

## PERJURY BY OMISSION

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### ABSTRACT

*“Do you swear to tell the truth, the whole truth, and nothing but the truth?” There are few legal phrases that the layperson can repeat verbatim; this is one of them. But how many people truly understand the nuances and ramifications of testifying under oath? Many assume that if they do not provide the “whole truth” under oath, they will face a perjury charge. However, perjury is a charge often threatened but rarely used. The offense requires that the defendant willfully and knowingly make a false statement, under oath, regarding a material fact.*

*The federal perjury statute does not contemplate a scenario in which a defendant (or declarant, deponent, witness, or interviewee) withholds truthful information in an attempt to mislead the questioner and alter the outcome of a judicial proceeding—in sum, not telling the “whole truth.” But, in *Bronston v. United States*, the Supreme Court considered just this situation, holding that the language of the federal perjury statute does not contemplate a defendant who intentionally omits material information. Instead, the Court broadly ruled that “literally truthful” answers are categorically forbidden from being the basis of perjury. The Court placed the burden on the questioner to elicit the desired answer from a witness when confronted with a literally truthful, yet unresponsive and misleading answer. Such an onus suggests that all questioners possess the abilities of a mind reader.*

*This Article demonstrates that the Bronston Court created unforeseen consequences. Currently, a sophisticated defendant can dodge a perjury charge by providing a literally true answer while omitting pertinent information. Sometimes, these answers communicate a lie, but as long as they are literally truthful under the Bronston Court’s broad interpretation, a defendant could never face a perjury charge. Congress can fill the holes of this decision by amending the federal perjury statutes to criminalize those who intentionally give incomplete or misleading responses regarding material information under oath.*

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## INTRODUCTION

In September 2018, Americans gathered around their televisions or computer monitors to watch members of the Senate Judiciary Committee question then-Judge Brett Kavanaugh and Dr. Christine Blasey Ford. Judge Kavanaugh had recently been nominated to the Supreme Court, motivating Dr. Ford to publicly accuse him of physically and sexually assaulting her in the 1980s.<sup>1</sup> For the Committee to gather potentially useful information in

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1. See Eli Watkins, *Timeline: How the Kavanaugh Accusations Have Unfolded*, CNN (Sept. 17, 2018, 4:46 PM), <https://www.cnn.com/2018/09/17/politics/kavanaugh-ford-timeline/index.html> [<https://perma.cc/6ZR4-Zj9Y>] (describing how Judge Kavanaugh agreed to answer senators’ questions in order to refute allegations of physical and sexual abuse against him).

Judge Kavanaugh's confirmation process, both Dr. Ford and Judge Kavanaugh willingly participated in a hearing.<sup>2</sup> At this hearing, each senator had five minutes to question Dr. Ford and Judge Kavanaugh, who were both under oath, in order to elicit information regarding the allegations.<sup>3</sup> Due to this time restraint, it was important that both witnesses answer each question as directly and truthfully as possible. When it was Judge Kavanaugh's turn, however, he often used evasive, unresponsive answers, which derailed the senators' lines of questioning and frustrated their ability to get the answers they desired.<sup>4</sup> By providing irrelevant answers,<sup>5</sup> and sometimes even asking the senators questions instead of answering theirs,<sup>6</sup> Judge Kavanaugh managed to avoid revealing certain information. His testimony is an example of an educated person who has seemingly exploited the broad confines of perjury by providing useless answers under oath.

This is not the first time a public official has used slight ambiguity<sup>7</sup> to avoid admitting unfavorable information about himself. During a deposition regarding the Paula Jones lawsuit, President Bill Clinton was asked about his now-infamous relationship with Monica Lewinsky.<sup>8</sup> President Clinton was able to infuse ambiguity into the provided definition of "sexual relations" in order to avoid divulging information regarding his physical

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2. *Id.*

3. See Phil Mattingly & Kate Sullivan, *What Thursday's Hearing with Kavanaugh and Ford Will Look Like*, CNN (Sept. 25, 2018, 10:49 PM), <https://www.cnn.com/2018/09/25/politics/thursday-hearing-format-kavanaugh-ford/index.html> [<https://perma.cc/HK3H-DYH2>] (explaining that, at the testimony, "[t]here will be one round of questions in which each senator will have five minutes each to ask Ford questions").

4. See Kate Sullivan, *Kavanaugh's Yale Classmate: 'There Were Omissions' in Testimony About His College Drinking*, CNN (Oct. 1, 2018, 7:27 PM), <https://www.cnn.com/2018/10/01/politics/yale-kavanaugh-drinking-ludington/index.html> [<https://perma.cc/BXU2-N2RY>] (reporting that "Chad Ludington, who went to Yale with Supreme Court nominee Brett Kavanaugh, said 'there were omissions' in the nominee's testimony to the Senate Judiciary Committee on Thursday about his drinking in college").

5. In response to the following question by Senator Leahy: "So you don't know—you don't know whether that's you [in Mark Judge's book] or not?," then-Judge Kavanaugh responded, "we can sit here and you (ph) like (ph), make—make fun of some guy who has an addiction." Bloomberg Gov't, *Kavanaugh Hearing: Transcript*, WASH. POST (Sept. 27, 2018), [https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm\\_term=.72d4ba2bc183](https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm_term=.72d4ba2bc183) [<https://perma.cc/LGS8-WCD7>].

6. Senator Klobuchar asked the following: "So you're saying there's never been a case where you drank so much that you didn't remember what happened the night before, or part of what happened," to which Judge Kavanaugh responded: "It's—you're asking about, you know, blackout. I don't know. Have you?" *Id.*

7. Career prosecutor Rachel Mitchell asked: "OK. Have you ever passed out from drinking?" Kavanaugh responded: "I—passed out would be—no, but I've gone to sleep, but—but I've never blacked out." *Id.*

8. *President Clinton's Deposition*, WASH. POST (Mar. 13, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/clintondep031398.htm> [<https://perma.cc/LP9G-QY53>].

relationship with her.<sup>9</sup> In doing so, he avoided a perjury charge because, based on his own definition of “sexual relations,” he was telling the truth.<sup>10</sup>

This Article is not accusing now-Justice Kavanaugh or President Clinton of perjury. Instead, it is suggesting that their testimonies are examples of holes in the current perjury statute because they illustrate circumstances in which sophisticated individuals can omit material information under oath without facing perjury charges. Currently, a defendant commits perjury by giving a false statement under oath.<sup>11</sup> As the Supreme Court case *Bronston v. United States*<sup>12</sup> established, if a defendant’s statement is literally true, even if he or she intends to mislead the questioner, the defendant cannot be convicted under the federal perjury statutes.<sup>13</sup> Therefore, “a wily witness” can avoid truthfully answering a question by providing an answer that appears truthful but actually omits material information and sometimes even produces a lie by negative implication.<sup>14</sup>

By expanding the federal perjury statute, Congress would discourage individuals like Judge Kavanaugh and President Clinton from refusing to provide material information under oath. Congress could eliminate existing loopholes by amending the federal perjury statute to encompass perjury by omission. Under this amended statute, a defendant would commit perjury by omission by leaving out material information when providing a literally true answer to an unambiguous question with the intent to mislead the questioner.

This Article asserts that Congress should expand the federal definition of perjury to include omissions and half-truths, thereby closing the loophole created in *Bronston*. Part I.A of the Background explores the historical development of perjury and examines its current form in federal perjury statutes. Next, Part I.B discusses the Supreme Court’s decision in *Bronston*, which solidified the “literal truth” defense. Further, this Part explains the Court’s assumptions regarding the questioner’s acuity and details what a jury can infer, as well as how lower courts have distinguished *Bronston*’s holding. Moreover, Part I.B defines the various types of unresponsive answers and outlines the ethical rules relevant to perjury. Part I.C concludes the Background section by highlighting instances in which silence and omissions carry substantive meaning in the law.

Part II of this Article argues that the federal statute should encompass perjury by omission. First, Part II.A asserts that the literal truth defense

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9. See *infra* notes 159–62 and accompanying text (providing details regarding President Clinton’s deposition).

