Notes

Civil Remedies for Perjury: A Proposal for a Tort Action

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It is considered well-settled that no civil action lies in tort for perjury[1] or conspiracy to commit perjury[2] in any phase of a judicial proceeding.[3] This rule is neither a legislative nor a constitutional command, but exists through modern application of a common law creation of the English judiciary. American courts have remained true to this rule with virtual unanimity, giving undue weight to the mere existence of precedent. Although the necessity for stare decisis is obvious, courts have not hesitated in other areas to change judicial fiat when the cause of substantial justice has demanded it.[4] A reevaluation of the public policies giving rise to the

1. *See, e.g.*, Droppleman v. Horsley, 372 F.2d 249, 251 (10th Cir. 1967); Liddell v. Smith, 345 F.2d 491, 494 (7th Cir. 1965); Ragsdale v. Watson, 201 F. Supp. 495, 502-03 (W.D. Ark. 1962); Kessler v. Townsley, 132 Fla. 744, 746, 182 So. 232, 233 (1938); Kinter v. Kinter, 84 Ohio App. 399, 401, 87 N.E.2d 379, 380 (1949); Ginsburg v. Halpern, 383 Pa. 177, 180, 118 A.2d 201, 202 (1955); Felts v. Paradise, 178 Tenn. 421, 424, 158 S.W.2d 727, 728 (1942); W.G. Platts, Inc. v. Platts, 73 Wash. 2d 434, 440, 438 P.2d 867, 871 (1968).

2. A conspiracy to give or procure false testimony is generally not actionable as a civil matter. *E.g.*, Droppleman v. Horsley, 372 F.2d 249, 251 (10th Cir. 1967); Kinter v. Kinter, 84 Ohio App. 399, 401, 87 N.E.2d 379, 380 (1949); W.G. Platts, Inc. v. Platts, 73 Wash. 2d 434, 440, 438 P.2d 867, 871 (1968). However, some jurisdictions consider a conspiracy to use legal proceedings fraudulently, or to misuse legal proceedings, to be actionable in tort. Dixon v. Bowen, 85 Colo. 194, 198, 274 P. 824, 825 (1929); Oldham v. McRoberts, 37 Misc. 2d 979, 984, 237 N.Y.S.2d 26, 31 (Sup. Ct.), *aff'd*, 18 App. Div. 2d 773, 235 N.Y.S. 2d 457 (1962); Smith v. Nippert, 76 Wis. 86, 87, 44 N.W. 846, 846 (1890).

3. Johnson v. Stone, 268 F.2d 803, 804 (7th Cir. 1959); Dean v. Kirkland, 301 Ill. App. 495, 505, 23 N.E.2d 180, 187 (1939); Jenson v. Olson, 273 Minn. 390, 393-94, 141 N.W.2d 488, 490-91 (1966).

4. *See* Smith v. Allwright, 321 U.S. 649, 665 & n.10 (1944); Helvering v. Hallock, 309 U.S. 106, 119 (1940). The New Hampshire Supreme Court in Amoskeag Trust Co. v. Trustees of Dartmouth College, 89 N.H. 471, 200 A. 786 (1938) stated:

> The doctrine of *stare decisis* is not one to be either rigidly applied or blindly followed. So used, the doctrine would nullify that basic principle of the common law which permits it to grow and develop to meet new and changing social conditions and would soon render the law inelastic, archaic and useless to serve the needs of a dynamic community.

Id. at 474, 200 A. at 788.

prohibition of this action nearly 400 years ago[5] now argues in favor of the recovery of damages for those individuals injured by perjury. Whether accomplished by means of judicial reversal of the traditional rule or through legislative action, the need for change is paramount.

The Model Penal Code states that a "person is guilty of perjury . . . if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true."[6] Perjury is incompatible with the integrity and administration of justice. In order to keep the evidentiary process free of contamination, federal law makes perjury a felony punishable by imprisonment.[7] In Arizona, perjury can be punished by imprisonment, and, until October 1, 1978, the effective date of the Arizona Revised Penal Code, by the penalty of death, if an innocent person is executed because of this act.[8] Although perjury has a substantial detrimental effect upon civil and criminal litigants, public policies rooted in the early common law bar a civil recovery for damages suffered as a proximate cause of false testimony.[9] Because a recovery in tort against a perjurer is not allowed, the victim is restricted to the limited remedies provided in equity: vacation of a civil judgment or collateral attack of a criminal conviction.[10]

Among the reasons for disfavoring a civil action for perjury is the judicial belief that criminal sanctions provide a sufficient deterrent.[11]

5. Damport v. Sympson, 78 Eng. Rep. 769 (K.B. 1596); see text & notes 103-110 *infra*.

6. MODEL PENAL CODE § 241.1(1) (Proposed Official Draft 1962). The elements of the crime of perjury are the wilful giving of false testimony in a judicial proceeding on a point material to the issue or inquiry by a person to whom a lawful oath is administered. United States v. Hvass, 355 U.S. 570, 574 (1958); United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970); Hirsch v. State, 279 So. 2d 866, 869 (Fla. 1973); *see* 18 U.S.C. § 1621 (1970). *See also* Comment, *Perjury: The Forgotten Offense*, 65 J. CRIM. L. & C. 361, 362 (1974). A representative state perjury statute may be found in ch. 27, § 88, 1977 Ariz. Legis. Serv. 771 (to be codified at ARIZ. REV. STAT. ANN. § 13-2702(A)). "A person commits perjury by making a false sworn statement in regard to a material issue, believing it to be false." *Id. See also* MODEL PENAL CODE § 241.1(1)-(6) (Proposed Official Draft 1962). Perjury may be found where a false statement is made under oath in a trial, deposition, declaration, or affidavit, when accompanied by an intent to publish the matter as true. *See* Jefferson v. United States, 277 F.2d 723, 725 (9th Cir.), *cert. denied*, 364 U.S. 896 (1960); ARIZ. REV. STAT. ANN. § 13-561 (Supp. 1976-77); CAL. PENAL CODE § 118 (West 1970).

7. 18 U.S.C. § 1621 (1970); *see* United States v. Manfredonia, 414 F.2d 760, 764 (2d Cir. 1969). *See also* United States v. Otto, 54 F.2d 277, 279 (2d Cir. 1931) (perjury is a "most serious" crime with "far reaching, obstructive, and destructive effects"). The reprehensible nature of false testimony has been emphasized since early times. The Bible commands: "Thou shalt not bear false witness against thy neighbour." *Exodus* 20:13. "[A]nd, behold, if the witness be a false witness, and hath testified falsely against his brother; then shall ye do unto him, as he had purposed to do unto his brother; so shalt thou put away the evil from the midst of thee." *Deuteronomy* 19:18-19.

8. "A person who by wilful perjury of subornation of perjury procures the conviction and execution of a sentence of death of an innocent person shall be punished by death." ARIZ. REV. STAT. ANN. § 13-572(B) (1956) (repealed effective Oct. 1, 1978, ch. 142, 1977 Ariz. Legis. Serv. 670). A new Arizona Statute, effective October 1, 1978, provides that perjury is a class 4 felony. Ch. 27, § 88, 1977 Ariz. Legis. Serv. 771 (to be codified at ARIZ. REV. STAT. ANN. § 13-2702(B)).

9. *See* text & notes 103-47 *infra*.

10. *See* text & notes 19-82 *infra*.

11. *See* W.G. Platts, Inc. v. Platts, 73 Wash. 2d 434, 440 & n.3, 438 P.2d 867, 871 & n.3 (1968) *quoting* RESTATEMENT OF TORTS § 588, comment a (1938); Hargreaves v. Bretherton, (1958) 1 Q.B. 45, 54; Damport v. Sympson, 78 Eng. Rep. 769 (K.B. 1596).

Moreover, a common law judicial policy grants absolute civil immunity from suits for libel, slander, or perjury arising from participation in a legal proceeding.[12] Although this rule admittedly allows abuse of judicial administration,[13] courts nevertheless have sanctioned it to encourage prospective witnesses to come forward and testify.[14] Commentators suggest there is an urgent need for reformation of the perjury laws and for a new emphasis on prosecution.[15] Indeed, instigation of a criminal proceeding for perjury is rare: Of 41,108 federal prosecutions commenced in the United States district courts during fiscal year 1975, only 225 were for perjury.[16] Actual imprisonment after a conviction for perjury is virtually nonexistent: Of approximately 20,000 prisoners in federal institutions on June 30, 1968, only two were sentenced for perjury.[17] The criminal laws against perjury apparently are a small obstacle to the individual contemplating such an act. In 1968, the President's Commission on Law Enforcement and the Administration of Justice concluded that more effective deterrents against perjury are needed if courts wish to ensure the integrity of their proceedings.[18]

This Note will propose the creation of an action in tort for perjury. The

12. *See* text & notes 117-31 *infra*. In a recent decision the Arizona Supreme Court considered the origins of the civil immunity granted to members of the Arizona Board of Pardons and Paroles. *See* Grimm v. Arizona Board of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977). The court stated:

> It is generally agreed that the origin of official immunity (as well as of sovereign immunity) lies partly in the maxim "the King can do no wrong.". . .
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> . . . Over the years the potential liability of public officials as it related to what are termed "discretionary" functions became associated with—almost equated with—the traditional absolute immunity of judges. . . . The modern trend in the United States has been to grant more and more immunity to public officials. . . . This development has occurred in the context of logical inconsistencies and often with only cursory reasoning.

Id. at 264, 564 P.2d at 1231. The *Grimm* court held that members of the Arizona Board of Pardons and Paroles enjoy only a qualified privilege from civil suit. *Id.* at 125, 564 P.2d at 1237.

13. The Louisiana Supreme Court, in Lescale v. Joseph Schwartz Co., 116 La. 293, 40 So. 708 (1906) stated:

> The immunity contended for may . . . be abused. Its advocates seem to assume that the occasions when it could be abused would be of rare occurrence; but the fact is that every suit affords ample room for its abuse. . . .
>
> Because a certain rule has prevailed in England, and has been followed more or less extensively in those states whose jurisprudence is a mere continuation of that of England is no reason why a court, administering the civil law, and acting under a statute . . . should sanction a thing working such great hardship in individual cases, without any appreciable good to the public.

Id. at 310, 40 So. at 714.

14. *See* Petty v. General Accident Fire & Life Assurance Corp., 365 F.2d 419, 421 (3d Cir. 1966); Stewart v. Fahey, 14 Ariz. App. 149, 150-51, 481 P.2d 519, 520-21 (1971); Rainier's Dairies Corp. v. Raritan Valley Farms, Inc., 19 N.J. 552, 558, 117 A.2d 889, 891 (1955). *Cf.* Abbott v. Tacoma Bank of Commerce, 175 U.S. 409, 411 (1899) (privileged communications doctrine, although harsh, is justified by hardships present without the rule).

15. *See, e.g.*, Black, *A Report on Perjury*, 49 ILL. B.J. 574, 574-75 (1961); McClintock, *What Happens to Perjurers?*, 24 MINN. L. REV. 727 (1940); Pollard, *"False Witness"—A Comment*, 1974 CRIM. L. REV. 588, 593-96; Whitman, *A Proposed Solution to the Problem of Perjury in our Courts*, 59 DICK. L. REV. 127 (1955); Comment, *supra* note 6, at 372.

16. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT, ANNUAL REPORT, table D2, at 412 (1975).

17. FEDERAL BUREAU OF PRISONS, A REPORT OF THE WORK OF THE FEDERAL BUREAU OF PRISONS, table A7, at 29 (1968). *See* Comment, *supra* note 6, at 361.

18. REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 347 (1968).

civil remedies for perjury will first be presented and evaluated. The existing tort avenues through which a damage recovery for perjury may be pursued will then be explored. A third section presents the English and American common law origins of the judicial policies that limit recognition of a tort for perjury. The competing public policies will then be critiqued in light of current legal trends. A final discussion suggests the elements of a judicially cognizable tort for perjury and a model statute for legislative consideration.

CIVIL REMEDIES FOR A JUDGMENT TAINTED BY PERJURY

A court of equity has inherent power to consider remedial actions for relief from erroneous or fraudulently obtained judgments. Relief may be obtained on several theories: an independent action for review of a judgment obtained in an unconscionable manner;[19] a suit in equity for fraud upon the court;[20] or a motion to set aside a judgment for fraud, deceit, or similar impropriety according to Federal Rule of Civil Procedure 60(b).[21] Although these three potential remedies exist, each is circumscribed by elements that confine their applicability to a small number of cases. Further, laches may operate to bar an action, even where a previous judgment is obtained by perjury.[22] Although some relief may be obtained, primarily where perjury is discovered within one year from the date of final judgment, a new remedy should be designed to encompass a broader range of factual circumstances. However, before such a proposal can be made, the weaknesses of existing legal remedies must be demonstrated.

