overlooks the law’s obligation to punish perjurers when there is no benefit for pardoning the crime. Moreover, if the liar is to be found out, presumably the truth will come to light anyway. Thus, contrary to Judge Desmond’s dissent, the “interest of justice”¹⁴⁸ will be served equally if the perjurer is punished because courts still “get the truth into the record.”¹⁴⁹

Lastly, perhaps in the spirit of utilitarianism, some suggest that the recantation defense be available to witnesses who recant – even with an impure motive – if once the lie is discovered, additional corrected testimony comes out that would never have been discovered and benefits the overall proceeding.¹⁵⁰ Logically, this is a sound and well-reasoned proposition, but in practice it may encourage perjury.

3. Eliminate All Other Requirements

As long as the objective-view-of-motive standard requirement is strictly construed, as suggested above,¹⁵¹ legislatures should eliminate all other elements. It is irrelevant when a liar ultimately recants his misstatements. Therefore, to impose an arbitrary *locus poenitentiae* or time period is without purpose. If without a recantation the truth will never come to light, then it is unimportant how long the liar waited until he recanted. This is true even if it is after the conclusion of the proceeding or trial.¹⁵² What is only important is that but for the liar’s recantation the truth will never have come to light. An arbitrary, finite *locus poenitentiae* neither discourages perjury nor increases recantations. After the time period has

¹⁴⁷ *People v. Ezaugi*, 141 N.E.2d 580, 584 (N.Y. 1957) (Desmond, J., dissenting).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *United States v. Del Toro*, 513 F.2d 656 (2d Cir. 1975); Salzman, *supra* note 4, at 280.

¹⁵¹ See *supra* notes 144-50 and accompanying text.

¹⁵² Recantation of perjured testimony produces a complex set of issues in both criminal and civil trials involving how or whether to go about a retrial. In the interest of brevity, this Article does not touch upon them. For more information, see generally Janice J. Repka, Comment, *Rethinking the Standard for New Trial Motions Based upon Recantations of Newly Discovered Evidence*, 134 U. PA. L. REV. 1433 (1986); Sharon Cobb, Comment, *Gary Dotson as Victim: The Legal Response to Recanting Testimony*, 35 EMORY L.J. 969 (1986).

elapsed, perjurers will keep their lies secret. This fails to further justice. Therefore, the only sensible *locus poenitentiae* is one that is contingent upon motive only, which this Article has called a *contingent locus poenitentiae*.

The same is true with the effect-on-party-or-proceeding element. No matter how irreparably harmed the court or its litigants are, it is senseless to disallow the recantation defense. If the effect-on-party-or-proceeding element is employed in a recantation defense, witnesses will elect not to recant once it is apparent that a party or the proceeding has been harmed. Presumably any recantation of false testimony offers some benefit, however slight, to the parties and proceeding. After all, if a party or proceeding has been harmed, a recantation can do nothing but alleviate some, if not all, of the harm. With the effect-on-party-or-proceeding element included in defenses, witnesses will refrain from recanting once the lie harms the party or proceeding, and there will be no chance, however slight, of reducing that harm caused by speaking the truth. Thus, this element, along with all others except for the objective-view-of-motive element, should be discarded.

Keeping the foregoing in mind, this Article advocates the following recantation statute, which embodies all of the suggestions outlined in this Article:

§ Y Recantation. It shall be a defense to perjury if one who knowingly lies under oath retracts his falsification before it becomes manifest that the falsification was or would be exposed to the authorities.

Disregarding the effect-on-party-or-proceeding and *locus poenitentiae* elements is perhaps the most controversial proposition of this Article. The few commentators who discuss the recantation defense disagree with this Article's argument for their elimination. Instead, they argue the contrary – that these two elements are indeed necessary. However, closer reading of their writings reveals their arguments are conclusory. They fail to explain why these two elements are in fact necessary.¹⁵³

¹⁵³ Harris, *supra* note 3, at 1792. See also Salzman, *supra* note 4, at 280. Mr. Salzman, contrary to the previously mentioned commentator, Ms. Harris, offers at least *some* support for the effect-on-party-or-proceeding and *locus poenitentiae* elements as articulated in *People v. Ezaugi*, 141 N.E.2d 580 (N.Y. 1957). Nevertheless, as this Article has illustrated, his arguments for effect-on-party-or-proceeding and *locus poenitentiae* elements lack merit. Mr. Salzman writes:

While some state and federal courts have frustrated the development of a workable recantation rule through misplaced emphasis on chronological timeliness [which this Article calls a fixed *locus Poenitentiae*], the "New York rule" [see *supra* note 75 and accompanying text] advanced in *Ezaugi* recognized the proper interweaving of the factors of timeliness, motive, and prejudice as a better solution to the perjury problem. The *Ezaugi* test requires that the presiding judge inquire initially into the "timeliness" of a correction; however, the question of timeliness

IV. CONCLUSION

In order to maximize the truth-gathering function of judicial proceedings, more legislatures should adopt properly formulated recantation defenses. However, in adopting them, legislatures must use unequivocal language and formulate them in with an objective-view-of-motive, which considers the recanter's motive for retracting to be paramount in deciding whether to award a recantation defense, as this Article suggests. While motive is important, all other elements presently employed by most states' defenses should be discarded. Such a formulation will yield the following benefits: it will increase recantations of lies; discourage perjury; and, ultimately, it will best serve public policy by pardoning perjurers only when the greater good results from doing so.

turns on whether the testimony sought to be corrected has already prejudiced the administration of justice and on whether the witness believed he was providing information with his correction which the authorities did not already have. By varying the intensity of this scrutiny, a deciding court can encourage corrections whenever it deems correction helpful without making the privilege available to every potential perjurer.

Salzman, *supra* note 4, at 280 (citation omitted). Additionally, Mr. Salzman advocates – in a more conclusory manner – that recantation defenses should incorporate the effect-on-party-or-proceeding element: “Extreme cases, such as a correction offered subsequent to the completion of a trial, surely cannot be permitted. Thus, even under the most liberal view of ‘immediately,’ there must be some point after which a correction will always be too late.” *Id.* at 279 n.54. Notice that Mr. Salzman fails to give any reason for such a time limitation.