10. See *infra* Part II.A (explaining how President Clinton avoided a perjury charge).

11. See *infra* Part I.A.2 (defining perjury).

12. 409 U.S. 352 (1973).

13. *Id.* at 360.

14. *Id.*

developed by the *Bronston* Court created a loophole for sophisticated defendants. Next, Part II.B proposes that the federal perjury statute should be expanded to include perjury by omission, thus remedying the loophole. Accordingly, Part II.B demonstrates what juries would be permitted to infer under an expanded perjury statute. Further, this Part illustrates how the current statute and the literal truth defense might implicate an attorney's ethical obligations. Finally, Part II.C utilizes state statutes that contemplate perjury by omission as a foundation to recommend a revised federal statute, with accompanying jury instructions.

## I. BACKGROUND

### A. Perjury

#### 1. *The Early History of Perjury*

Perjury traces its roots as far back as the Old Testament and has evolved with society.<sup>15</sup> In early civilizations, “[t]he judge, be he elder, chief, priest, king, or professional, was a surrogate for divine intervention.”<sup>16</sup> However, society was skeptical that these judges would sufficiently deter individuals from lying, so participants in a trial were required to take an oath invoking the deity to ensure that they would be punished for lying—whether it be in their lifetime or the next.<sup>17</sup> The notion that witnesses must give completely truthful answers, or they will be punished for bearing false witness, is cross-cultural.<sup>18</sup>

The common law crime of perjury appeared much later when the Perjury Statute of 1563 made perjury by witnesses a punishable crime.<sup>19</sup> This statute defined perjury as “a deliberate lie” made in a courtroom and was the

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15. See Richard H. Underwood, *False Witness: A Lawyer's History of the Law of Perjury*, 10 ARIZ. J. INT'L & COMP. L. 215, 215–16 (1993).

16. *Id.* at 217.

17. See *id.* By the mid-thirteenth century, juries were being used to resolve disputes. See Bradley L. Brown, *A Different Light: The Evolution of Our System for Dispute Resolution*, OR. ST. B. BULL., Dec. 1997, at 41, 41. Early juries did not hear evidence and only sought divine help when making decisions. *Id.* Slowly, juries were allowed to talk to litigants and witnesses, and with the passing of the Renaissance, the Reformation, and the Industrial Revolution, juries became a tool used to determine the truth in contested disputes rather than to enact God's judgment. *Id.*

18. See Underwood, *supra* note 15, at 218–33 (referencing instances of false witnesses and punishment in Egypt, Mesopotamia, India, Greece, and Rome, as well as in the Bible).

19. See Alan Heinrich, *Clinton's Little White Lies: The Materiality Requirement for Perjury in Civil Discovery*, 32 LOY. L.A. L. REV. 1303, 1305–06 (1999); see also Michael D. Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts*, 24 AM. J. LEGAL HIST. 145, 145–46 (1980) (citing T. F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 436 (5th ed. 1956)). The statute could not have taken effect before the sixteenth century, as witnesses did not formally exist before this time. *Id.* at 46 (quoting S. F. C. MILSON, THE HISTORICAL FOUNDATION OF THE COMMON LAW 366 (1969)).

support for perjury charges throughout the nineteenth century.<sup>20</sup> In early English law, the perjury charge was used against individuals who had taken on a party oath or wager of law.<sup>21</sup> The modern federal perjury statutes, which have not changed much since the framing of the Constitution, are mostly derived from English common law.<sup>22</sup>

## 2. *The Modern Federal Perjury Statutes*

The modern federal perjury statutes criminalize intentionally making false statements under oath. There are three federal perjury statutes—sections 1621, 1622, and 1623.<sup>23</sup> Section 1621, the general perjury statute, applies to a broad range of circumstances.<sup>24</sup> It provides, in pertinent part:

Whoever—(1) having taken an oath before a competent tribunal, officer, or person . . . that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury . . . .<sup>25</sup>

In sum, a person commits perjury under § 1621 when he or she testifies under oath or affirmation and “gives false testimony concerning a material matter with the willful intent to provide false testimony.”<sup>26</sup> For a person to commit perjury, he or she must take an oath “before a competent tribunal, officer, or person” and willingly state false information that is material to

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20. Roberto Suro & Bill Miller, *Perjury: A Tough Case to Make*, WASH. POST (Sept. 24, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/perjury092498.htm?noredirect=on> [<https://perma.cc/SE9M-6FJB>] (referencing the Perjury Statute of 1563 when discussing the Clinton impeachment case); J. Kevin Quinn et al., *Resisting the Individualistic Flavor of Opposition to Model Rule 3.3*, 8 GEO J. LEGAL ETHICS 901, 930–31 (1995).

21. See Brown, *supra* note 17, at 41. Under wager of law, litigants must produce a certain number of witnesses, known as compurgators, to testify on their behalf under oath. *Id.* The wager of law was won if the right number of witnesses adequately testified under oath. *Id.*

22. See Underwood, *supra* note 15, at 245–47 (noting some discrepancies between the perjury charge in England and the United States); CHARLES DOYLE, CONG. RESEARCH SERV., 7-5700, PERJURY UNDER FEDERAL LAW: A BRIEF OVERVIEW 1 (2010). The notable change to the perjury statutes is that they now cover more than court proceedings. *Id.* See also *infra* Part I.A.2 (defining perjury).

23. See 18 U.S.C. §§ 1621, 1622, 1623 (2012). Section 1622, which criminalizes the subornation of perjury, is outside the scope of this Article.

24. See 18 U.S.C. § 1621(1).

25. *Id.* § 1621.

26. *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).

the case.<sup>27</sup> Therefore, false statements made “as a result of confusion, mistake, or faulty memory” are not sufficient grounds for perjury.<sup>28</sup>

Section 1623, written more narrowly than § 1621, only applies “in any proceeding before or ancillary to any court or grand jury of the United States.”<sup>29</sup> It provides, in pertinent part:

Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) . . . knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.<sup>30</sup>

In other words, a person commits perjury under § 1623 when he or she makes a false declaration under oath in “any proceeding before or ancillary to any court or grand jury” that is material to the case.<sup>31</sup> Section 1623 does not apply in any proceeding “less formal than a deposition.”<sup>32</sup> Therefore, § 1623 applies to a smaller range of circumstances than the general perjury statute. Both §§ 1621 and 1623, however, have several common elements: oath, intent, materiality, and falsity.

While the two perjury statutes share the foregoing elements, they differ slightly in their mens rea requirements. Section 1621 requires that the government show that a defendant *willfully* provided testimony that he or she knew was false.<sup>33</sup> By contrast, § 1623 requires only that the government prove that a defendant *knew* his or her statement to be false.<sup>34</sup>

Additionally, the federal perjury statutes require different burdens of proof. Under § 1621, the government must satisfy the two-witness rule, which is an evidentiary requirement, in order to prevail on a perjury

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27. See 18 U.S.C. § 1621.

28. *Dunnigan*, 507 U.S. at 94.

29. 18 U.S.C. § 1623(a). Section 1623 was enacted as part of the 1970 Organized Crime Control Act to ensure reliable testimony before federal courts and grand juries. *Dunn v. United States*, 442 U.S. 100, 107–09 (1979).

30. § 1623(a).

31. *Id.* § 1623.

32. *Dunn*, 442 U.S. at 113.

33. See 18 U.S.C. § 1621(1); see also *Dunnigan*, 507 U.S. at 94 (stating that § 1621 requires “willful intent to provide false testimony”).