At common law, courts of equity would entertain an independent action to set aside a judgment under very limited circumstances. The requirements for relief under this theory are generally recognized to be:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from

19. *See* text & notes 23-37 *infra*.
20. *See* text & notes 52-57 *infra*.
21. *See* text & notes 58-66 *infra*.
22. An inexcusable delay in asserting rights, resulting in a disadvantage to another, is laches. Chisholm v. House, 183 F.2d 698, 705 (10th Cir. 1950); Northern Pac. Ry. v. Boyd, 177 F. 804, 823 (9th Cir. 1910). Several courts have barred a petition for equitable review on the ground of laches. *See* O'Neal v. B.F. Goodrich Rubber Co., 204 Ark. 371, 375, 162 S.W.2d 52, 54 (1942); First Nat'l Exch. Bank v. Harvey, 176 Wis. 64, 68-69, 186 N.W. 215, 216-17 (1922). Where the plaintiff can show that an adverse party prevented him from the exercise of due diligence, however, this requisite is held in abeyance: A delay induced by the fraud of a defendant is not laches. Duniway v. Barton, 193 Ore. 69, 85, 237 P.2d 930, 937 (1951).

However, laches may not apply in a bill of review for fraud upon the court. The Supreme Court, in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), upheld the reversal of a 12 year-old judgment. The *Hazel-Atlas* Court stated that it would weigh the facts of the individual case since "[i]t cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent." *Id.* at 246. Arguably, the *Hazel-Atlas* holding is applicable only when some additional public interest is involved, such as the validity of patents. *See id.*

obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.[23]

The success of a petition to vacate a judgment for fraud or perjury depends upon the characterization of the fraudulent act as either "intrinsic" or "extrinsic" fraud.[24] A chancellor in equity will grant relief only in the latter situation.[25] Extrinsic fraud is defined to include acts that are collateral to the issue of a pending or completed litigation and prevent a party from fully and fairly litigating his case.[26] For example, giving improper notice of a suit to the adverse party,[27] instances where the opposing party is kept away from court,[28] cases where fraud by an attorney is involved,[29] and in some cases, documentary fraud[30] are labeled "extrinsic" because they involve matters outside of or extrinsic to the substantive issues of the case. "Intrinsic" fraud, on the other hand, is "fraud relating to the subject matter of the action."[31] It is that type of fraud which relates to the determination of those issues which were, or could have been, litigated in the action in question.

The cornerstone of the extrinsic-intrinsic dichotomy was laid by the United States Supreme Court in *United States v. Throckmorton*.[32] In *Throckmorton*, the federal government sought to have a 20 year-old district court judgment declared void for fraud. The plaintiff in the original case allegedly obtained title to real property from the United States by producing a fraudulent instrument and supporting it with perjured testimony.[33] The Supreme Court ruled that such perjury did not rise to the level of extrinsic fraud. Perjury of this type, according to *Throckmorton*, is fraud relating to the subject matter for which the decree was sought and as such cannot be used to overturn the judgment.[34] The decision rested in part upon the Court's

23. National Sur. Co. v. State Bank, 120 F. 593, 599 (8th Cir. 1903). *Accord, e.g.*, Winfield Assocs. v. Stonecipher, 429 F.2d 1087, 1090 (10th Cir. 1970); Bankers Mortgage Co. v. United States, 423 F.2d 73, 79 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970); Dunham v. First Nat'l Bank, 201 N.W. 2d 227, 231 (S.D. 1972).

24. 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2868, at 240 (1973).

25. *See, e.g.*, United States v. Throckmorton, 98 U.S. 61, 66 (1878); Pico v. Cohn, 91 Cal. 129, 133, 25 P. 970, 971 (1891); Thiriot v. Santa Clara Elementary School Dist., 128 Cal. App. 2d 548, 550-51, 275 P.2d 833, 836 (Ct. App 1954). *See also* cases cited notes 27-30 *infra*.

26. United States v. Throckmorton, 98 U.S. 61, 66 (1878); 11 C. WRIGHT & A. MILLER, *supra* note 24, § 2861, at 192.

27. Aldrich v. Aldrich, 203 Cal. 433, 437, 264 P. 754, 755 (1928) (process not served upon defendant although his location was known to plaintiff); Gregory v. Hancock, 81 Idaho 221, 340 P.2d 108, 111 (1959) (filing false affidavit that plaintiff could not be found in order to obtain a default judgment).

28. Flood v. Templeton, 152 Cal. 148, 155, 92 P. 78, 82 (1907) (defendant's promise to compromise debt resulted in plaintiff's failure to plead valid claim).

29. People v. Perris Irrigation Dist., 142 Cal. 601, 606, 76 P. 381, 382 (1904) (bribery of attorney employed to litigate action); McHugh v. Howard, 165 Cal. App. 2d 169, 175-76, 331 P.2d 674, 679 (Ct. App. 1958) (collusion between plaintiff's and defendant's attorneys for plaintiff and defendant, while constituting extrinsic fraud, not shown by evidence presented).

30. Bates v. Carter, 222 Iowa 1263, 1269, 271 N.W. 307, 310 (1937). *Contra*, Kachig v. Boothe, 22 Cal. App. 3d 626, 634, 99 Cal. Rptr. 393, 398 (1971).

31. 11 C. WRIGHT & A. MILLER, *supra* note 24, § 2861, at 192.

32. 98 U.S. 61 (1878).

33. *Id.* at 62-63.

34. *Id.* at 68.

conception of the adversarial process. The *Throckmorton* decision seems to recognize that false and misleading factual evidence, perhaps sometimes representing differing views as to the facts, will be presented to the court, and that perjury is to be expected during the course of a judicial proceeding.[35] To be sure, policies of judicial economy and finality of judgments also justify the Court's holding: "[T]he mischief of retrying every case in which the judgment or decree [is] rendered on false testimony, given by perjured witnesses . . . would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."[36] The *Throckmorton* Court contemplated a risk that litigation would be unending in the event perjury could be used to overturn a judgment, because adversaries would refuse to leave a decision at rest.[37]

Although *Throckmorton* resolved the conflict between res judicata and substantial justice in favor of the finality of judgments,[38] the Court seemingly reached an opposite result thirteen years later in *Marshall v. Holmes*.[39] In

35. *See id.* at 68-69. See also text & notes 141-46 *infra*.

36. 98 U.S. at 68-69.

37. *See id.* at 69. The California Supreme Court, in Pico v. Cohn, 91 Cal. 129, 25 P. 970 (1891), following *Throckmorton*, reasoned that a party must be prepared to meet and expose perjury at the trial and held that the risk of unending litigation was best obviated by foreclosing all equitable claims based upon perjury. *Id.* at 133, 25 P. at 971. A number of courts follow this rule. Dockery v. Central Ariz. Light & Power Co., 45 Ariz. 434, 451-54, 45 P.2d 656, 663-64 (1935); Kachig v. Boothe, 22 Cal. App. 3d 626, 632-33, 99 Cal. Rptr. 393, 396 (1971); Chermak v. Chermak, 227 Ind. 625, 627-28, 88 N.E.2d 250, 251 (1949); Edgerly v. Sherman, 252 Iowa 352, 357, 107 N.W.2d 72, 75-76 (1961); Fawcett v. Atherton, 298 Mich. 362, 366, 299 N.W. 108, 109 (1941); Seubert v. Seubert, 69 S.D. 143, 146, 7 N.W.2d 301, 302 (1943).

Some courts have avoided the harshness of *Throckmorton* by construing perjury to be extrinsic fraud. *See* Chicago, R.I. & Pac. Ry. v. Callicotte, 267 F. 799, 810 (8th Cir. 1920); El Reno Mut. Fire Ins. Co. v. Sutton, 41 Okla. 297, 306, 137 P. 700, 703 (1913). One state, declining to follow the original development of the extrinsic-intrinsic dichotomy in *Throckmorton*, has consistently recognized the right to petition the courts for review in situations involving perjury, whenever it is against judicial conscience to enforce a judgment. The Wisconsin Supreme Court, in Weber v. Weber, 260 Wis. 420, 51 N.W.2d 18 (1952), noted in 36 MARQ. L. REV. 198 (1952), stated that it did not follow the rule of *Throckmorton*, and would grant relief from a judgment when the party against whom the judgment was obtained was unaware of the perjury and not negligent in failing to discover it. *Id.* at 430-31, 51 N.W.2d at 23, *quoting* Laun v. Kipp, 155 Wis. 347, 369-70, 145 N.W. 183, 191-92 (1914). Each case is judged on its facts and the characterization of perjury as extrinsic or intrinsic is not determinative of the right to relief. *Id.* at 431, 51 N.W.2d at 23. *See also* 36 MARQ. L. REV. 198, 201 (1952). Although Wisconsin allows liberal use of equitable actions to overturn judgments, no "flood of litigation" has ensued. Since 1914 when the rule was adopted by the court in *Laun v. Kipp*, a small number of cases have been litigated. *See* Conway v. Division of Conservation, Dept. of Natural Resources, 50 Wis. 2d 152, 183 N.W.2d 77 (1971); Hartenstein v. Hartenstein, 18 Wis. 2d 505, 118 N.W.2d 881 (1963). The Wisconsin courts have not allowed this rule to substantially impair the interest in res judicata. In *Conway* the court ruled that a judgment originally granted to the appellants was res judicata and could not be overturned: the appellants were clearly attempting to relitigate the merits. 50 Wis. 2d at 159-61, 183 N.W.2d at 80-81. Several commentators have concluded that the Wisconsin practice does not result in endless litigation. *See* Comment, *Equitable Relief for Judgments, Orders and Decrees Obtained by Fraud*, 23 CALIF. L. REV. 79, 84 (1934); Note, *Perjury as a Ground for Vacating a Judgment*, 49 HARV. L. REV. 327, 327 (1935); Note, *Intrinsic and Extrinsic Fraud and Relief Against Judgments*, 4 VAND. L. REV. 338, 341 (1951); 36 MARQ. L. REV. 198, 201 (1952).

38. *See generally* F. JAMES, CIVIL PROCEDURE § 11.7, at 540-45 (1965).

39. 141 U.S. 589 (1891). Courts and commentators have had great difficulty reconciling *Throckmorton* with *Marshall*. *See, e.g.*, Publicker v. Shallcross, 106 F.2d 949, 952 (3rd Cir.), *cert. denied*, 308 U.S. 624 (1939); Chicago R.I. & P. Ry. v. Callicotte, 267 F. 799, 806 (8th Cir. 1920); United States v. Gleeson, 90 F. 778, 779 (2d Cir. 1898); American Bakeries, Inc. v. Vining, 13 F. Supp. 323, 325 (S.D. Fla. 1935); 11 C. WRIGHT & A. MILLER, *supra* note 24, §

Marshall, the petitioner sought equitable relief from a series of Louisiana judgments allegedly obtained by use of fraudulent evidence.[40] The Supreme Court held that Mrs. Marshall's claim was an appropriate one for relief:

> [I]t is the settled doctrine that "any fact which *clearly proves it to be against conscience* to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.[41]

The *Throckmorton* decision was cited as one authority for this proposition,[42] even though it and *Marshall* reach opposite results on virtually the same facts.[43] Which of these holdings will be applied to a given case is apparently an open question. Federal courts have given spotty application to both cases;[44] paradoxically, state courts have chosen to ignore the more salutary doctrine of *Marshall*, and for the most part, follow the *Throckmorton* rule.[45] It is clear that the two Supreme Court cases cannot be reconciled. Justice William Brennan, while a member of the New Jersey Supreme Court, has called the attempt to do so "a journey into futility."[46] Although

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2861, at 193 (reconciliation of *Throckmorton* with *Marshall* "is a mystery"); Note, *Post-Term Vacation of Judgments Obtained by Perjury*, 54 COLUM. L. REV. 403, 405 n.12 (1954) (*Marshall* granted relief on facts practically identical to *Throckmorton*); Note, *Attacking Fraudulently Obtained Judgments in the Federal Courts*, 48 IOWA L. REV. 398, 406 (1963) ("somewhat conflicting" decisions).

40. 141 U.S. at 591-92.

41. *Id.* at 596 (emphasis added), *quoting* Marine Ins. Co. v. Hodgson, 11 U.S. (7 Cranch) 332, 336 (1813).

42. 141 U.S. at 596.

43. The court in Publicker v. Shallcross, 106 F.2d 949 (3d Cir.), *cert. denied*, 308 U.S. 624 (1939) states:

> The Supreme Court of the United States, to show its utter impartiality, has ruled both ways, and left the spectacle of two cases, one of which holds that false evidence is a ground for reversal, the other that it is not, both of which have been followed, and neither of which has ever been overruled.

Id. at 951, *quoting* Note, *Fraud as a Basis for Setting Aside a Judgment*, 21 COLUM. L. REV. 268, 269 (1921). The *Publicker* court then declined to follow *Throckmorton*, in favor of the more salutary doctrine of *Marshall*. 106 F.2d at 952. However, it cannot be said that *Throckmorton* is no longer viable, for other courts continue to follow it. *E.g.*, Kachig v. Boothe, 22 Cal. App. 3d 626, 632-33, 99 Cal. Rptr. 393, 396 (1971); Chermak v. Chermak, 227 Ind. 625, 627-28, 88 N.E.2d 250, 251 (1949); Edgerly v. Sherman, 252 Iowa 352, 357, 107 N.W.2d 72, 75 (1961); Fawcett v. Atherton, 298 Mich. 362, 366, 299 N.W. 108, 109 (1941). *See* Winfield Assocs. v. Stonecipher, 429 F.2d 1087, 1090 (10th Cir. 1970); Bankers Mortgage Co. v. United States, 423 F.2d 73, 79 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970). *See also* 11 C. WRIGHT & A. MILLER, *supra* note 24, § 2868.