34. See § 1623(a); see also *United States v. Sherman*, 150 F.3d 306, 311 (3d Cir. 1998) (noting that § 1623 “has a reduced *mens rea* requiring only that one ‘knowingly’ commit perjury rather than ‘willfully’”).

conviction.<sup>35</sup> The rule is a misnomer, however, as it does not explicitly require two separate witnesses to uphold a perjury charge; instead, the rule allows the government to provide testimony of one witness coupled with sufficient corroborative evidence.<sup>36</sup> The rule is frequently criticized, but the Supreme Court has upheld it, concluding that it alleviates innocent witnesses' fear of prosecution.<sup>37</sup>

Conversely, Congress expressly prohibited the use of the two-witness rule in § 1623, allowing a conviction of perjury based on the testimony of only one witness.<sup>38</sup> Accordingly, the government's burden of proof under § 1623 requires less than the government's burden of proof under § 1621. Further, although § 1623 no longer has the two-witness rule, the statute does provide for a recantation defense, which is not available under § 1621.<sup>39</sup> Under the recantation defense, a defendant may retract a statement made under oath to avoid a perjury prosecution.<sup>40</sup> Notably, attorneys rarely use this defense successfully because the recantation defense "appears to be an illusion—often asserted but never found."<sup>41</sup>

### B. *Bronston and the Literal Truth Defense*

The Supreme Court profoundly impacted the landscape of perjury law for the first time when it established the literal truth defense in *Bronston v. United States*.<sup>42</sup> In *Bronston*, Samuel Bronston, the owner of a production company, was charged with perjury under § 1621 based on testimony he made during a Chapter 11 examination before a bankruptcy referee.<sup>43</sup> The United States District Court for the Southern District of New York

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35. See, e.g., *United States v. Chaplin*, 25 F.3d 1373, 1374 (7th Cir. 1994); Mary T. Hall, *The Two-Witness Rule in Falsification Offenses: Going, Going, But Still Not Gone*, ARMY LAW., May 1989, at 11 (discussing the two-witness rule in the context of the Uniform Code of Military Justice).

36. See, e.g., *United States v. Daniels*, 174 F. Supp. 2d 1209, 1214 (D. Kan. 2001) (finding a defendant's prior sworn testimony to be sufficient corroborative evidence).

37. See *Weiler v. United States*, 323 U.S. 606, 608–09 (1945). Early common law did not require that the government prove perjury by using more than one witness. 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2032 (James H. Chadbourne rev., 1978). However, in the 1600s, courts in England required the oath of two "witnesses" to prove falsity, and common law courts and American jurisprudence adopted the practice. *United States v. Hogue*, 42 M.J. 533, 534–35 (A.F. Ct. Crim. App. 1995). In 1945, the government argued that the Supreme Court should abolish the two-witness rule. See *Weiler*, 323 U.S. at 608.

38. See 18 U.S.C. § 1623(e) (stating that "[i]t shall not be necessary that such proof [under this section] be made by any particular number of witnesses").

39. Compare 18 U.S.C. § 1623(d) (prohibiting a perjury prosecution if the defendant admits the statement was false in the same proceeding), with 18 U.S.C. § 1621 (providing no such defense).

40. See Linda F. Harrison, *Recantation: Illusion or Reality?*, 2006 MICH. ST. L. REV. 637, 644 (2006) (enumerating the conditions that must be satisfied in order to use the recantation defense).

41. *United States v. Awadallah*, 202 F. Supp. 2d 17, 38 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003).

42. 409 U.S. 352 (1973).

43. *United States v. Bronston*, 453 F.2d 555, 556 (2d Cir. 1971), *rev'd*, 409 U.S. 352 (1973).



ultimately convicted Bronston of perjury.<sup>44</sup> The conviction rested on the following testimony that Bronston gave under oath during the bankruptcy hearing:

Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

A. No, Sir.

Q. Have you ever?

A. The company had an account there for about six months, in Zurich.<sup>45</sup>

At the time of the questioning, Bronston had no personal Swiss bank accounts.<sup>46</sup> However, Bronston previously had a personal bank account in Geneva, Switzerland between October 1959 and June 1964, which he failed to disclose to the bankruptcy trustee.<sup>47</sup>

Bronston appealed his perjury conviction, claiming that the question, “Have you ever?” was ambiguous or, alternatively, that his answer was true and could not form the basis of a perjury conviction.<sup>48</sup> The Second Circuit affirmed Bronston’s conviction for perjury, finding that witnesses should not be able to intentionally mislead questioners with half-truths.<sup>49</sup> While acknowledging that courts have held that a “literally accurate, technically responsive, or legally truthful” answer cannot be the basis for a perjury conviction,<sup>50</sup> the Second Circuit held that a half-true answer that intentionally contains a “lie by negative implication” could constitute perjury under § 1621.<sup>51</sup> Although Bronston’s answer was literally true because he communicated truthfully that the company previously had a Swiss bank account, the court concluded that the jury should be able to determine whether Bronston was aware of the underlying falsity of his answer at the time he made it.<sup>52</sup> Affirming his conviction, the court found

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44. *See id.* at 556 (stating that Bronston was sentenced to six months of probation and fined \$2,000).

45. *Bronston*, 409 U.S. at 354.

46. *Id.*

47. *Id.*; *see also Bronston*, 453 F.2d at 557 (explaining that it was never disputed that Bronston’s company had a Swiss bank account, but the jury found that he intentionally left out information about his personal bank accounts).

48. *Bronston*, 453 F.2d at 558 (arguing that “the question upon which his conviction is predicated was misleading, imprecise and suggestive of various interpretations”).

49. *Id.* at 558–59.

50. *Id.* at 557 (citing *Blumenfeld v. United States*, 306 F.2d 892, 897 (8th Cir. 1962)).

51. *Id.* at 559.

52. *Id.* at 558 (recognizing the importance of the defendant’s intent at the time he made his statement).

that “the jury could have inferred that Bronston willfully gave false and evasive testimony.”<sup>53</sup>

The Supreme Court reversed, invalidating Bronston’s perjury conviction because his answer, while misleading and unresponsive, was literally true.<sup>54</sup> Reading § 1621 as requiring a witness to willfully make a false statement, the Court refused to expand the interpretation of the statute to include intentionally misleading but truthful statements.<sup>55</sup> Because courtroom testimony is not “casual conversation,” the Court would not allow juries to infer negative implications from non-responsive answers.<sup>56</sup> Instead, the Court placed the burden on questioners to “recognize the [witness’s] evasion” and “bring the witness back to the mark.”<sup>57</sup> The Court reasoned that if juries could determine a defendant’s intent to mislead a questioner, witnesses would be faced with too high a burden and feel discouraged from testifying.<sup>58</sup> Thus, this Supreme Court decision created the broad literal truth defense.<sup>59</sup>

### 1. *The Literal Truth Defense and Questioner’s Acuity*

The literal truth defense forbids using a literally true but unresponsive statement to form the basis of a perjury conviction.<sup>60</sup> The purpose of the defense is to protect witnesses who misunderstand a question while permitting the law to punish individuals who clearly lie.<sup>61</sup> In creating the literal truth defense, the Court noted that it is not surprising for witnesses to give answers that are not “entirely responsive” under the “pressures and

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53. *Id.* at 560.

54. *See* *Bronston v. United States*, 409 U.S. 352, 360, 362 (1973) (holding that “the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner—so long as the witness speaks the literal truth”).

55. *See id.* at 357–58 (stating that the federal perjury statute “does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true”).

56. *Id.*

57. *Id.* at 358–59 (holding that “[i]t is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer’s responsibility . . . to flush out the whole truth with the tools of adversary examination”).

58. *See id.* at 359 (“[T]he measures taken against [perjury] must not be so severe as to discourage witnesses from appearing or testifying.” (quoting Study of Perjury, *reprinted in* Report of New York Law Revision Commission, Legis. Doc. No. 60, at 249 (1935))).

59. Some courts report that *Bronston* created both the “literal truth” defense and also the “stark contrast rule.” *See, e.g.,* *United States v. DeZarn*, 157 F.3d 1042, 1047 (6th Cir. 1998) (asserting that the “stark contrast” rule and the “literal truth” defense both had their genesis in *Bronston*, and that *Bronston* required a “‘stark contrast’ between the ‘truth portion’ and [the] allegedly false testimony”).

60. *See Bronston*, 409 U.S. at 362.