44. *See, e.g.*, Cuthill v. Ortman-Miller Mach. Co., 216 F.2d 336, 338 (7th Cir. 1954) (applied the *Throckmorton* rule to an independent action for fraud); Independence Lead Mines v. Kingsbury, 175 F.2d 983, 987-88 (9th Cir.), *cert. denied*, 338 U.S. 900 (1949) (to be actionable, fraud must be extrinsic to the issues decided in a former action); Publicker v. Shallcross, 106 F.2d 949 (3d Cir.), *cert. denied*, 308 U.S. 624 (1939) (*Throckmorton* and *Marshall* are in conflict; application of the *Marshall* doctrine). *See generally* discussion note 43 *supra*.

45. *See, e.g.*, Kachig v. Boothe, 22 Cal. App. 3d 626, 632-33, 99 Cal. Rptr. 393, 396 (1971); Chermak v. Chermak, 227 Ind. 625, 627-28, 88 N.E.2d 250, 251 (1949); Edgerly v. Sherman, 252 Iowa 352, 357, 107 N.W.2d 72, 75 (1961).

46. Shammas v. Shammas, 9 N.J. 321, 330, 88 A.2d 204, 209 (1952) (*quoting* Moore & Rodgers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 658 (1946)). *But see* Keith v. Alger, 114 Tenn. 1, 22-26, 85 S.W. 71, 77-78 (1905) (stating that *Marshall* and *Throckmorton* are reconcilable; *Marshall* gave relief on facts constituting "extrinsic" fraud).

commentators have suggested accommodations,[47] the controversy awaits an explicit Supreme Court resolution. Until such time as the Court undertakes to resolve this question, reliance on the independent action to set aside a judgment procured by perjured testimony or documentary evidence will be governed by the distinction between intrinsic and extrinsic fraud. At best, therefore, the independent action is an unsatisfactory remedy for fraud. A second common law remedy will now be explored.

A court has inherent power to vacate a judgment procured by "fraud upon the court."[48] However, the doctrine of fraud upon the court redresses only the most egregiously injurious conduct. As defined by Professor Moore, it "embrace[s] only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform . . . its impartial task of adjudging cases that are presented for adjudication."[49] Perjury by a witness, without the presence of other factors, is not generally considered a fraud upon the court.[50] However, when perjury occurs in conjunction with other miscon-

47. Note, *Post-Term Vacation of Judgments Obtained by Perjury*, *supra* note 39, at 404-05; Note, *Judgment: Equity: Relief Against Judgment Obtained by Perjury*, 12 CORNELL L.Q. 385, 387-92 (1927); Note, *Injunctions Against the Enforcement of Judgments Obtained by Perjury*, 22 HARV. L. REV. 600, 601 (1909); Note, *Intrinsic and Extrinsic Fraud and Relief Against Judgments, supra* note 37, at 340-42. *See also* 3 ALA. L. REV. 224 (1950); 21 COLUM. L. REV. 268 (1921).

48. In Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), the Supreme Court stated:

> Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which . . . arise from a hard and fast adherence to . . . the general rule that judgments should not be disturbed after the term of their entry has expired. . . . [T]his equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention . . . .
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> . . .[T]his Court . . . held that federal appellate courts have the power . . . to grant or deny, petitions for bills of review even though the petitions be presented long after the term of the challenged judgment has expired . . . . [T]he whole history of equitable procedure . . . enable[s] the courts to grant all relief against judgments which the equities require . . . .

Id. at 248-49.

49. 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 60.33, at 515 (1975).

50. *See, e.g.*, Dowdy v. Hawfield, 189 F.2d 637, 638 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951); Chisholm v. House, 160 F.2d 632, 643 (10th Cir. 1947); Lockwood v. Bowles, 46 F.R.D. 625, 630-31 (D.D.C. 1969). *But see* Lim Kwock Soon v. Brownell, 369 F.2d 808 (5th Cir. 1966).

The cases limiting the remedy for fraud upon the court, when perjury is the asserted justification for relief, indicate that this means of attacking a judgment is intertwined with the intrinsic-extrinsic dichotomy discussed in relation to the independent action for review. *See* text & notes 23-47 *supra*. *Dowdy v. Hawfield* concerned a will which was contested but admitted to probate in a previous proceeding after a trial of issues raised by the *Dowdy* appellants. The probate proceeding litigated questions of fraud and undue influence in the execution of the will. Appellants filed an independent action seeking to impeach the probate judgment. *Id.* at 638. Because the action was brought more than one year after the previous judgment was rendered, a FED. R. CIV. P. 60(b)(3) motion to vacate the judgment could not be brought. 189 F.2d at 638. For a discussion of rule 60(b), see text & notes 58-66 *infra*. The *Dowdy* court, citing United States v. Throckmorton, 98 U.S. 61 (1878), ruled that the alleged fraud was purely intrinsic, and affirmed the dismissal of appellants' independent action, because appellants contended only that witnesses for appellees perjured themselves. 189 F.2d at 638. The court in *Chisholm v. House* considered an action brought to set aside a consent judgment in which a final settlement of trust accounts was made, and the trust terminated. 160 F.2d at 635, 640. The court allowed relief for fraud upon the court on the basis of certain misleading trustees' reports and accountings, relied upon by the plaintiffs in consenting to the prior judgment. *Id.* at 643. The *Chisholm* court stated that equitable relief could be obtained

duct which has beguiled the court itself there may be equitable redress.[51]

The leading case on the right to relief for fraud upon the court is *Hazel-Atlas Glass Co. v. Hartford-Empire Corp.*[52] In that case, attorneys for Hartford-Empire wrote an article describing a particular unpatented industrial device as a remarkable advance in technology. The attorneys then arranged to have the article published in a trade journal under the name of a purportedly disinterested expert. The United States Patent Office, relying in part on the article, granted the patent. A judgment for patent infringement was then obtained and subsequently affirmed by the United States Circuit Court of Appeals, which also relied on the article.[53] Justice Black, for the *Hazel-Atlas* Court, set aside the twelve year-old judgment and held that equitable relief can be afforded if the enforcement of a judgment would be "manifestly unconscionable."[54] Although the decision reaffirms the *Marshall* standard of unconscionability and ignores the *Throckmorton* extrinsic fraud standard, the facts of the *Hazel-Atlas* case are distinguishable from both of the earlier cases. Arguably, the *Hazel-Atlas* Court upset the prior judgment because of the public interest in the proper administration of the Patent Office as well as because of the involvement of attorneys in perpetrating the fraud upon the court.[55] Perjury will constitute such a fraud only where it rises to the level of fraud upon the administration of justice because of the involvement of a weighty public interest or when it includes the complicity of a party's attorney.[56] It will rarely offer relief, therefore, solely where one party is victimized by another's perjury.[57]

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only for extrinsic or collateral fraud; that is, fraud that prevented a party from having a trial or from presenting his cause of action or defense, and held that material omissions from the trustees' accountings constitute extrinsic fraud. *See id.*

The court in *Lockwood v. Bowles* ruled upon a motion under FED. R. CIV. P. 60(b)(3), and an action for review, brought by two individuals who claimed in a prior probate proceeding that they were the natural children of the deceased. The probate court had found that the movants were not the natural children of the testator. The *Lockwood* claimants urged that the first ruling was obtained by fraud and perjury. *Id.* at 46 F.R.D. 627-28. The court ruled that expiration of the one year limit for filing a motion under rule 60(b)(3) precluded such relief. *Id.* at 628. See text & notes 58-66 *infra*. It also ruled that the alleged fraud should have been discovered at the original proceeding and that the 14-year delay between the original judgment and the independent action would result in substantial prejudice to the plaintiffs were the action to be maintained, thereby barring the suit under laches. *See* 46 F.R.D. at 630-31. Finally, the court held that perjury is only an intrinsic fraud and will not be redressed in an independent action for review. *Id.* at 632-33.

51. *See* Sutterly v. Easterly, 354 Mo. 282, 294, 189 S.W. 2d 284, 287-88 (1945). In *Sutterly*, an illustrative case, the parties, including an attorney, plotted to furnish a witness to support the case with perjured testimony. This was found to be a fraud on the court. *Id.*

52. 322 U.S. 238 (1944).

53. *Id.* at 245, 247.

54. *Id.* at 244-45.

55. *Id.* at 250; *see* 11 C. WRIGHT & A. MILLER, *supra* note 24, § 2870, at 256.

56. *See* Lockwood v. Bowles, 46 F.R.D. 625 (D.D.C. 1969), where the court stated the following interpretation of *Hazel-Atlas*:

> We believe the better view to be that where the court or its officers are not involved, there is no fraud upon the court. . . . The possibility of a witness testifying falsely is always a risk in our judicial process, but there are safeguards within the system to guard against such risks.

Id. at 632-33.

57. In *Hazel-Atlas*, the court restricted the scope of its holding: "This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after discovered evidence,

The traditional legal remedies available to vacate a judgment procured by fraud have inherent problems that prevent them from adequately deterring perjury and compensating those injured by false testimony. In addition, the need to rely on these antiquated equitable principles has been reduced substantially by the adoption of the Federal Rules of Civil Procedure.

The enactment of federal rule 60(b)[58] substantially expands the grounds for equitable relief from a final judgment obtained by fraud, misrepresentation, or other misconduct of an adverse party, if the fraud is discovered within a reasonable time after the entry of the judgment.[59] One court has stated that rule "60(b) is a response to the plaintive cries of parties who have for centuries floundered, and often succumbed, among the snares and pitfalls of the ancillary common law and equitable remedies."[60] Rule 60(b)(3) authorizes a motion for relief upon the grounds of perjury or fraud if such injustice is discovered within a reasonable time, but not more than

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is believed possibly to have been guilty of perjury." 322 U.S. at 245. *See also* United States v. Throckmorton, 98 U.S. 61, 68 (1878).

58. The pertinent parts of FED. R. CIV. P. 60(b) follow:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment . . . or to set aside a judgment for fraud upon the court.

59. Aside from liberalizing the availability of remedies for inequitable judgments, FED. R. CIV. P. 60(b) contains a specific savings clause preserving the common law equitable remedies; the independent action, see text & notes 23-27 *supra*, and the action for fraud upon the court, see text & notes 52-57 *supra*. The savings clause does not purport to create such causes of action, nor does it expand the existing common law actions. 11 J. MOORE, *supra* note 49, ¶ 60.21, at 245. II C. WRIGHT & A. MILLER, *supra* note 24, at 237. *See generally* Moore & Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623 (1946); Comment, *Temporal Aspects of the Finality of Judgments: The Significance of Federal Rule 60(b)*, 17 U. CHI. L. REV. 664, 670 (1950).

60. Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970). The Eighth Circuit Court of Appeals in Conerly v. Flower, 410 F.2d 941 (8th Cir. 1969) allowed relief for fraudulent misrepresentation under FED. R. CIV. P. 60(b)(3) in an action brought seven months after the entry of a final judgment. The defendant and his attorney had informed the plaintiff in a personal injury case that the maximum available insurance coverage was $20,000. 410 F.2d at 943. The plaintiff stipulated to a recovery of $19,500 on the basis of this information. *Id.* After entry of a judgment in this amount, the plaintiff discovered that the extent of the insurance was greater than that represented. *Id.* The *Conerly* court affirmed the district court decision setting aside the consent judgment and reinstating a jury verdict of $40,000. *Id.* at 945. In disposing of the appellant's arguments that the first decision was final, the court states: "Under Rule 60(b) . . . the problem of finality is not involved; a motion under 60(b) does not affect the time for appeal nor the finality of the judgment itself." *Id.* at 944; *see* 7 J. MOORE, *supra* note 49, ¶ 60.24(5), at 287-93. FED. R. CIV. P. 60(b)(3) will allow relief for fraud, misrepresentation, or other misconduct, circumvention, or wrongful act that makes it inequitable to enforce the judgment. *See* Wilkin v. Sunbeam Corp., 466 F.2d 714, 717 (10th Cir. 1972); Peacock Records, Inc. v. Checker Records, Inc., 365 F.2d 145, 147-48 (7th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); Hadden v. Rumsey Prods., Inc., 196 F.2d 332, 336 (8th Cir. 1947).

one year[61] from a final judgment. Such a motion rests in the sound discretion of the trial court,[62] and a judicially created standard of clear and convincing proof must be met before equitable relief will be given.[63] Wrongful acts sufficient to warrant redress according to rule 60(b)(3) include all species of factual misrepresentation or deception, whether or not *Throckmorton* would characterize them as extrinsic or intrinsic.[64] Perjury falls within the criteria of 60(b)(3) if its effect is to prevent a full and fair adversarial consideration or exposition of all relevant facts.[65] The major restriction on rule 60(b)(3) motions when fraud or perjury is alleged is the one year time limitation. However, for motions more than one year from the final judgment, a saving clause preserves the independent action for review and the action for fraud upon the court.[66] Nonetheless, even where federal rule 60(b) or any existing equitable or common law theory can be applied, the remedy for a judgment procured by perjury is not adequate. This subject now will be explored in substantial depth.

Inadequacy of Existing Remedies for a Judgment Tainted by Perjury

If a litigant can frame a proper prayer for relief in an independent action for review, establish fraud upon the court, or prevail on a motion under rule

61. A motion under FED. R. CIV. P. 60(b)(3) will not be granted if more than one year has elapsed from the date of final judgment. Petry v. GMC, 62 F.R.D. 357, 359 (E.D. Pa. 1974); Armour & Co. v. Nard, 56 F.R.D. 610, 612 (N.D. Iowa 1972). Moreover, under FED. R. CIV. P. 60(b)(3) there is a requirement that such a motion be made within a "reasonable time," which may, in a particular case, be less than one year. *See* Mayfair Extension, Inc. v. Magee, 241 F.2d 453, 454 (D.C. Cir. 1957); Kahle v. Amtorg Trading Corp., 13 F.R.D. 107, 109 (D.N.J. 1952) (claims were filed within the one year limit and found to be untimely). *See generally* Note, *Attacking Fraudulently Obtained Judgments in the Federal Courts, supra* note 39, at 399-404. A reasonable time is determined in the light of all circumstances, including subsequent events, and the equities of the case. *See* 7 J. MOORE, *supra* note 49, §60.27[3], at 384-85; Note, *Federal Rule 60(b): Relief From Civil Judgments*, 61 YALE L.J. 76, 85 (1952).

62. Wagner v. Pennsylvania Ry., 282 F.2d 392, 397-98 (3d Cir. 1960); England v. Doyle, 281 F.2d 304, 309 (9th Cir. 1960); Atchison T. & S. F. Ry. v. Barrett, 246 F.2d 846, 849 (9th Cir. 1957). While all cases may not warrant rule 60(b) relief, it is an abuse of discretion for the court to refuse such a motion when it is well supported. *See* Peacock Records, Inc. v. Checker Records, Inc., 365 F.2d 145, 148 (7th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967).

63. Di Vito v. Fidelity & Deposit Co., 361 F.2d 936, 939 (7th Cir. 1966); Brown v. Pennsylvania Ry., 282 F.2d 522, 527 (3d Cir. 1960), *cert. denied*, 365 U.S. 818 (1961); England v. Doyle, 281 F.2d 304, 309-10 (9th Cir. 1960); Assmann v. Fleming, 159 F.2d 332, 336 (8th Cir. 1947).

64. FED. R. CIV. P. 60(b)(3); *see* Peacock Records, Inc. v. Checker Records, Inc., 365 F.2d 145, 147-48 (7th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967) (unchallenged testimony clearly showed perjury; 60(b)(3) motion granted). *See also* State *ex rel.* Symms v. V-I Oil Co., 94 Idaho 456, 458-59, 490 P.2d 323, 324-25 (1971) (perjury proven by conflicting statements in separate federal and state court actions—ground for relief under IDAHO R. CIV. P. 60(b)); Shammas v. Shammas, 9 N.J. 321, 329, 88 A.2d 204, 207 (1952) (perjured testimony ground for relief from judgment under N.J.R. CIV. P.); ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, 5 F.R.D. 433, 477-79 (1946).

65. Estate of Murdoch v. Philadelphia, Pennsylvania, 432 F.2d 867, 870 (3d Cir. 1970) (false statement in affidavit grounds for 60(b)(3) relief); Peacock Records, Inc. v. Checker Records, Inc., 365 F.2d 145, 147-48 (7th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967) (perjured testimony is ground for vacation of judgment under 60(b)(3)). *See also* State *ex rel.* Symms v. V-I Oil Co., 94 Idaho 456, 458-59, 490 P.2d 323, 324-25 (1971) (perjury proven by conflicting statements in separate federal and state court actions—a ground for relief under IDAHO R. CIV. P. 60(b)(3)); 11 C. WRIGHT & A. MILLER, *supra* note 24, § 2861, at 196.

66. FED. R. CIV. P. 60(b).

60(b)(3), a court may vacate an erroneous judgment and impose the duty of restitution upon the party to whom the fraud is charged.[67] However, even where the remedy is otherwise available, circumstances may be present which will require the court to deny specific restitutionary recovery. Specifically, the rights of innocent third parties may rest upon the continuing validity of the judgment.[68] If, for instance, the prior case adjudicates the title to real property which is then transferred to a bona fide purchaser, or establishes personal rights affecting third parties, the interests of innocent persons may outweigh the desirability of vacating the judgment.[69]

In designing equitable relief for a judgment obtained by fraud or perjury, another complication is caused if the perjurer is not a party to the action. Although rule 60(b)(3) will allow a court to rescind a judgment obtained by fraud or perjury, this relief is unavailable where the perjury cannot fairly be charged to an adverse party.[70] The independent action and the action for fraud upon the court are likely to be subject to the same limitation. Both of these actions may fail unless the fraudulent acts can be classified as extrinsic,[71] and it is clear that the false testimony of a witness, unless he has conspired with a party to the action, is viewed by most courts as intrinsic.[72] Since it will be rare that extrinsic fraud will be chargeable to a nonparty, the traditional remedies will be of little avail in such cases; the

67. In Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), an action for fraud upon the court, the Supreme Court reversed a judgment more than ten years old which was obtained by a fraud upon the federal court and Patent Office. *Id.* at 245-46, 251. Upon remand of the same case, in Hartford-Empire Co. v. Shawkee Mfg. Co., 163 F.2d 474 (3d Cir. 1947), Shawkee sought recovery of sums paid to the appellant by reason of the original judgment, royalty fees paid under a subsequent patent licensing agreement, damages for the loss of certain sales, and exemplary damages. *Id.* at 477. The court of appeals ruled that the remedy available in this situation was restitution. *Id. See* Pentz v. Kuppinger, 31 Cal. App. 3d 590, 594, 107 Cal. Rptr. 540, 542-43 (Ct. App 1973) (court noted in dicta that restitution is the remedy available to a plaintiff charging "extrinsic" fraud that has unjustly enriched a defendant, in an independent action for review). Although there does not appear to be any case law allowing restitutionary recovery in an action under rule 60(b), such recovery would seem to be available on the theory that the federal rule was meant to be at least coextensive with the existing common law remedies.

68. *See, e.g.*, Menashe v. Sutton, 90 F. Supp. 531, 533 (S.D.N.Y. 1950); Albion-Idaho Land Co. v. Adams, 58 F. Supp. 579, 581-82 (D. Idaho 1945); Norwood v. Heaslett, 218 Ark. 286, 289, 235 S.W.2d 955, 956 (1951); Zeitlin v. Zeitlin, 202 Mass. 205, 207-08, 88 N.E. 762, 762 (1909).

69. It is a general rule that if a bona fide purchaser acquires legal title without notice of legal or equitable titles or interests, his title must prevail. Osin v. Johnson, 243 F.2d 653, 657 (D.C. Cir. 1957). *See, e.g.*, Strutt v. Ontario Sav. & Loan Ass'n., 11 Cal. App. 3d 547, 555-56, 90 Cal. Rptr. 69, 73-74 (1970); Home Owners' Loan Corp. v. Murdock, 150 Pa. Super. 284, 288-89, 28 A.2d 498, 500 (Super. Ct. 1942); RESTATEMENT OF RESTITUTION § 172 (1936); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.7, at 283 (1973).

In situations where the offensive judgment cannot be overturned, money damages represent an attractive alternative. In Zeitlin v. Zeitlin, 202 Mass. 205, 88 N.E. 762 (1908), the Massachusetts Supreme Court held that relief could not be granted in equity where it was alleged that a divorce had been fraudulently obtained. The court ruled that it would not upset a decree even if obtained by perjured testimony procured by a party, when a child had been born by a remarriage made upon the assumption of the decree's validity. *Id.* at 207-08, 88 N.E. at 762-63. An action in tort for perjury would have allowed the court to sustain a judgment for damages. For an explanation of the elements of such a tort, see text & notes 148-68 *infra*.

70. FED. R. CIV. P. § 60(b)(3); *See* 7 J. MOORE, *supra* note 49, ¶ 60.24[5], at 291.

71. *See* text & notes 23-57 *supra*.

72. *See* cases cited note 50 *supra*.

perjury victim is left wholly without remedy and the perjurer left unpunished.[73]

A third disadvantage of a restitutionary remedy for perjury or fraud is the inadequacy of the measure of recovery. Where a valid claim is lost due to perjury, the person suffering the loss is entitled to recover the defendant's unjust enrichment.[74] Although restitution sometimes will provide adequate recovery,[75] consider the following example. Assume that *X*, owner of Blackacre, having a fair market value of $30,000, has contracted for its sale to a third party who, for his own special reasons, proposes to buy at $100,000. Thereafter, *Y* sues *X* and receives title to Blackacre upon a wholly fabricated claim. Assume further, that the suit causes *X* not only to breach his contract with the third party, but to suffer damages in a subsequent legal action with him. After receiving title to Blackacre, *Y* sells it to a bona fide purchaser, who begins living on it with his family.

Under federal rule 60(b)(3), if *X* discovers the fabrication within one year, he may bring an action against *Y* to vacate the judgment and obtain restitution.[76] In this case, *X* will receive a restitutionary substitute of $30,000 for the value of Blackacre, as well as *Y's* profits in the sale of Blackacre to the bona fide purchaser.[77] However, *X* will not recover for the

73. Of course, this conclusion assumes the perjuring witness is not charged in a criminal prosecution, ordinarily a valid assumption. *See* text & notes 16-18 *supra*. Further, if an injured party can get the judgment vacated, and obtain restitution from an adverse party, a tort action against the perjuring witness may raise the spectre of double recovery.

74. *See, e.g.*, Hill v. Waxberg, 237 F.2d 936, 939 (9th Cir. 1956); Pentz v. Kuppinger, 31 Cal. App. 3d 590, 594, 107 Cal. Rptr. 540, 542-43 (1973); Franks v. Lockwood, 146 Conn. 273, 278, 150 A.2d 215, 218 (1959). Once a plaintiff has elected to rescind a fraudulent transaction he is entitled to restoration of the status quo, but he may not recover damages as such. *See* Jennings v. Lee, 105 Ariz. 167, 173, 461 P.2d 161, 167 (1969); Mock v. Duke, 20 Mich. App. 453, 174 N.W.2d 161, 162 (1969); State *ex rel.* Burk v. Oklahoma City, 556 P.2d 591, 594 (Okla. 1976).

Where the plaintiff has paid the now vacated judgment pursuant to court order, he is entitled to the return of monies paid. RESTATEMENT OF RESTITUTION § 74 (1936) states:

> A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable . . .; if the judgment is modified, there is a right to restitution of the excess.

75. When a plaintiff suffers no consequential damages other than loss of a judgment, restitution will, by definition, be sufficient to redress his injury. *See* RESTATEMENT OF RESTITUTION § 74 (1936).

76. *See* United States v. 3,317.39 Acres of Land, 481 F.2d 417, 420 (8th Cir. 1973). *See also* Mobile Gas Servs. Corp. v. Federal Power Comm'n., 215 F.2d 883, 892 (3d Cir. 1954), *aff'd sub nom.* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956).

77. A conscious wrongdoer must disgorge the greater of the amount by which he is unjustly enriched or the value conferred upon him by the transferor. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Clayton, 488 F.2d 974, 975-76 (5th Cir. 1974). The RESTATEMENT OF RESTITUTION § 157 (1936) states:

> (1) A person under a duty to another to make restitution of property received by him or of its value is under a duty
>
> (a) to account for the direct product of the subject matter received while in his possession, and
>
> (b) To pay such additional amount as compensation for the use of the subject matter as will be just to both parties in view of the fault, if any, of either or both of them.

The Restatement also allows tracing of wrongfully acquired property:

> Where a person wrongfully disposes of property of another knowing that the disposition is wrongful and acquires in exchange other property, the other is entitled at his option to enforce either

judgment entered against him for breach of contract, an element of special damages.[78] If *X* could elect to proceed upon a theory of tort based on perjury,[79] he should receive $30,000 as general damages—the value of Blackacre.[80] In addition, he would be entitled to his loss in the suit with the third party,[81] as well as his lost profits on the proposed contract of sale—$70,000.[82] In this example, a tort action will provide a substantially more adequate recovery than merely allowing nullification of the prior judgment and restitution of the defendant's unjust gain. Moreover, in situations where the judgment cannot be vacated, a tort remedy for perjury will be the only means to compensate the plaintiff for a grievous wrong. Existing tort actions, providing some recourse for an individual harmed by perjury, are also limited in value, as the next section will demonstrate.

ALTERNATIVE ACTIONS IN TORT FOR PERJURY

Although courts have steadfastly refused to recognize a common law

(a) a constructive trust of the property so acquired, or
(b) an equitable lien upon it to secure his claim for reimbursement from the wrongdoer.