61. Paul Rosenzweig, *Truth, Privileges, Perjury, and the Criminal Law*, 7 TEX. REV. L. & POL. 153, 165 (2002).

tensions of interrogation.”<sup>62</sup> Although the Court acknowledged that it might be possible for an unresponsive answer to mislead a questioner,<sup>63</sup> it ultimately concluded that unresponsive answers should alert the questioner to continue his inquiry until obtaining the desired information.<sup>64</sup> When the questioner fails to do so, a defendant can take advantage of this defense and utilize it even when he intended to mislead the questioner or provided an answer that created a false-negative implication.<sup>65</sup>

Lower courts are often asked to analyze *Bronston*'s literal truth defense along with the fundamental ambiguity defense.<sup>66</sup> The fundamental ambiguity defense is raised when the question is so clearly ambiguous that there is no basis for a perjury conviction.<sup>67</sup> While no clear definition details what constitutes “fundamentally ambiguous,” courts generally agree that if “men of ordinary intelligence” recognize, based on the circumstances and context, a mutual understanding of the question, then it is not fundamentally ambiguous.<sup>68</sup> A questioner and answerer do not have a mutual understanding of a fundamentally ambiguous question unless the

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62. *Bronston*, 409 U.S. at 358.

63. *Id.* at 361–62 n.5 (explaining that “the questioner may conclude that the unresponsive answer is given only because it is intended to make a statement—a negative statement—relevant to the question asked”).

64. *See id.* at 358–59 (explaining that “it is the lawyer’s responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination”); *see also id.* at 360 (determining that the questioner bears the burden “of pin[ning] the witness down to the specific object of [his] inquiry”).

65. *See id.* at 362.

66. *See, e.g.,* *United States v. Sarwari*, 669 F.3d 401, 407 (4th Cir. 2012) (finding that *Bronston*'s literal truth defense “does not apply in cases in which ‘the focus is on the ambiguity of the question asked’” (quoting *United States v. Boskic*, 545 F.3d 69, 92 (1st Cir. 2008))); *United States v. Strohm*, 671 F.3d 1173, 1181–85 (10th Cir. 2011) (addressing both the literal truth and fundamental ambiguity defense, and concluding that the question was not fundamentally ambiguous and Strohm's responses did not fall within the paradigm of *Bronston*); *United States v. DeZarn*, 157 F.3d 1042, 1048 (6th Cir. 1998) (“Absent fundamental ambiguity or impreciseness in the questioning, the meaning and truthfulness of the declarant’s answer is for the jury.” (quoting *United States v. Robbins*, 997 F.2d 390, 395 (8th Cir. 1993))); *United States v. Schafrick*, 871 F.2d 300, 303 (2d Cir. 1989) (“The rule prevents an examiner from resolving ambiguities in the elicited testimony with a perjury prosecution after the fact.”); *United States v. Slawik*, 548 F.2d 75, 86 (3d Cir. 1977); *United States v. Long*, 534 F.2d 1097, 1101 (3d Cir. 1976).

67. *See DeZarn*, 157 F.3d at 1049 (“A question that is truly ambiguous or which affirmatively misleads the testifier can never provide a basis for a finding of perjury, as it could never be said that one intended to answer such a question untruthfully.”). *But see* *United States v. McKenna*, 327 F.3d 830, 841 (9th Cir. 2003) (establishing that the existence of some ambiguity in a question is not a complete bar to a perjury charge); *United States v. Williams*, 552 F.2d 226, 229 (8th Cir. 1977) (“If the response given was false as the defendant understood the question, his conviction is not invalidated by the fact that his answer to the question might generate a number of different interpretations.” (citing *United States v. Parr*, 516 F.2d 458, 470 (5th Cir. 1975); *United States v. Chapin*, 515 F.2d 1274, 1280 (D.C. Cir. 1975))).

68. *See United States v. Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003) (per curiam) (“A question is fundamentally ambiguous when ‘men of ordinary intelligence’ cannot arrive at mutual understanding of its meaning.” (citing *United States v. Boone*, 951 F.2d 1526, 1534 (9th Cir. 1991))); *see also* Mark Hsen et al., *Perjury*, 55 AM. CRIM. L. REV. 1537, 1547–48 (2018).

ambiguous question is defined at the time the question is offered as testimony.<sup>69</sup>

When determining if a question is fundamentally ambiguous, lower courts look to several different factors including:

- (1) the inherent vagueness—or, conversely, the inherent clarity—of certain words and phrases, (2) the compound character of a question, (3) the existence of defects in syntax or grammar in a question, (4) the context of the question and answer, and (5) the defendant's own responses to allegedly ambiguous questions.<sup>70</sup>

Lower courts citing *Bronston* agree that a fundamentally ambiguous question cannot be the foundation of a perjury conviction; the rationale is that there is no way to determine whether the defendant intended to answer the question untruthfully, since the question has no definitive meaning.<sup>71</sup> When a court decides that it is not inherently clear if a question is fundamentally ambiguous, the determination is left to the jury.<sup>72</sup>

Moreover, the jury is not permitted to infer the witness's intent to mislead. The Supreme Court rebuked the lower court's holding that the jury could infer Bronston's intent to mislead the questioner.<sup>73</sup> According to the Court, if a jury can infer the witness's intent to mislead, then a witness will be posed with the task of measuring the scope of their responsibility over the examiner's understanding of their answers.<sup>74</sup> The Court in *Bronston* was concerned that introducing a novel element into the current testimonial system would neglect the policy consideration that has existed since perjury's origins, which is "that the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying."<sup>75</sup>

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69. See *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986) (quoting *United States v. Lattimore*, 127 F. Supp. 405, 410 (D.D.C. 1955)).

70. *Strohm*, 671 F.3d at 1179; see also *United States v. Bonacorsa*, 528 F.2d 1218, 1221 (2d Cir. 1976) (discussing the importance of context in determining whether perjury was established).

71. See *United States v. Richardson*, 421 F.3d 17, 33 (1st Cir. 2005); see also *Strohm*, 671 F.3d at 1179 (finding that an excessively vague question makes it impossible to know the meaning of the question and whether the testifier intended to make a false statement).

72. See, e.g., *Strohm*, 671 F.3d at 1181 ("A question is arguably ambiguous where more than one reasonable interpretation of a question exists. . . . The 'meaning of a prosecutor's question and the truthfulness of a defendant's answer are best left to the jury.'" (quoting *United States v. Farmer*, 137 F.3d 1265, 1269 (10th Cir. 1998))).

73. *Bronston v. United States*, 409 U.S. 352, 359 (1973) ("A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner. . . .").

74. *Id.*

75. *Id.* (quoting *Study of Perjury*, *supra* note 58, at 249).

## 2. Lower Courts Moving Forward—What Juries Can Infer

After the Supreme Court in *Bronston* held that juries cannot infer a defendant's intent to mislead in a perjury case,<sup>76</sup> lower courts have scrambled to determine what juries can infer in a perjury trial.<sup>77</sup> Ultimately, some courts have concluded that an ambiguous question does not guarantee that a defendant will not be charged with or convicted of perjury.<sup>78</sup> A perjury conviction requires the jury to find that the defendant's answer was false. Accordingly, some courts have ruled that a jury may determine the defendant's objective interpretation of the question instead of the defendant's subjective understanding.<sup>79</sup> In circumstances in which the question is not precise when standing alone, the jury may consider the context surrounding the questioning and other factors that demonstrate the question's objective meaning.<sup>80</sup> For example, in *United States v. Culliton*,<sup>81</sup> the United States Court of Appeals for the Ninth Circuit explained that it could not consider the defendant's "unilateral reinterpretation of questions."<sup>82</sup> In summary, some lower courts allow a jury to infer the "intended meaning of a question and answer" and may do so by looking at the context of the question and answer.<sup>83</sup>

## 3. Unresponsive vs. Responsive Answers

In *Bronston*, the Supreme Court further elaborated that *Bronston*'s unresponsive answer could not form the basis of a perjury charge when his answer was literally true.<sup>84</sup> However, the Court failed to detail what type of

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76. See *supra* note 73 and accompanying text.

77. See, e.g., *United States v. Finucan*, 708 F.2d 838, 848 (1st Cir. 1983); *United States v. Slawik*, 548 F.2d 75, 85–86 (3d Cir. 1977).