Id. § 202.

78. Restitution is a cause of action for money had and received. Atlantic Coast Line Ry. v. Florida, 295 U.S. 301, 309 (1935). In an action for recovery of monies paid pursuant to an erroneous court judgment, restitution is available only where a "party received under the decree what he is asked to restore to the adverse party, upon its dismissal." Tenth Ward Road Dist. No. 11 v. Texas & P. Ry., 12 F.2d 245, 247 (5th Cir. 1926); Monolith Portland Midwest Co. v. Reconstruction Finance Corp., 128 F. Supp. 824, 878 (S.D. Cal. 1955), *rev'd. on other grounds*, 240 F.2d 444, 448 (9th Cir. 1957). Thus, because restitution proceeds upon the theory of one party's unjust enrichment at the other party's expense, *see* RESTATEMENT OF RESTITUTION § 74 (1936), *supra* note 74, the injured party can recover only the amount given to the adverse party pursuant to the decree. Hartford-Empire Co. v. Shawkee Mfg. Co., 163 F.2d 474, 477 (3d Cir. 1947); Tenth Ward Road Dist. No. 11 v. Texas & P. Ry., 12 F.2d 245, 247 (5th Cir. 1926). *See also* D. DOBBS, *supra* note 69, § 3.1, at 136-37.

79. *See* text & notes 148-60 *supra*.

80. The usual measure of damages for injury of a permanent nature to an interest in real property is computed by determining the diminution in fair market value before and after the injury to it; limited to a total amount not in excess of the fair market value. *See* Blanton & Co. v. Transamerica Title Ins. Co., 24 Ariz. App. 185, 188, 536 P.2d 1077, 1080 (1975); Commonwealth v. Claypool, 405 S.W.2d 674, 678 (Ky. 1966); D. DOBBS, *supra* note 69, § 9.2, at 595.

81. In a tort action, the court will compensate the victim for all injuries proximately resulting from the act. *See, e.g.*, Barnett v. Collection Serv. Co., 214 Iowa 1303, 1312, 242 N.W. 25, 28 (1932); Moore v. Jefferson Hosp., Inc., 208 Va. 438, 441-42, 158 S.E.2d 124, 127 (1967); Gadbury v. Bleitz, 133 Wash. 134, 136, 233 P. 299, 300 (1925). Termed "special damages," such items may be recovered in tort if they are specifically pleaded and proved. Special damages in the context of malicious prosecution, an analogous tort action, have included: damages for discomfort or injury to health, Grimes v. Greenblatt, 47 Colo. 495, 511-12, 107 P. 1111, 1118 (1910); reasonable expenses in the first action, including attorney's fees, *see* Bernstein v. Simon, 77 Colo. 193, 196, 235 P. 375, 376 (1925); Seidler v. Burns, 86 Conn. 249, 251, 85 A. 369 (1912) (per curiam), as well as any specific financial loss which can be proved with reasonable certainty to have been caused by the prosecution of the first action, provided it was foreseeable. Seidler v. Burns, 86 Conn. at 251, 85 A. at 369; Duckwall v. Davis, 194 Ind. 670, 681-82, 142 N.E. 113, 116-17 (1924) (dictum).

Punitive damages could also be awarded where malice can be shown. *See* Morgan v. Graham, 228 F.2d 625, 628 (10th Cir. 1956) (fraud); Western Union Tel. Co. v. Thomasson, 251 F. 833, 836 (4th Cir. 1918) (malicious prosecution); Virginia Elec. & Power Co. v. Wynne, 149 Va. 882, 894, 141 S.E. 829, 834 (1928) (malicious prosecution).

82. Lost profits are recoverable in tort, but the courts strictly adhere to the rule that they be proved with reasonable certainty: if they are speculative or conjectural, they cannot be recovered. D. DOBBS, *supra* note 69, § 3.3 at 153-54. In the present case, however, lost profits would be recoverable, since they are not uncertain or speculative. *See* A.R.A. Mfg. Co. v. Pierce, 86 Ariz. 136, 141-42, 341 P.2d 928, 932 (1959).

action for perjury,[83] alternative actions in tort can sometimes be used to recover damages where perjury is an element of the cause of action. Perjury may establish an element of the currently recognized actions for fraud and deceit,[84] conspiracy to misuse legal proceedings,[85] and malicious prosecution.[86] For example, proof of a material false representation, spoken with malicious intent or reckless disregard, in such a manner that another individual can and does reasonably rely on the truth of the representation, establishes the requisite elements of the tort of fraud or deceit.[87] Of course, the hearer must not have known of the falsehood at the time it was spoken and he must suffer proximate injury as a result of his reliance on its truth.[88] Where an act of perjury is combined with other fraudulent misrepresentations, precedent exists for a court to grant recovery in tort. In *Morgan v. Graham*,[89] the plaintiff sought damages for an injury inflicted by the defendant's filing of a fraudulent verified answer and affidavit in reply to a complaint by a creditor seeking recovery on an insurance policy.[90] The defendant, president of the insurance company, had falsely denied in his answer that such a policy existed.[91] If not for the perjured affidavit, it was alleged the plaintiff would have fully pursued his legal remedy rather than accepting a non-suit.[92] The *Morgan* court characterized the action as one for fraud, and allowed recovery of damages. This characterization was based on the defendant's action filing the false affidavit, coupled with other fraudulent conduct, including the giving of false testimony and removing the insured from the jurisdiction.[93]

83. *See* text & notes 1-3 *supra*.

84. Morgan v. Graham, 228 F.2d 625, 628 (10th Cir. 1956); Frist v. Gallant, 240 F. Supp. 827, 828 (W.D.S.C. 1965).

85. *See, e.g.*, Dixon v. Bowen, 85 Colo. 194, 274 P. 824 (1929); Verplanck v. Van Buren, 76 N.Y. 247 (1879); Oldham v. McRoberts, 37 Misc.2d 979, 237 N.Y.S.2d 26 (Sup. Ct.), *aff'd*, 18 App. Div. 2d 773, 235 N.Y.S.2d 457 (1962); Bailey v. McGill, 247 N.C. 286, 100 S.E.2d 860 (1957); Smith v. Nippert, 76 Wis. 86, 44 N.W. 846 (1890).

86. Perjured testimony given to a grand jury with the intent to cause it to return a false indictment is a ground for a suit alleging malicious prosecution. Wheeler v. Satilla Rural Elec. Membership Corp., 103 Ga. App. 401, 404, 119 S.E.2d 375, 377 (1961); Price v. Cobb, 63 Ga. App. 694, 702-03, 11 S.E.2d 822, 827 (1940). *But see* Bailey v. McGill, 247 N.C. 286, 297, 100 S.E.2d 860, 870 (1957). A cause of action in malicious prosecution was found to be stated in Overson v. Lynch, 83 Ariz. 158, 162, 317 P.2d 948, 949-50 (1957), where a complaint alleged that the defendant had instituted a criminal prosecution by intentionally swearing out a false and malicious complaint while under oath.

87. Hester v. New Amsterdam Cas. Co., 412 F.2d 505, 508 (4th Cir. 1969); Neff v. World Publishing Co., 349 F.2d 235, 255 (8th Cir. 1965); Equitable Life & Cas. Ins. Co. v. Lee, 310 F.2d 262, 267 (9th Cir. 1962); Jennings v. Lee, 105 Ariz. 167, 170, 461 P.2d 161, 164 (1969).

88. *See* cases cited note 87 *supra*.

89. 228 F.2d 625 (10th Cir. 1956).

90. *Id.* at 627.

91. *Id.*

92. *Id.*

93. *Id.* at 627-28. Although the court carefully distinguishes this action from one based solely upon perjury, *id.* at 627, the reasoning used is perplexing. Perjury was held in *Morgan* to be a factor in showing fraudulent conduct. In light of the prevailing logic that perjury is to be expected in the adversarial process, *see* text & notes 141-46 *infra*, it seems ironic that there can be recovery for it in fraud. If the potential plaintiff is held by courts to "expect" that the opposing litigant may prove his claim with false evidence, he could not have reasonably "relied" upon the truthfulness of the false assertion—an element of the cause of action for fraud. *See* text & note 87 *supra*. Therefore, *Morgan* arguably stands for a more salutory rule, that perjury may be a fraud upon the opposing litigant, and cannot always be expected.

Some courts recognize an action for conspiracy to misuse legal proceedings.[94] Where an adverse party, pursuant to a scheme or other artifice, fraudulently obtains a judgment by procuring witnesses to give perjured testimony, these courts hold that an action in tort is established. The Colorado Supreme Court, in *Dixon v. Bowen*,[95] held that three individuals, pursuant to a conspiracy to procure payment upon a debt not lawfully owing, wrongfully obtained a judgment.[96] The *Dixon* court found a cause of action where the suit did not directly attack the previous judgment[97] or request the court to overturn it. Apparently the legally cognizable injury occurred from the defendants' collective acts in furtherance of a conspiracy to misuse the process of the court. This holding departs from the rule in a majority of American jurisdictions that a conspiracy to commit perjury cannot be a legal wrong because perjury is itself not tortious.[98]

The perpetration of perjury also has been held actionable where it is an element of malicious prosecution.[99] A claim of malicious prosecution or its sister tort of wrongful civil proceedings is established if the defendant is shown to have initiated a criminal or civil proceeding against the plaintiff, with malice and without probable cause or justification, and that the proceeding has terminated favorably for the plaintiff.[100] Some courts have expanded the purview of this action to allow recovery for the malicious instigation of criminal proceedings caused by false representations to the official or body that actually profers the criminal complaint.[101] Thus, perjury before a grand jury has been held by some courts to be an injury that can be redressed by an action in tort.[102]

The above discussion demonstrates the willingness of courts to allow redress in factual situations encompassing perjury. However, the legal theories through which relief can be offered to the individual injured by

94. *See, e.g.*, Dixon v. Bowen, 85 Colo. 194, 274 P. 824 (1929); Verplanck v. Van Buren, 76 N.Y. 247 (1879); Oldham v. McRoberts, 37 Misc. 2d 979, 237 N.Y.S.2d 26 (Sup. Ct.), *aff'd*, 18 App. Div. 2d 773, 235 N.Y.S.2d 457 (1962); Clark v. Sloan, 169 Okla. 347, 37 P.2d 263 (1934); Smith v. Nippert, 76 Wis. 86, 44 N.W. 846 (1890). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 120, at 850-56 (4th ed. 1971).

95. 85 Colo. 194, 274 P. 824 (1929).

96. *Id.* at 196, 274 P. at 825.

97. *Id.*

98. John Allan Co. v. Brandow, 59 Ill. App. 2d 328, 333, 207 N.E.2d 339, 342 (1965); Ginsburg v. Halpern, 383 Pa. 178, 180, 118 A.2d 201, 202 (1955); Felts v. Paradise, 178 Tenn. 421, 424, 158 S.W.2d 727, 728 (1942); W.G. Platts, Inc. v. Platts, 73 Wash. 2d 434, 441, 438 P.2d 867, 871-72 (1968); W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 43, at 260 (3d ed. 1964).

99. Wheeler v. Satilla Rural Elec. Membership Corp., 103 Ga. App. 401, 404, 119 S.E.2d 375, 377 (1961); Price v. Cobb, 63 Ga. App. 694, 702-03, 11 S.E.2d 822, 827 (1940); *see* Overson v. Lynch, 83 Ariz. 158, 162, 317 P.2d 948, 949-50 (1957).

100. *See, e.g.*, Larocque v. Dorsey, 299 F. 556, 558 (2d Cir. 1924); Glenn v. Lawrence, 280 Ill. 581, 585, 117 N.E. 757, 759-60 (1917); Wilson v. Lapham, 196 Iowa 745, 748-49, 195 N.W. 235, 237 (1923); W. PROSSER, *supra* note 94, §§ 119-120, at 835, 853.

101. Quigley v. Hawthorne Lumber Co., 264 F. Supp. 214, 219 (S.D.N.Y. 1967) (dictum); Wheeler v. Satilla Rural Elec. Membership Corp., 103 Ga. App. 401, 414, 119 S.E.2d 375, 377 (1961); Price v. Cobb, 63 Ga. App. 694, 702-03, 11 S.E.2d 822, 827 (1940); W. PROSSER, *supra* note 94, § 119, at 836-37.

102. *See* cases cited note 99 *supra*.

perjury are limited because they were designed to allow redress for other types of tortious injury. At best, these actions are substitute remedies for perjury, used because courts have refused to allow a tort action for perjury itself. The reasons for the judicial reluctance to recognize this tort will now be explored.