78. See, e.g., *Slawik*, 548 F.2d at 86.

79. See George W. Aycock, III, Note, *Nothing but the Truth: A Solution to the Current Inadequacies of the Federal Perjury Statutes*, 28 VAL. U. L. REV. 247, 266 (1993) (citing *United States v. Fulbright*, 804 F.2d 847, 851 (5th Cir. 1986); *United States v. Eddy*, 737 F.2d 564, 567–69 (6th Cir. 1984); *United States v. Wall*, 371 F.2d 398, 400 (6th Cir. 1967)).

80. See, e.g., *United States v. Camper*, 384 F.3d 1073, 1076 (9th Cir. 2004) ("The context of the question and other extrinsic evidence relevant to the defendant's understanding of the question may allow the finder of fact to conclude that the defendant understood the question as the government did and, so understanding, answered falsely." (citing *United States v. Culliton*, 328 F.3d 1074, 1079 (9th Cir. 2003) (per curiam))); *United States v. DeZarn*, 157 F.3d 1042, 1049 (6th Cir. 1998) (determining that the government can present evidence to demonstrate that the defendant understood the objective meaning of the question).

81. 328 F.3d 1074 (9th Cir. 2003) (per curiam).

82. *Id.* at 1079.

83. *United States v. Williams*, 552 F.2d 226, 229 (8th Cir. 1977). See also *United States v. Sainz*, 772 F.2d 559, 562 (9th Cir. 1985); *United States v. McCafferty*, No. 1:10CR387, 2011 WL 933771, at \*6 (N.D. Ohio Mar. 16, 2011).

84. *Bronston v. United States*, 409 U.S. 352, 360 (1973).

unresponsive answer Bronston had actually given.<sup>85</sup> It found only that it was the questioner's duty to recognize the unresponsive answer and to continue asking the witness precise questions until the witness gave a responsive answer.<sup>86</sup>

Because the Court in *Bronston* did not address the definition of unresponsive answers, attorneys can turn to linguists for guidance. According to linguists, there are multiple types of responsive and unresponsive answers.<sup>87</sup> One type of unresponsive answer is an evasive, unresponsive answer.<sup>88</sup> A witness who gives an evasive, unresponsive answer intends his response "to be irrelevant to the question posed in order to avoid answering."<sup>89</sup> This type of response does not have any relationship to the question, so the only way it could communicate an answer to the question is through inferences.<sup>90</sup> In this situation, it is reasonable for a court to require a questioner to react to the evasion by continuing his inquiry.<sup>91</sup>

Other types of unresponsive answers may not be as obvious. Some answers are superficially unresponsive;<sup>92</sup> a person's statement might not appear to reply to the question, but may provide an indirect answer.<sup>93</sup> These answers are not evasive because the intention is to offer a response rather than to avoid the question altogether, as with evasive, unresponsive answers.<sup>94</sup>

Superficially unresponsive answers typically include "implicit yes/no" responses.<sup>95</sup> In these answers, a person's unresponsive reply requires the questioner to make an inference as to whether a witness means "yes" or "no."<sup>96</sup> Such responses differ from evasive, unresponsive answers because an implication is required for the answer to make sense.<sup>97</sup> Further, the

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85. See Peter Meijes Tiersma, *The Language of Perjury: "Literal Truth," Ambiguity, and the False Statement Requirement*, 63 S. CAL. L. REV. 373, 386 (1990) (explaining "to the extent that the Supreme Court's decision in *Bronston* relates to evasive (and not merely unresponsive) replies, it comports entirely with linguistic notions regarding communication").

86. See *Bronston*, 409 U.S. at 358–59 (declaring that it is the questioner's burden to spot the witness's unresponsive answer and "bring the witness back to the mark").

87. See generally Tiersma, *supra* note 85, at 386–93.

88. See *Bronston*, 409 U.S. at 362 (speculating that Bronston's answers might not have been "guileless but were shrewdly calculated to evade").

89. Tiersma, *supra* note 85, at 386 (giving a basic example of an evasive, unresponsive reply to a question).

90. See *id.*; see also *supra* notes 5 & 6 (providing examples from Judge Kavanaugh's testimony before the Senate Judiciary Committee).

91. See Tiersma, *supra* note 85, at 386.

92. *Id.* at 387–89.

93. See *id.* at 388 (explaining that, after receiving a lunch invitation, a superficially unresponsive reply might be, "I'm going to lunch with Rhonda," which clearly intends to decline the invitation).

94. *Id.* at 388.

95. See *id.* at 389 (providing that, after being asked if you own a car, an implicit yes or no answer might be, "I have a Ford.").

96. See *id.*

97. *Id.* at 390.

implied answer's meaning is usually clearer than an evasive, unresponsive answer because either a "yes" or a "no" answer *can* be inferred, depending on the context of the conversation.<sup>98</sup> Therefore, a witness can more easily mislead and manipulate the questioner by giving superficial, unresponsive answers rather than by giving evasive, unresponsive answers.<sup>99</sup>

In addition, some unresponsive answers initially appear responsive.<sup>100</sup> On the surface, these superficially responsive answers seem to address the question, but, in reality, they leave out information in a way that is misleading to the questioner.<sup>101</sup> Because these statements appear to answer the question posed, the questioner receives no signal that he or she should continue his inquiry.<sup>102</sup> Accordingly, witnesses, by choosing to respond with superficially responsive answers, have the power to dictate the course of the questioning.

#### 4. *An Attorney's Ethical Obligation*

An attorney has an ethical obligation to notify the court when he or she knows a witness disclosed material, false information to a judge or jury, even if the witness is the attorney's client.<sup>103</sup> For an attorney to violate this ethical obligation, the attorney would have to somehow know, and not merely reasonably believe, that what the witness said was false.<sup>104</sup> Unless Bronston presented information his attorney knew was false, his attorney had no ethical obligation to disclose the fact that Bronston's answer was misleading under Model Rule 3.3. However, an attorney also has an ethical obligation to never "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."<sup>105</sup> Further, under the duty of confidentiality, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."<sup>106</sup> Therefore, attorneys must tread the line between fulfilling their obligation to their clients and ensuring that witnesses do not mislead judges and juries.

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98. *See id.* (explaining that "there is little room for doubt about the meaning of the implied communication: 'yes' or 'no,' as the case may be").

99. *Id.* at 391 (noting that "[b]ecause the implication is often so strong and unambiguous, this type of response is a convenient mechanism for deception").

100. *See generally id.* at 391–93.

101. *Id.* at 391–92.

102. *See id.* at 392 (arguing that superficially responsive statements do not trigger a questioner's acuity).

103. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 2018) ("If a lawyer . . . has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including . . . disclosure to the tribunal.>").

104. *Id.*

105. MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2018).

106. *Id.* r. 1.6(a).

### C. Silence, Omissions, and the Law

#### 1. When Silence Has Legal Meaning

In certain legal contexts, silence has the same meaning as a verbal statement. In the field of contracts, a court can confer acceptance of an offer when the offeree is silent or does not act.<sup>107</sup> For instance, in *Wadsworth v. New York Life Insurance, Co.*,<sup>108</sup> a court found that an insurance company accepted an offer for a life insurance policy application because it failed to reject the application within a reasonable time.<sup>109</sup> Similarly, under the Second Restatement of Contracts, prior dealings “between the parties may give the offeror reason to understand that silence will constitute acceptance.”<sup>110</sup>

Silence and inaction can even be the basis of a perjury conviction in the voir dire context. In *People v. Meza*,<sup>111</sup> the defendant was charged with perjury for failing to raise his hand and thereby notify the court that he knew the defendant during jury selection.<sup>112</sup> Before voir dire began, the court clerk had administered an oath to all the potential jurors.<sup>113</sup> Later, when the jurors were asked if they knew the defendant, one juror verbally acknowledged that he knew the defendant, and another juror raised his hand to indicate that he also knew the defendant.<sup>114</sup> The judge spoke briefly to these jurors and then asked if anyone else knew the defendant.<sup>115</sup> A third juror, Meza, failed to indicate, either verbally or by raising his hand, that he knew the defendant, even though the defendant was his brother-in-law.<sup>116</sup> While the trial court set aside Meza’s perjury charge, the California Court of Appeals reversed,<sup>117</sup> finding that Meza’s silence could constitute a false statement and thus make him liable for perjury.<sup>118</sup>

Additionally, silence can serve multiple uses under the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Under the Federal Rules

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107. See RESTATEMENT (SECOND) OF CONTRACTS § 69 (AM. LAW INST. 1986) (listing instances in which an offer may be accepted through silence or inaction).