COMMON LAW PRECLUSION OF A CIVIL ACTION FOR PERJURY

The judicial policy that denies a tort for injurious statements made in the course of a judicial proceeding can be traced as far back as 1596, to the English case of *Damport v. Sympson*.[103] In *Damport*, the plaintiff sought to recover damages against a witness who testified in an earlier suit for conversion. The plaintiff alleged that the defendant committed perjury by testifying that the value of the converted property was no more than £180, whereas the actual value was £500.[104] As a result of the perjury, plaintiff claimed he recovered only £200 in damages, instead of £500.[105] The *Damport* court reversed a judgment for £300 against the defendant and held that perjury was not actionable.[106] The court reasoned that since perjury was punishable by criminal statute,[107] a civil action for damages must be disallowed, for "the defendant might twice be punished . . . by the statute, and by this action, which is not reasonable."[108] The existence of criminal sanctions for perjury similarly convinced Lord Holt, in *Ashby v. White*,[109] to refuse to allow a civil action:

> [F]or perjury is a crime of so high a nature that it concerns all mankind to have it punished, which cannot be in an action upon the case, where nothing but damages shall be recovered by the party injured . . . . Therefore, for example sake, and public security, the prosecution of such an offense is vested in the Crown.[110]

Of course, it is desirable for the state to prosecute perjurous testimony. However, the denial of a parallel civil action for damages based on this proposition does not seem to be mandated by reason.[111] A private action

103. 78 Eng. Rep. 769 (K.B. 1596).
104. *Id.* at 769.
105. *Id.*
106. *Id.*
107. *Id.* Perjury has been a criminal offense since 1487. *See* 3 Hen. 7 c.1 (1487), cited in W. BURDICK, LAW OF CRIME § 324 (1946).
108. 78 Eng. Rep. at 769. *See also* Eyres v. Sedgewicke, 79 Eng. Rep. 513, 514 (K.B. 1620).
109. 25 Eng. Rul. C. 52 (K.B. 1701) (dicta) (reporting contents of notes of Lord Holt discovered in 1837. The case without notes may be found at 90 Eng. Rep. 1188 (K.B. 1701)).
110. *Id.* at 75.
111. Undoubtedly perjury, as much as assault, fraud, or murder, is an offense to the public. But it is clear that all such acts also inflict private injuries. No one would seriously suggest that the civil counterparts of these latter criminal offenses should be disallowed. The deterrent effect statutes provide by applying criminal sanctions to perjury is not a persuasive justification for refusal of tort recovery, particularly in light of the sporadic enforcement of such laws. *See* text & notes 15-18 *supra*. Arguably, perjury is a much more serious offense than murder, in terms of its potential consequences upon a vital organ of our society—the judicial system. At a time when the commentators characterize perjury as rampant, see text & note 15 *supra*, it

would not necessarily interfere with the government's right to prosecute. On the other hand, the absence of a private action leaves injured parties without compensation. Nonetheless, American courts blindly follow the weight of precedent. For example, the Washington Supreme Court, in dismissing a tort action for perjury,[112] noted that "[p]erjury is, of course, a public offense and punishable in criminal proceedings, but from the earliest times the giving of false testimony has not been treated as a wrong actionable in civil proceedings."[113]

Clearly, the traditional rule cannot be justified on the basis of its longevity. Nor can the existence of criminal sanctions outweigh the paramount need to provide substantial justice to those wronged by perjury. Aside from the availability of criminal sanctions, other justifications have been given for the common law rule disallowing a tort for perjury. Some courts have urged that such an action would harass witnesses and deter full public cooperation with the courts.[114] Courts have also found a conflict between this tort and the policy of res judicata.[115] Alternatively, after assessing the adversary nature of a court proceeding, some tribunals hold that undiscovered perjury is presumed to result from a failure to exercise due diligence in the conduct of a court proceeding.[116] These public policies require close scrutiny if they are to justify the encouragement of perjury.

Immunity for Witnesses and Parties

In 1875, the English House of Lords established civil immunity for persons testifying before the English courts. In *Dawkins v. Lord Rokeby*,[117] an action was brought for libel against a witness in a former proceeding. The House of Lords affirmed the following statement of Kelly, C.B.: "[T]he principle, we apprehend, is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice."[118] The American courts have followed the rule of civil immunity.[119] Indeed, the

would seem that a civil action should be created for the deterrent effect it might provide. The present rule, on the other hand, provides an incentive for the individual to walk into court and lie. *See generally* Hirschman, *You Do So Solemnly Swear*, 24 J. CRIM. L. & C. 901, 901 (1934); McClintock, *supra* note 10, at 727; Purrington, *The Frequency of Perjury*, 8 COLUM. L. REV. 67, 75 (1908); Whitman, *supra* note 15, at 127; Comment, *supra* note 6, at 361.

112. W.G. Platts, Inc. v. Platts, 73 Wash. 2d 434, 444, 438 P.2d 867, 873 (1968).

113. *Id.* at 440, 438 P.2d at 871. As is often the case, the English rule has been adopted by numerous American jurisdictions. Almost universally, American courts have refused to recognize a cause of action in tort for perjury. *E.g.*, Maicobo Inv. Corp. v. Von Der Heide, 243 F. Supp. 885, 892 (D. Md. 1965); Agnew v. Parks, 172 Cal. App. 2d 756, 765, 343 P.2d 118, 124 (Ct. App. 1959); Morris v. Taylor, 353 S.W.2d 956, 958 (Tex. Civ. App. 1962).

114. *See* text & notes 117-31 *infra*.

115. *See* text & notes 132-35 *infra*.

116. *See* text & notes 141-47 *infra*.

117. 7 H.L. 744, 33 L.T.R. 196 (1875).

118. 33 L.T.R. at 197. The rule has been followed in the recent case of Hargreaves v. Bretherton, [1959] 1 Q.B. 45, where it was held that because immunity is necessary for the administration of justice, *id.* at 52, an action will not lie upon an allegation that the plaintiff was damaged by false evidence given against him in a criminal proceeding. *See id.*

119. The Florida Supreme Court, in Catlett v. Chestnut, 108 Fla. 475, 146 So. 547 (1933),

Restatement of Torts urges that "[a] witness is absolutely privileged to publish false and defamatory matter of another . . . as a part of a judicial proceeding in which he is testifying, if it has some relation thereto."[120] It is argued that if civil immunity no longer adhered to courtroom testimony, pleadings, or depositions, the administration of justice might be substantially hindered.[121] Because of a belief that vexatious or intimidating suits may deter full cooperation with the court by witnesses and parties,[122] any relevant testimony or other material given to a court has been accorded an absolute privilege from suit, whether or not the information complained of is maliciously given, and regardless of its truth or falsity.[123] To be sure, the policy of civil immunity adopted by English and American tribunals is a weighty one. However, the concomitant detriment to substantial justice should require a careful reevaluation.

The rule of witness immunity has its primary application in preventing suits for libel and defamation, actions that are readily distinguishable from the proposed suit to remedy perjury. By definition, perjured testimony is given maliciously.[124] Unlike defamation or libel, intentionally false testimony strikes at the core of judicial administration. It taints the basic evidentiary facts upon which the judgment is rendered. Assuming that full disclosure of the truth is the goal of judicial policies,[125] application of civil immunity to witnesses should not extend to falsehoods that can be clearly proven. It is argued that the immunity from civil suit protects the parties and other witnesses before the court from harassment and vexatious suit.[126] Clearly, avoiding the harassment of witnesses is a substantial and legitimate concern for the legal system. However, the immunity and the benefits obtained thereby must be weighed against the policies of substantial justice

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sums up the rule succinctly: "Public policy, and the safe administration of justice, require that Circuit Judges, witnesses and parties to pending legal controversies, be privileged against any restraint sought to be imposed upon them by suits for damages." *Id.* at 477, 146 So. at 548; *accord*, Kessler v. Townsley, 132 Fla. 744, 746, 182 So. 232, 232-33 (1938).

120. RESTATEMENT OF TORTS § 588 (1938). The Restatement goes on to declare: "The function of witnesses is of fundamental importance in the administration of justice. The final judgment of the tribunal must be based upon the facts as shown by their testimony, and it is necessary therefore that a full disclosure be not hampered by fear of private suits for defamation." *Id.* § 588 comment a.

121. Catlett v. Chestnut, 108 Fla. 475, 477, 146 So. 547, 548 (1933); Brewer v. Carolina Coach Co., 253 N.C. 257, 261-62, 116 S.E.2d 725, 727-28 (1960). *Cf.* Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc., 358 F. Supp. 17, 22 (E.D. Tenn. 1972) (stating merely that "public policy underlies the rule"), *aff'd mem.*, 477 F.2d 598 (6th Cir. 1973).

122. *See* Abbott v. Tacoma Bank of Commerce, 175 U.S. 409, 411 (1899).

123. *Id.*; Petty v. General Accident Fire & Life Assurance Corp., 365 F.2d 419, 421 (3d Cir. 1966); Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc., 358 F. Supp. 17, 22 (E.D. Tenn. 1972), *aff'd mem.*, 477 F.2d 598 (6th Cir. 1973). *See also* Todd v. Cox, 20 Ariz. App. 347, 348, 512 P.2d 1234, 1235 (1973).

124. *See* MODEL PENAL CODE § 241.1(1) (Proposed Official Draft, 1962).

125. *See generally* United States v. Manfredonia, 414 F.2d 760, 764 (2d Cir. 1969) (perjury is punished for harm perpetrated on the courts); United States v. Otto, 54 F.2d 277, 279 (2d Cir. 1931) (perjury is a "most serious" crime with far-reaching obstructive effects on justice); Comment, *Perjury: The Forgotten Offense*, 65 J. CRIM. L. & C. 361 (1974).

126. *E.g.*, Catlett v. Chestnut, 108 Fla. 475, 477, 146 So. 547, 548 (1933); Jensen v. Olsen, 273 Minn. 390, 393, 141 N.W.2d 488, 490 (1966); Brewer v. Carolina Coach Co., 253 N.C. 257, 261-62, 116 S.E.2d 725, 727-28 (1960).

and protecting the integrity of the courts. One might ask whether it is unduly burdensome to expect that a witness, deponent, or affiant will not commit a felony in court. It is submitted that the policies currently used to support the rule of absolute immunity can be satisfactorily furthered while the goals of substantial justice and judicial integrity are fostered. A civil action in tort for perjury can be created, according the witness a qualified immunity from civil suit. One state has so limited immunity of witnesses: Louisiana has declined to follow the principle of absolute immunity to courtroom testimony and offers only a qualified privilege—to material statements based on probable cause, and spoken without malice.[127] That state's supreme court reasons that the potential abuse of the immunity by litigants is more substantial than the potential for harassment by vexatious civil suits. Consequently, Louisiana allows tort actions for libel and slander in court proceedings.[128] Providing a degree of immunity similar to that in Louisiana will guarantee a high level of cooperation with the courts, and will also allow justice to be done in civil suits alleging perjury. The risk of vexatious litigation can be mitigated by appropriate application of the existing torts of wrongful civil proceedings and abuse of process.[129]

It may be feared that a liberalization of the rule of civil immunity will result in a flood of litigation or will tend to frustrate parties with legitimate claims.[130] To preempt this potentiality, the creation of a tort action for

127. *See* Lescale v. Joseph Schwartz Co., 116 La. 293, 310, 40 So. 708, 714 (1906); discussion note 13 *supra*.

128. Lescale v. Joseph Schwartz Co., 116 La. 293, 40 So. 708 (1906); Jones v. Davis, 233 So. 2d 310, 315 (La. App. 1970). Interestingly, Louisiana may not recognize a tort action for perjury. The only case on point, Gusman v. Hearsey, 28 La. Ann. 709, 710 (1876), holds that res judicata bars a suit for perjury. Arguably, in light of *Lescale*, *Gusman* may not be followed today in Lousiana for perjury.

129. The torts of wrongful civil proceeding and abuse of process are closely related. Both are intended to protect individuals from vexatious litigation. Wrongful civil proceeding is the civil equivalent of malicious prosecution, providing a remedy for suits wrongfully brought, while abuse of process is applicable where an individual brings a proper suit, but then subverts it to an ulterior motive beyond the scope of the legal system. *See* W. PROSSER, *supra* note 94, §§ 120-121. The Arizona Supreme Court in Grimm v. Arizona Board of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977) ruled that the individual members of the Board of Pardons and Paroles enjoy only a qualified immunity from civil suits charging gross negligence and recklessness in the release of a prisoner. The court considered the origins of the rule of immunity and its purpose and concluded:

> We are persuaded that public needs are best served by a qualified rather than absolute immunity for parole board members in relation to their parole decisions. In many bureaucratic and administrative decisions there are few or no safeguards to take care of wrong, harmful decisions. . . . The Board of Pardons and Paroles, however has had no check on its unbridled discretion. The question arises whether such unbridled discretion is appropriate in our modern society.

Id. at 265-66, 564 P.2d at 1232-33. The court went on to hold that a parole board member owes a duty to protect the public from highly dangerous prisoners. *Id.* at 267, 564 P.2d 1234. The *Grimm* court felt that logic requires an immunity that is less than absolute because an unqualified immunity deprives individuals of a remedy for wrongdoing. *Id.* at 265, 564 P.2d at 1232.

The *Grimm* holding is strong support for a decision that would grant only a qualified immunity to witnesses or parties that commit perjury during judicial proceedings. The absolute immunity now accorded to them deprives the victim of a needed redress. A tort action would also assist the court in placing restraints upon unbridled acts of perjury, especially in light of the demise of the criminal penalty for this offense. *See* text & notes 11-18 *supra*.