108. 84 N.W.2d 513 (Mich. 1957).

109. See *id.* at 517–18 (noting that Michigan is in the minority of states that require insurance companies to reject within a reasonable time).

110. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. d.

111. 234 Cal. Rptr. 235 (Cal. Ct. App. 1987).

112. See *id.* at 235–36.

113. *Id.* (“By the terms of the oath the jurors promised to answer ‘well and truly’ questions concerning their qualifications to act as trial jurors.”).

114. *Id.* at 236.

115. *Id.*

116. *Id.* at 236–37.

117. *Id.* at 245.

118. See *id.* at 243 (examining the definitions of “conduct” and “statement” in the state Evidence Code and finding that both include nonverbal behaviors and actions).



of Civil Procedure, there are several common defenses that defendants must assert either in a motion or in the responsive pleading to a complaint, or the defendant waives his or her right to assert any of the defenses.<sup>119</sup> Similarly, under the Federal Rules of Evidence, silence can have multiple uses.<sup>120</sup> First, silence can be used as an adoptive admission, which constitutes an exception to the hearsay rule.<sup>121</sup> In *United States v. Duval*,<sup>122</sup> the United States Court of Appeals for the First Circuit articulated a three-part test for determining when a party's silence may be used as an adoptive admission.<sup>123</sup> Under this test, a party's agreement with another's statement can be inferred "when (i) a statement is made in a party's presence, (ii) the nature of the statement is such that it normally would induce the party to respond, and (iii) the party nonetheless fails to take exception."<sup>124</sup>

Second, silence can be used for impeachment purposes.<sup>125</sup> In *Raffel v. United States*,<sup>126</sup> the Supreme Court held that a defendant's choice not to take the stand in his defense at his first trial could be used on cross-examination when he chose to take the stand during his retrial.<sup>127</sup> Nevertheless, the use of silence as impeachment evidence is limited to particular circumstances.<sup>128</sup> Finally, in civil cases, juries can use the defendant's decision not to take the stand to infer liability.<sup>129</sup> Thus, silence can have a variety of legal consequences.

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119. See FED. R. CIV. P. 12(b)(2)–(5) (listing the waivable objections); see also FED. R. CIV. P. 12(h)(1) (noting that a party waives any defense listed in 12(b)(2)–(5) when the party fails to include "it in a responsive pleading or in an amendment allowed by Rule 15(a)(1)").

120. See generally Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. LOUISVILLE L. REV. 21, 22–27 (2008) (describing the evidentiary use of silence).

121. See FED. R. EVID. 801(d)(2)(B) (declaring that an opposing party's statement is not hearsay if it "is one the party manifested that it adopted or believed to be true").

122. 496 F.3d 64 (1st Cir. 2007).

123. See *Duval*, 496 F.3d at 76 (explaining the evolution of the test within First Circuit case law); see also *People v. Medina*, 799 P.2d 1282, 1294–95 (Cal. 1990) (upholding the admission of the defendant's silence in response to his sister's question, "Why did you have to shoot those three poor boys?" as a valid adoptive admission).

124. *Duval*, 496 F.3d at 76 (quoting *United States v. Miller*, 478 F.3d 48, 51 (1st Cir. 2007)).

125. See Thompson, *supra* note 120, at 24.

126. 271 U.S. 494 (1926).

127. *Id.* at 497.

128. See, e.g., *Grunewald v. United States*, 353 U.S. 391, 421–23 (1957) (finding that a defendant's choice not to take the stand during *grand jury proceedings* could not be used to impeach his testimony when he took the stand at trial because "no implication of guilt could be drawn" from his prior silence).

129. See, e.g., *Baxter v. Palmigiano*, 425 U.S. 308, 320 (1976) (holding that permitting a civil jury to draw adverse inferences from a prisoner's silence at a disciplinary hearing does not violate the Fifth Amendment).

## 2. Statutes in Which Silence and/or Omissions Can Lead to Conviction

A defendant's silence and/or omission may lead to a criminal conviction under certain statutes, such as those criminalizing false statements and obstruction of justice. The elements of the federal false statement statute, 18 U.S.C. § 1001,<sup>130</sup> are falsity, materiality, and intent.<sup>131</sup> False statements are similar to perjury, as the two crimes share the above elements.<sup>132</sup> The key difference between false statements and perjury is that perjury requires a defendant to be under oath and the statement to be relevant to the matter at hand, while a false statement does not require the defendant to be under oath.<sup>133</sup> Under the false statement statute, the defendant must only be making a false statement to a branch of the government regardless of relevance to a specific matter.<sup>134</sup>

Defendants have the capacity to commit false statements by omission.<sup>135</sup> A defendant makes a culpable omission when he or she purposefully omits material information with knowing and willful intent.<sup>136</sup> For example, in *United States v. Larranaga*,<sup>137</sup> the defendant was subpoenaed to bring in his company's records, including minutes from board meetings, for purposes of a grand jury investigation.<sup>138</sup> While testimony indicated that the executive director of Health and Human Services was present at numerous board

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130. 18 U.S.C. § 1001 (2012).

131. *See id.*; *see also* *United States v. Gaudin*, 515 U.S. 506, 515–23 (1995) (asserting that, in a federal false statement case, the issue of materiality must be submitted to a jury to consider).

132. *Compare* 18 U.S.C. § 1001 (2012), *with* 18 U.S.C. § 1621 (2012).

133. *Compare* § 1001, *with* § 1621. *See* Daniel Engber, *How Many Ways Can You Say "Lie"?*, SLATE (Mar. 7, 2007, 2:46 PM), [http://www.slate.com/articles/news\\_and\\_politics/recycled/2007/03/how\\_many\\_ways\\_can\\_you\\_say\\_lie.html](http://www.slate.com/articles/news_and_politics/recycled/2007/03/how_many_ways_can_you_say_lie.html) [<https://perma.cc/5G97-L6KL>] (illustrating the differences between perjury, false statements, and obstruction of justice in the context of the I. Lewis "Scooter" Libby conviction).

134. Engber, *supra* note 133.

135. *See, e.g.*, *United States v. Boskic*, 545 F.3d 69, 71, 93 (1st Cir. 2008) (upholding a false statement conviction for concealing information on a refugee application); *United States v. Larranaga*, 787 F.2d 489, 498 (10th Cir. 1986) (upholding a false statement conviction for knowingly submitting false board meeting minutes to a grand jury); *United States v. Stephens*, 779 F.2d 232, 237 (5th Cir. 1985) (affirming a false statement conviction on the basis of the defendant's omission of loans from his financial statement); *United States v. Walsh*, 119 F.3d 115, 117–19 (2d Cir. 1997) (concluding that the trial court was correct in convicting the defendant of making a false statement when he failed to disclose a pre-existing loan and home equity line of credit on a home mortgage application); *United States v. Rapoport*, 545 F.2d 802, 806–07 (2d Cir. 1976) (upholding conviction in a false statement case involving omissions of finder's fees); *Robinson v. United States*, 345 F.2d 1007, 1009–11 (10th Cir. 1965) (affirming the defendant's conviction in a false statement case involving the defendant's failure to disclose liabilities on a loan application).

136. *See, e.g.*, *United States v. Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006) (defining the requisite mens rea as making a statement knowing that it was false or acting with a conscious disregard for the truth or with the purpose of avoiding ascertaining the truth).

137. 787 F.2d 489 (10th Cir. 1986).

138. *See Larranaga*, 787 F.2d at 492–93 (noting that, because the grand jury investigation heavily involved the executive director of the Department of Health and Human Services, the court was particularly interested in his presence at particular board meetings).

meetings, the minutes that the defendant provided indicated that the executive director had only attended one.<sup>139</sup> Because the defendant not only omitted the executive director's attendance at the board meetings in the meeting notes, but also failed to report his attendance verbally, the court found him guilty of making a false statement.<sup>140</sup>

A defendant may commit obstruction of justice by omission as well. Under the federal obstruction of justice omnibus provision, 18 U.S.C. § 1503, the government must show that a judicial proceeding was pending, the defendant knew or had notice of the proceeding, and that the defendant acted, or attempted to act, corruptly with the intent to interfere with the proceeding.<sup>141</sup>

Obstruction of justice and perjury typically work in conjunction with one another because a defendant almost always meets the requirements of both when he or she lies about an important topic under oath.<sup>142</sup> However, obstruction of justice encompasses a wider array of conduct than perjury does, as a defendant does not have to be under oath to commit obstruction of justice and can be guilty of obstruction of justice due to any act that hampers an ongoing case.<sup>143</sup> Furthermore, a defendant cannot use the literal truth as an affirmative defense to obstruction of justice.<sup>144</sup>

Due to the broad nature of obstruction of justice, prosecutors can utilize the charge in a multitude of situations. For example, a defendant may obstruct justice by concealing pertinent information in such a way that misleads the prosecution.<sup>145</sup> In *People v. Williams*,<sup>146</sup> the New York defendant was convicted of hindering prosecution (a state crime related to obstruction of justice) when she failed to disclose that she personally knew the perpetrator of a robbery that she reported.<sup>147</sup> Courts have also found that failing to divulge aliases during an arrest,<sup>148</sup> misleading a probation officer

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139. *Id.*

140. *Id.* at 494.

141. See 18 U.S.C. § 1503(a) (2012) (providing the federal statute for the obstruction of justice omnibus clause); *United States v. Williams*, 874 F.2d 968, 977 (5th Cir. 1989) (identifying these “three core elements that the government must establish to prove a violation of the omnibus clause of section 1503”).

142. See, e.g., Engber, *supra* note 133.

143. See Engber, *supra* note 133; Mark Mermelstein & Charlotte Decker, *Walk the Line*, L.A. LAW., Dec. 2006, at 27, 28 (explaining that “any actions can constitute obstruction if done with the requisite intent”).

144. See Mermelstein & Decker, *supra* note 143, at 31.

145. See, e.g., *People v. Williams*, 795 N.Y.S.2d 561, 567 (N.Y. App. Div. 2005).

146. 795 N.Y.S.2d 561 (N.Y. App. Div. 2005).

147. *Id.* at 566.

148. See, e.g., *United States v. Odedina*, 980 F.2d 705, 706–07 (11th Cir. 1993).

by not providing a complete list of past convictions,<sup>149</sup> and omitting home ownership in a financial statement give rise to obstruction of justice.<sup>150</sup>

While perjury, false statements, and obstruction of justice share many attributes, the federal perjury statute, as it currently stands, makes it seemingly impossible for defendants to commit perjury by omission.

## II. THE NEED TO EXPAND FEDERAL PERJURY LAW TO COUNTER WILY WITNESSES

### A. *The Literal Truth Loophole*

The Supreme Court's holding in *Bronston* provides “wily witness[es]”<sup>151</sup> with an opportunity to provide misleading, albeit literally truthful, answers under oath.<sup>152</sup> While the *Bronston* Court correctly placed the burden on the questioner to formulate precise questions,<sup>153</sup> there are still instances where a witness can artfully mislead the questioner with a literally true answer to an unambiguous question. Sometimes, these answers can even materially alter the outcome of the case.

For example, a defendant may strategically choose to address his or her own interpretation of a question as opposed to what he or she knows is the common interpretation of the question.<sup>154</sup> In choosing to answer his subjective interpretation of a question, the defendant may knowingly withhold material facts. *United States v. Eddy*<sup>155</sup> exemplifies this point. The defendant, Eddy, was originally convicted of perjury because he said “no” when a questioner asked him if he had contacted the Navy Medical Recruiters claiming to have an “official” medical degree—proven by his submission of an official transcript and official diploma.<sup>156</sup> On appeal, the defendant used his subjective understanding of the word “official”—i.e., that his documents had not been falsified—rather than the contextual meaning of the word—i.e., that the documents were authentic and had been issued by duly authorized personnel.<sup>157</sup> Based on Eddy's interpretation, he did not commit perjury, as he denied submitting a document, which had not been falsified. Because the literal truth defense allows defendants to answer questions based on their own subjective interpretation of words and phrases,

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149. See, e.g., *United States v. St. Cyr*, 977 F.2d 698, 706 (1st Cir. 1992).

150. See, e.g., *United States v. Smaw*, 993 F.2d 902, 903–04 (D.C. Cir. 1993).

151. See *Bronston v. United States*, 409 U.S. 352, 360 (1973).

152. *Id.* at 362.

153. *Id.*

154. See *supra* Part I.B.3 (discussing unresponsive vs. responsive answers).

155. 737 F.2d 564 (6th Cir. 1984).

156. *Id.* at 565–66.

157. See *id.* at 569 (identifying that Eddy's subjective interpretation of the word “official” meant documents that were not falsified).

the defendant was ultimately able to escape his perjury conviction.<sup>158</sup> While the questioner bears the burden of asking follow-up questions, the questioner likely had no reason to know that the defendant's response hinged on his own interpretation of the word "official."

Similarly, President Bill Clinton avoided a perjury conviction based on statements he made during the Paula Jones lawsuit.<sup>159</sup> During a deposition, the questioner provided President Clinton with a written definition of the term "sexual relations."<sup>160</sup> When asked about his relationship with Monica Lewinsky, he used his subjective interpretation of the provided definition to claim that he never had a sexual relationship with her.<sup>161</sup> This illustrates how a defendant can successfully take advantage of the literal truth defense even when the questioner does his due diligence in clearing any ambiguity in his questions and asking follow-up questions.<sup>162</sup>

In these instances, the questioners asked clear and unambiguous questions, yet the defendants still avoided conviction under the federal perjury statutes because their answers were literally true based on their subjective interpretation of the questions. Like in *Eddy*, there are situations in which nothing within the defendant's response signals the need for follow-up questions because there is only one clear objective meaning of the question. Furthermore, in situations like President Clinton's deposition, a questioner may continue to ask clarifying questions to no avail. The questioner may fulfill his or her obligation by providing definitions and follow-up questions and still not elicit the desired response. At a certain point, a questioner needs to move on in an inquiry without getting a completely truthful response—sometimes without realizing that the defendant was trying to evade providing the complete truth.

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158. *Id.*

159. See Peter Baker & Helen Dewar, *The Senate Acquits President Clinton*, WASH. POST (Feb. 13, 1999), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/impeach021399.htm> [<https://perma.cc/AW8Q-LX2U>] (explaining that the Senate acquitted President Clinton of perjury charges relating to the Paula Jones lawsuit).

160. See *President Clinton's Deposition*, *supra* note 8. The Paula Jones legal team submitted the following definition of "sexual relations":

For the purposes of this deposition, a person engages in "sexual relations" when the person knowingly engages in or causes - (1) contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person; (2) contact between any part of the person's body or an object and the genitals or anus of another person; or (3) contact between the genitals or anus of the person and any part of another person's body. "Contact" means intentional touching, either directly or through clothing.

*Id.*

161. *Id.*

162. See *id.* The questioner asked President Clinton multiple follow-up questions, such as: "[d]id you have an extramarital sexual affair with Monica Lewinsky"; "[i]f she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie"; and "so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the Court?" *Id.*

Because the *Bronston* Court broadly included all unresponsive answers within the literal truth defense without addressing the different types of unresponsive answers, it created a loophole for witnesses, allowing them to give unresponsive, but literally true answers and evade perjury. This is detrimental to the purpose of the perjury statute because a defendant can use unresponsive answers to create false inferences. A witness whose answer is evasively unresponsive intends for his or her answer to “be irrelevant to the question posed in order to avoid answering.”<sup>163</sup> Conversely, a superficially unresponsive answer appears to avoid the question but does provide an answer on a deeper level.<sup>164</sup> Further, a responsive but incomplete answer provides some information without fully answering the question asked.<sup>165</sup> Under *Bronston*, none of these responses can be used for a perjury charge if the words were literally true, even if they impliedly create false statements. By oversimplifying what an unresponsive answer is, the Court has narrowed perjury’s falsity requirement, such that it does not include false inferences. Measures should be taken to remedy this literal truth loophole.