130. The mechanism for controlling vexatious suits is provided by the Federal Rules of Civil Procedure. FED. R. CIV. P. 56(b) allows the defending party to move for summary

perjury should be accompanied by a demanding standard of proof. For the plaintiff to prevail on a complaint alleging perjury, he should be required to prove every element of his cause of action by clear and convincing evidence.[131] Such a standard of proof will keep to a minimum any potential for harassment of witnesses or parties by unfounded claims. With this procedural safeguard, the absolute privilege from civil suits accorded to all participants in the legal proceeding should no longer be applied to bar a tort action for perjury. However, the general public interest in disposing of litigation must also be considered, as it affects the validity of the proposed tort.

The Policy Favoring the Finality of Judgments

The public's interest in disposing of litigation is frequently cited as a primary reason for denying a tort action for perjury.[132] As a general matter, economies of judicial administration make it desirable that a litigant be allowed only one full and fair opportunity to litigate his case. Therefore, the question arises whether an action in tort for perjury is precluded by a judgment in a prior action. Res judicata bars a subsequent suit between the same parties that seeks to relitigate the subject matter of a prior cause of action by contesting issues which were, or might have been fairly decided in the original proceeding.[133] A tort action for perjury will bring this principle into play where a party-victim sues a party-perjurer for injuries arising out of the first proceeding. An argument can be made, however, that the doctrine of res judicata—preclusion by judgment—does not apply to this situation. A fundamental element of res judicata is the prevention of the relitigation of a single cause of action. It is often stated that res judicata prohibits the splitting of a claim.[134] Essential to the application of res judicata, therefore,

judgment of a claim or any part thereof. FED. R. CIV. P. 12(c) allows a motion to be made for judgment based upon the pleadings. In addition, FED. R. CIV. P. 12(b)(6) makes the failure to state a cognizable claim a basis for a motion to dismiss.

131. "Clear and convincing evidence is 'that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.'" Hobson v. Eaton, 399 F.2d 781, 784 n.2 (6th Cir. 1968) (quoting Cross v. Ledford, 161 Ohio St. 469, 477, 120 N.E.2d 118, 123 (1954)). *See also* Aetna Ins. Co. v. Paddock, 301 F.2d 807, 811 (5th Cir. 1962); McDonnell v. General News Bureau, 93 F.2d 898, 901 (3d Cir. 1937); Whitmarsh v. Pennsylvania Ry., 61 F. Supp. 850, 852 (E.D. Pa. 1945). It is a quantum of evidence greater than the preponderance standard usually applicable to civil cases. Hentges v. Schuttler, 247 Minn. 380, 383, 77 N.W.2d 743, 746 (1956); Nicholson v. Shockey, 192 Va. 270, 282, 64 S.E.2d 813, 820 (1951). Another court has offered a definition of more practical application. Quoting with approval a jury instruction given by the trial court, the court stated that by the term clear and convincing evidence, it "is meant [that] the witnesses to a fact must be found to be credible and that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order and that the testimony be clear, direct and weighty and convincing. . . ." Aetna Ins. Co. v. Paddock, 301 F.2d 807, 811 (5th Cir. 1962).

132. *See, e.g.*, Kantor v. Kessler, 132 N.J.L. 336, 337, 40 A.2d 607, 608 (1945); Gusman v. Hearsey, 28 La. Ann. 709, 710 (1876); Smith v. Louis, 3 Johns. (N.Y.) 157, 168 (1808).

133. City of Elmhurst v. Kegerreis, 392 Ill. 195, 203, 64 N.E.2d 450, 453 (1946); *see* H. BLACK, LAW OF JUDGMENTS 760-61 (2d ed. 1902); Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 342 (1948). *See generally* Von Moschzisker, *Res Judicata*, 38 YALE L.J. 299 (1929).

134. Baltimore Steamship Co. v. Phillips, 274 U.S. 316, 319 (1927); Pan American Match Inc. v. Sears, Roebuck & Co., 454 F.2d 871, 875 (1st Cir.), *cert. denied*, 409 U.S. 892 (1972); Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 120, 259 P.2d 554, 557 (1953).

is the relitigation of the same claim. Res judicata should not be applied to bar litigation of a claim that on a specific instance—at trial, in court documents, or in a deposition, for example—the defendant consciously falsified evidence. It will be a rare case indeed in which this claim can be considered part of the same transaction or occurrence that gave rise to the initial suit.[135]

Collateral estoppel is a doctrine closely related to res judicata. Whereas res judicata can be called preclusion by judgment, collateral estoppel is a doctrine of issue preclusion. It bars relitigation of any issue necessarily decided in a previous action.[136] It prevents relitigation of those issues that were fully and fairly considered in the prior action. Res judicata and collateral estoppel differ in one more important way: the former doctrine applies only where the parties to the two actions are identical, while collateral estoppel is not necessarily so limited. Many jurisdictions have now discarded the so-called "mutuality of estoppel" rule,[137] and hold that collateral estoppel will apply whenever the party against whom the estoppel is asserted was a party to the previous action.[138] Clearly, the doctrine will apply, provided the court finds that the specific issue of the party's veracity was fully and fairly litigated.[139] Again, in most cases, although the finder of fact undoubtedly evaluated the truthfulness of all the testimony, the veracity of a particular witness, even a party, is unlikely to be litigated.[140] Only in

135. When the claim for perjury is asserted against a nonparty in the first trial, res judicata will not prevent suit, as the doctrine only applies when the parties are identical in both proceedings. *See, e.g.*, United States v. Harrison County, Mississippi, 339 F.2d 485, 491 (5th Cir. 1968), *cert. denied*, 397 U.S. 918 (1970); McKeown v. Wheat, 231 F.2d 540, 542 (5th Cir. 1956); Weller v. Weller, 14 Ariz. App. 42, 46, 480 P.2d 379, 383 (1971).

136. *See, e.g.*, State v. Little, 87 Ariz. 295, 304, 350 P.2d 756, 762 (1960); DiOrio v. City of Scottsdale, 2 Ariz. App. 329, 331, 408 P.2d 849, 851 (1965); State Sav. & Loan Ass'n v. Corey, 53 Hawaii 132, 139, 488 P.2d 703, 708 (1971), *cert. denied*, 406 U.S. 920 (1972).

137. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 350 (1971). *See "Collateral Estoppel, Criminal Proceedings, and the Prevention of Contradictory Results,"* 18 ARIZ. L. REV. 668, 672 (1976).

138. *See, e.g.*, Zbanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir. 1964); United States v. United Air Lines, Inc., 216 F. Supp. 709, 725-30 (E.D. Wash., D. Nev. 1962), *aff'd in part, mod. in part*, United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed sub nom.* United Air Lines, Inc. v. United States, 379 U.S. 951 (1964); Krumtum v. Burton, 111 Ariz. 448, 451, 532 P.2d 510, 513 (1975); Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal.2d 807, 813, 122 P.2d 892, 895 (1942).

139. The RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tentative Draft No. 3, 1976) indicates that on some occasions collateral estoppel should not be applied:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following instances:
>
> . . . .
>
> (e) There is a clear and convincing need for a new determination of the issue . . . (ii) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (iii) because the party sought to be concluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication of the initial action.

140. An illustration of a case in which a perjury action could be predicated upon testimony given in a prior action without running afoul of the principle of collateral estoppel, is provided in the criminal case law. Under double jeopardy principles, a prosecution charging perjury is not barred by the defendant's earlier acquittal of a substantive offense in a first action. *See, e.g.*, United States v. Tramunti, 500 F.2d 1334, 1346 (2d Cir.), *cert. denied*, 419 U.S. 1079

those rare cases in which the veracity of the witness alleged to have perjured himself was distinctly adjudged by the fact finder will the doctrine of collateral estoppel bar an action in tort for perjury.

Perjury—A "Forseeable" Hazard of Litigation?

An equitable action to overturn a final judgment upon the grounds of perjury has been denied by some courts for the reason that false testimony is a hazard of litigation.[141] In such an action, the Iowa Supreme Court ruled that the purpose of a trial was to search for the truth. It found that the nature of the proceeding suggests to both litigants that false evidence inevitably will be offered to prove facts which are not true.[142] It follows therefore that perjury is to be expected in the adversarial process because factual disputes are resolved. It is reasoned that a failure to exercise due diligence occurs when a party fails to discover perjury in a trial.[143]

Certainly, the function of the judicial process is to resolve factual issues. However, is it fair to charge a party with a result that he could not realistically have avoided? The Wisconsin Supreme Court, in *Boring v. Ott*,[144] a suit in equity to restrain the execution of a fraudulently obtained judgment, stated:

> It is not easy to see . . . why an issue determined in favor of the prevailing party solely by perjury does not amount to . . . a fraud, where such perjury was unknown to the defeated party, and could not by the exercise of reasonable diligence have been discovered. It would seem that a judgment thus obtained is as unconscionable as one secured against a party by keeping him away from court or by other corrupt means . . . .[145]

Moreover, although equity has always aided only the vigilant,[146] it is unwise judicial policy that unjustly enriches a perjurer, and presumes that the honest

(1974); United States v. Nash, 447 F.2d 1382, 1385 (4th Cir. 1971); Adams v. United States, 287 F.2d 701, 703 (5th Cir. 1961). Neither collateral estoppel nor double jeopardy bars such a suit unless the court finds that a reasonable jury necessarily determined the truthfulness of such testimony in arriving at its verdict. Adams v. United States, 287 F.2d at 704. In *Adams*, the court affirmed a conviction for perjury, and dismissed an appeal asserting double jeopardy. After they were discovered in Florida occupying an automobile, the defendants were charged with a violation of federal statutes regulating the possession and transportation of alcoholic beverages. *Id.* at 702. By way of defense, testimony was offered to prove that the defendants were actually in Georgia at the time the arrests occurred. *Id.* The court of appeals ruled that the acquittal determined only that the defendants were not in the automobile in question at the time the arrests occurred. *Id.* at 703-04. The court held that the first suit had not determined the validity of the defendants' alibi because the jury could have rendered a verdict of not guilty even if it discredited this story. Thus, double jeopardy was found not to apply. *Id.* at 705.

141. Westside Irrigating Co. v. United States, 269 F. 759, 763 (9th Cir. 1921); Donovan v. Miller, 12 Idaho 600, 608, 88 P. 82, 84 (1906); Croghan v. Umplebaugh, 179 Iowa 1187, 1190, 162 N.W. 596, 597 (1917); *see* 3 A. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 1241, at 2582 (5th ed. 1925).

142. Croghan v. Umplebaugh, 179 Iowa 1187, 1190, 162 N.W. 596, 597 (1917).

143. *See* cases cited note 141 *supra*.

144. 138 Wis. 260, 119 N.W. 865 (1909).

145. *Id.* at 269, 119 N.W. at 868.

146. The equity maxim of "clean hands" may bar a plaintiff's suit however improper the acts of the defendant may have been. Precision Instrument Mfg. Co. v. Automotive Maintenance Machine Co., 324 U.S. 806, 814 (1945); MacRae v. MacRae, 37 Ariz. 307, 294 P. 280

party has been negligent for failure to detect the wrongdoing. In many instances, it is completely unrealistic to expect a litigant to anticipate and meet the entire range of possible fabrications by his opponent and the opponent's witnesses.[147]

In summary, it is evident that existing law is incapable of adequately redressing the civil injury inflicted by the commission of perjury. Common law equitable remedies for fraud upon the court and the independent action for review are severely limited and camouflaged in a morass of conflicting case law. Federal rule 60(b)(3) offers some hope of relief where perjury of a party is discovered within one year, but still fails to provide adequate redress to the person wronged. Existing torts of fraud and deceit, malicious prosecution, and wrongful civil proceedings may provide a damage remedy for perjury, but only where their separate elements are also established. A need exists to reverse the rule of almost 400 years and to create a new common law tort. The final section of this Note will propose a formulation for this new tort.

A PROPOSAL FOR A NEW TORT FOR PERJURY

Once it is granted that the balance of all competing public policies favors establishment of a tort action for perjury, it is not difficult to formulate its elements. Perjury is by definition a voluntary and intentional act.[148] As such, it easily fits within the established guidelines of an intentional tort.[149] If the complaint is seasonably brought,[150] recovery for perjury

(1930). *See also* Loughran v. Loughran, 292 U.S. 216, 229 (1934). The Supreme Court in *Precision Instrument* held that the perjury of the plaintiff's agent in falsifying information on a patent application, barred a suit against the defendant for want of equity. 324 U.S. at 815-16. It is interesting to note for present purposes that "clean hands" are stated to be unnecessary to set aside a judgment for fraud upon the court. Martina Theatre Corp. v. Schine Chain Theatres, Inc., 278 F.2d 798, 801 (2d Cir. 1960); 11 C. WRIGHT & A. MILLER, *supra* note 24, § 2870, at 250-51.

147. Such an instance is illustrated by the following case. It is problematical whether the appellant could have been prepared to meet this case of alleged perjury. The United States Court of Appeals in Atchison, T. & S.F. Ry. v. Barrett, 246 F.2d 846 (9th Cir. 1957), considered the correctness of a lower court judgment and award of damages for head injuries suffered by a train waiter. The plaintiff's alleged injury consisted of a constant jerking or twisting of the head, described by medical experts as a "spasmodic torticollis." *Id.* at 847. The jury awarded a sum of $12,500 in compensation. *Id.* After the trial, the plaintiff was placed under observation by undercover operatives who took motion pictures indicating that all jerking had ceased during an observation period of two hours. *Id.* After the plaintiff discovered the film observation, the jerking phenomenon immediately reappeared. The *Atchison* court noted that "[t]he pictures raise grave suspicion of the legitimacy of plaintiff's complaint, but they are far from conclusive." *Id.* at 848. The *Atchison* court, while affirming the lower court decision not to grant a motion for relief under FED. R. CIV. P. 60(b), *id.* at 850, noted, "[w]e are frank to state that had the able judge determined that fraud or other misconduct existed to grant relief under Rule 60(b), we would not have disturbed that conclusion, on the record before us." *Id.* at 849.

148. *See* text & notes 6-8 *supra*.

149. *See* RESTATEMENT OF TORTS § 870 (1939), which states:

> A person who does any tortious act for the purpose of causing harm to another or to his things or to the pecuniary interests of another is liable to the other for such harm if it results, except where the harm results from an outside force the risk of which is not increased by the defendant's act.

When a tortious act is committed willfully or maliciously, damages have been awarded for all injuries proximately resulting from the act. *See, e.g.*, Barnett v. Collection Serv. Co., 214

should be allowed against an adverse party or witness[151] if the plaintiff can establish actual damages by clear and convincing proof. The plaintiff must be able to prove by clear and convincing evidence that the defendant's perjury resulted in pecuniary damages to him in the action in which the perjury occurred. He also must show that the perjury proximately caused this pecuniary harm.[152]

The tort action for perjury will also be available to an individual who was erroneously convicted of a criminal act due to false testimony of a prosecution witness. However, in order to prevent vast numbers of prisoners from bringing frivolous actions, it is suggested that the prerequisite of exoneration should be imposed.[153] Because conviction is imposed only after criminality is established beyond a reasonable doubt,[154] a greater presumption of correctness should be accorded to it, and perjury suits limited to this degree. While the truthfulness of all evidence is not necessarily determined by the trier of fact in a criminal case, the inference is strong that it is factually correct. In any event, although some testimony might be perjured, if the conviction was a correct one, the prisoner may not have suffered "damages," because of the perjury's cumulative effect. Adoption of this

Iowa 1303, 1312, 242 N.W. 25, 28 (1932); Gadbury v. Bleitz, 133 Wash. 134, 136, 233 P. 299, 300 (1925); Moore v. Jefferson Hosp., Inc., 208 Va. 438, 441-42, 158 S.E.2d 124, 127 (1967).

150. Because perjury can be discovered at any time after the initial judgment has become final, it is difficult to impose a specific time limitation upon the subsequent tort action. Of course, an action for perjury should be pursued with reasonable diligence once its propriety is ascertained. Perjury actions should therefore be subject to reasonable time limitations to prevent actions that work a hardship upon the defendant. In that memories fade, tort actions should certainly not be allowed after 25 or 50 years from the entry of previous judgment. In formulating a statute of limitations for this action, the legislature should allow a reasonable time for filing after discovery of the perjury. The statute should require due diligence in discovering the perjury, and impose an absolute limit, as suggested above. *Cf.* ARIZ. REV. STAT. ANN. § 12-543 (1956) (3 year period from date of discovery in which to commence action for fraud).

151. Only the perjury of an adverse party or witness should be a ground for the tort, excluding suits against a party's own witnesses. This element should be included simply to prevent relitigation. *See* ME. REV. STAT. tit. 14, § 870 (1964). *Cf.* Cole v. Chellis, 122 Me. 262, 264, 119 A. 623, 623 (1923) (the law abhors fraud, perjury, and interminable litigation).

152. The reason for requiring clear and convincing proof of actual pecuniary harm is again the prevention of fraud. Since this tort action has a potential for abuse, and will result in the reopening of prior litigation, suits alleging mere indignation, without pecuniary or tangible damage, should be disallowed. However, the plaintiff should be permitted to recover any elements of special damage, as for any other tort action.

153. This element is adopted by the courts for actions of malicious prosecution. A criminal conviction bars a suit for malicious prosecution. Dropszyk v. Great Lakes Steel Corp., 367 Mich. 318, 323, 116 N.W.2d 736, 739 (1962); W. PROSSER, *supra* note 94, § 119, at 838-40. There are two reasons for this limitation: (1) The previous judgment establishes the defendant's probable cause in bringing the action, *see* Ripley v. Bank of Skidmore, 355 Mo. 897, 903, 198 S.W.2d 861, 864 (1947); Weber v. Johnston Fuel Liners, Inc., 540 P.2d 535, 539 (Wyo. 1975); and (2) malicious prosecution is a collateral attack upon the first judgment, even where the conviction was obtained by fraud or perjury. *See* Turbessi v. Oliver Iron Mining Co., 250 Mich. 110, 112-13, 229 N.W. 454, 455 (1930). *See also* W. PROSSER, *supra* at 838; 25 ILL. L. REV. 957 (1931). However, proof of false evidence, testimony, or other corrupt practices overcomes the presumption of probable cause established by a conviction. *See, e.g.*, Sheffield v. Cantwell, 101 F.2d 351, 352 (7th Cir. 1938) (dictum); McMahon v. Florio, 147 Conn. 704, 707, 166 A.2d 204, 206 (1960); Olson v. Independent Order of Foresters, 7 Utah 2d 322, 324, 324 P.2d 1012, 1014 (1958) (dictum).

154. *In re* Winship, 397 U.S. 358, 364 (1970); United States v. Petersen, 513 F.2d 1133, 1136 (9th Cir. 1975); Leonard v. People, 149 Colo. 360, 372, 369 P.2d 54, 61 (1962); Cole v. State, 467 P.2d 511, 515 (Okla. Crim. App. 1970).

prerequisite will not be unduly restrictive. Due process will compel a court to overturn a conviction obtained by perjury where the prosecution had knowledge of it.[155] Additionally, a criminal defendant should be able to obtain a new trial where the discovery of perjury constitutes new evidence.[156] When the conviction is reversed or successfully attacked collaterally, the former prisoner should be allowed to recover damages for perjury.[157]

Undoubtedly, courts will be hesitant to overturn almost 400 years of precedent denying a tort action for perjury.[158] Therefore it is urged that legislatures also consider creation of a statutory cause of action. The state of Maine has adopted such a statute.[159] The Maine statute provides that a tort is established when a plaintiff can show that a judgment has been obtained against him by the perjury of a witness introduced at trial by the adverse party, and that damage has resulted.[160] Such an action may be brought within three years after the offensive judgment is rendered.[161] A less comprehensive statute exists in New York, where the legislature has made the perjury of an attorney an actionable civil offense subject to treble damages.[162] Although the New York law does not recognize an action in tort for perjury generally,[163] civil relief can be obtained where an attorney has deceived a client or the court.[164]

Case law under the statute in Maine is sparse.[165] The most recent case

155. Napue v. Illinois, 360 U.S. 264 (1959); *see* Pyle v. Kansas, 317 U.S. 213, 216 (1942); Mooney v. Holohan, 294 U.S. 103, 112 (1935).

156. Where the new evidence showing perjury is convincing, a court may grant a new trial. Martin v. United States, 17 F.2d 973, 976 (5th Cir.), *cert. denied*, 275 U.S. 527 (1927); Imbler v. Craven, 298 F. Supp. 795, 807-08 (C.D. Cal. 1969), *aff'd sub nom.* Imbler v. California, 424 F.2d 631 (9th Cir.), *cert. denied*, 400 U.S. 865 (1970); *see* Comment, *Relief From Convictions Based Upon Perjured Testimony—A Proposal for a Reasonable Standard*, 11 SANTA CLARA LAW. 316, 325 (1971).

157. Older cases have indicated a judicial willingness to allow a new trial upon a civil matter if a conviction of a witness for perjury is first obtained. *See* Moore v. Gulley, 144 N.C. 81, 85, 56 S.E. 681, 683 (1907). *See also* Maddox v. Apperson, 82 Tenn. 596, 605-06 (1885).

158. *See* text & notes 1-3 *supra*.

159. ME. REV. STAT. tit. 14, § 870 (1964) states:

> When a judgment has been obtained against a party by the perjury of a witness introduced at the trial by the adverse party, the injured party may, within 3 years after such judgment or after final disposition of any motion for relief from the judgment, bring an action against such adverse party, or any perjured witness or confederate in the perjury, to recover the damages sustained by him by reason of such perjury; and the judgment in the former action is no bar thereto.

160. *Id.*

161. *Id.*

162. N.Y. JUD. LAW § 487 (McKinney 1968) states in part:

> "An attorney or counselor who:
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . .
> . . . .
> . . . forfeits to the party injured treble damages, to be recovered in a civil action."

See Nones v. Security Title & Guar. Co., 4 Misc. 2d 1057, 1058, 162 N.Y.S.2d 761, 762 (Sup. Ct. 1958).

163. *See* Anchor Wire Corp. v. Borst, 277 App. Div. 728, 729, 102 N.Y.S.2d 871, 872-73 (1951).

164. Nones v. Security Title & Guar. Co., 4 Misc. 2d 1057, 1058, 162 N.Y.S.2d 761, 762 (Sup. Ct. 1958).

165. In over 100 years that the statute has been in existence, apparently only three suits for

brought in tort for perjury was *Milner v. Hare*, decided by the Maine Supreme Court in 1926.[166] There are earlier precedents establishing that the tort action created by the statute will be strictly construed, since it is in derogation of the common law rule.[167] The sparcity of litigation under this statute, in addition to the experience in New York[168] should substantially assuage whatever fears might exist about a possible flood of vexatious litigation resulting from the enactment of such a statute.

The following model statute is proposed:

MODEL STATUTE CREATING A TORT FOR PERJURY

A. Where a judgment has been procured by the perjury of an adverse witness or party, and
   (1) a civil recovery is substantially diminished or avoided, or
   (2) civil or criminal liability is erroneously imposed, the person or persons responsible shall be civilly liable for all damages proximately caused by such perjury.
B. The plaintiff shall prove each and every element of his cause of action by clear and convincing evidence.
C. An action in tort for perjury shall not be allowed unless it is:
   (1) commenced within a seasonable length of time after an erroneous judgment is rendered, and
   (2) commenced within three years from the date that the perjury is or could have been discovered in the exercise of ordinary diligence.
D. Before any action for perjury may be brought, where damages are sought for injuries proximately related to the imposition of a criminal conviction, the plaintiff shall have first been exonerated, by a decision of a competent court of law, or pardoned by the executive authority of the State, on grounds that the conviction was obtained by perjured evidence. Where the plaintiff has been exonerated pursuant to a decision of a competent court of law by reason of perjury, such decision shall constitute prima facie evidence against the persons responsible.

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perjury have been argued in the appellate courts of Maine. Milner v. Hare, 126 Me. 14, 135 A. 522 (1926); Cole v. Chellis, 122 Me. 262, 119 A. 623 (1923); Landers v. Smith, 78 Me. 212, 3 A. 463 (1886).

166. 126 Me. 14, 135 A. 522 (1926).

167. *See* Cole v. Chellis, 122 Me. 262, 265, 119 A. 623, 624 (1923); Landers v. Smith, 78 Me. 212, 214-15, 3 A. 463, 464 (1886). The court in Milner v. Hare, 126 Me. 14, 135 A. 522 (1926), noted that a statutory remedy existed for any litigant who stated a case within its terms. *Id.* at 16, 135 A. at 523.

168. New York has apparently litigated only one appellate case charging an attorney with perjury. *See* Nones v. Security Title & Guar. Co., 4 Misc. 2d 1057, 1058, 162 N.Y.S.2d 761, 762 (Sup. Ct. 1958).

CONCLUSION

Perjury is an undoubted offense against society and the administration of justice. Obviously, it can have very serious effects upon the parties engaged in civil or criminal litigation. Despite these effects, a rule with its origins in English common law forbids any action in tort against a perjurer. Many American jurisdictions follow this precedent. Equity has provided a limited remedy for perjury. An independent action for review or a bill of review for fraud upon the court were once the sole avenues available to one damaged by perjury. Federal rule 60(b)(3) has added a third way of attacking a judgment obtained by the use of perjured evidence. In some cases, perjury may even be an element in a tort recovery upon a more traditional theory. None of these remedies, however, is capable of providing consistently complete relief to the victim of perjury.

Various policies, including the need for finality of judgments, and the encouragement of voluntary testimony, have been cited to justify the rule which limits equitable and tort recovery. However, these policies conflict with the state interest in achieving substantial justice. Where perjury can be proven by clear and convincing evidence, and the perjury has resulted in actual monetary harm to the plaintiff or a criminal conviction, the interests in achieving justice and deterring perjury must prevail. Allowing a tort action for perjury will achieve these ends without precipitating a flood of spurious claims.