### B. Perjury by Omission

The concept of perjury by omission would remedy the literal truth loophole. A defendant would commit perjury by omission when his or her response to an unambiguous question omits information with the intent to create false inferences about an outcome-determinative fact. Justice Kavanaugh and President Clinton might have faced perjury charges if the federal perjury statutes had provided for perjury by omission because they omitted material information that the questioners were seeking to elicit even when they were asked unambiguous questions.<sup>166</sup>

In *Bronston*, the Court tried to balance perjury’s purpose of ensuring that witnesses testify truthfully with protecting witnesses from standards that would discourage them from testifying.<sup>167</sup> However, the Court’s reasoning gave too much weight to standards that protect witnesses at the expense of the perjury statute’s ultimate purpose. Defendants such as Eddy and President Clinton illustrate the Court’s failure to appropriately balance these competing interests by avoiding perjury charges.<sup>168</sup> To readjust the scales,

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163. See Tiersma, *supra* note 85, at 386 (defining evasive unresponsive responses); see, e.g., *Bronston v. United States*, 409 U.S. 352, 360–62 (1973) (demonstrating how a “wily witness” can mislead the questioner by responding with an evasive answer).

164. See Tiersma, *supra* note 85, at 387–89 (defining superficially unresponsive answers).

165. See *id.* at 391–92 (defining superficially responsive but materially incomplete answers).

166. See Baker & Dewar, *supra* note 159; Sullivan, *supra* note 4.

167. See *supra* note 58 and accompanying text (highlighting “that the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying”).

168. See *supra* Part II.A (describing the Eddy case and the President Clinton deposition).

Congress should rewrite the federal perjury statutes to address witnesses who commit perjury by omission.

The addition of perjury by omission would not completely alter the current federal perjury landscape. Rather, it would expand the falsity requirement to include intentionally misleading or incomplete statements in very limited circumstances. The other elements of perjury—such as oath, materiality, and intent—would remain the same. Under the Court’s current literal truth analysis, statements are analyzed for their truth alone, regardless of how the elements of perjury interact with each other.<sup>169</sup> The Court ignores the language of the statute that indicates that it is not whether a statement is completely true but whether the defendant believed it was true. The amended statute would not defeat the literal truth defense but instead leave courts with the opportunity to take a deeper look at the defendant’s intent. Defendants would still be able to use the literal truth defense because there would still be circumstances in which a questioner did not ask precise enough questions, or when a defendant merely misunderstood a question and provided what he or she thought was the correct, truthful answer.

Moreover, this statute would honor policy considerations, such as protecting witnesses from standards that would discourage them from testifying because it would still require intent. By incorporating perjury by omission into the federal perjury statute, the truth or falsity of a statement would be judged by whether a defendant believed what he or she said was true and whether he or she said it willingly or knowingly.<sup>170</sup>

### *1. What Juries Would Be Able to Infer*

Under the amended perjury statute, juries would be judging whether a defendant believed what he or she said was true and whether he or she said it willingly or knowingly. Juries traditionally infer intent;<sup>171</sup> this would not change in the context of perjury. The jury would be inferring the defendant’s intent to mislead by determining whether the defendant objectively understood what the question meant but chose to answer the question based

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169. See *Bronston v. United States*, 409 U.S. 352, 359 (1973) (explaining that “[a] jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner”); see also *United States v. Slawik*, 548 F.2d 75, 83–84 (3d Cir. 1977) (reasoning that if Slawik’s answer was “literally true, there was no offense, even if Slawik’s answer was deliberately misleading,” because “[t]o hold otherwise . . . would allow defendants to be convicted for immaterial falsehoods or for ‘intent to mislead’ or ‘perjury by implication’—which *Bronston* specifically prohibited”).

170. See *infra* Part II.C.2 (providing a model perjury statute that includes language for perjury by omission).

171. See generally Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187 (1979) (providing a background on the use of permissive inferences in criminal contexts).

on his or her subjective understanding of it. While it is important that questioners aim to ask unambiguous questions, witnesses, defendants, or deponents such as Judge Kavanaugh, Eddy, and President Clinton have shown that even words such as “blacking out,” “official,” and “sexual relations” are arguably ambiguous.<sup>172</sup> In fact, in the legal world, any word may be considered ambiguous,<sup>173</sup> which is why some courts have reinforced that juries may infer a defendant’s objective understanding of a question.<sup>174</sup>

If a jury may determine a defendant’s objective understanding of a question,<sup>175</sup> then the jury is virtually determining that the defendant chose to ignore that understanding of the question and answer it based on his or her subjective interpretation in order to mislead the questioner. The jury would be deducing that the defendant conveniently interpreted a question in a manner that allows him or her to provide an answer that may seem responsive but is actually evasive and communicates something contrary to the truth. Intent is an element of perjury, so by making this determination, the jury would be fulfilling its fact-finding duties and could take various factors into consideration, such as the defendant’s level of education.

## 2. Omissions in Other Contexts as Support

Perjury, false statements, and obstruction of justice are interconnected and often overlap.<sup>176</sup> Further, the differences among perjury, false statements, and obstruction of justice are sparse.<sup>177</sup> There are circumstances in which a defendant’s omission may lead to a criminal conviction for false statements, obstruction of justice, and fraud.<sup>178</sup> Therefore, the federal perjury statutes should leave room for omissions as well.

Because false statement and perjury charges are similar, a defendant who is charged with one should also be charged with the other. For example, the defendant in *Larranaga*,<sup>179</sup> who made a false statement by omission at a

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172. See *supra* notes 60–75 and accompanying text (discussing literal truth and the questioner’s acuity); *supra* notes 1–7 and accompanying text (discussing Judge Kavanaugh); notes 155–58 and accompanying text (discussing Eddy); notes 159–62 and accompanying text (discussing President Clinton).

173. See, e.g., *Frigalment Importing Co. v. B.N.S. Int’l Sales Corp.*, 190 F. Supp. 116, 117 (S.D.N.Y. 1960) (arguing about what constitutes a “chicken” for the purpose of a contract).

174. *Slawik*, 548 F.2d at 86.

175. *Id.* at 85–86.

176. See *supra* notes 130–34, 142 and accompanying text (highlighting how defendants are often charged with some combination of perjury, false statements, and obstruction of justice).

177. Compare 18 U.S.C. § 1001 (2012), with § 18 U.S.C. 1621 (2012) (illustrating that the major difference between the false statement statute and the perjury statute is that perjury requires that the defendant be under oath). See, e.g., Engber, *supra* note 133 (explaining that former vice-presidential aide Lewis Libby’s perjury, false statement, and obstruction charges for deceiving investigators and a grand jury are based on similar statutes that often apply to identical fact patterns).

178. Compare 18 U.S.C. § 1621, and § 1623(a), with 18 U.S.C. § 1001.

179. *United States v. Larranaga*, 787 F.2d 489 (10th Cir. 1986).



grand jury hearing when he failed to disclose that a material person was present at numerous meetings,<sup>180</sup> should have been charged with both making a false statement and perjury by omission. Further, just as the defendant in *Larranaga* intentionally led a grand jury to believe that a material person was not present at certain meetings,<sup>181</sup> a defendant could intentionally lead a jury to believe that a material person was not present in a room in which serious criminal activity occurred. In this instance, the questioner might direct the defendant, who is testifying under oath, to name everyone who was in a specific room on the night the criminal activity occurred. The defendant may then name three people, when four people were actually present in the room. At this point, the attorney would have done everything in his power to determine exactly what occurred in that room that night and who was there, especially if every other witness testifying or explaining the events of that night also failed to disclose the fourth person present. In that case, the questioner would have no reason to believe that there was a fourth person in the room that night, and because the defendant provided a responsive answer, the questioner fulfilled his duty to press for material information during an inquiry and would not be alerted to ask more questions.<sup>182</sup> Therefore, the witness who testified about three, rather than four, people present in the room could be convicted of perjury by omission.

Additionally, perjury is also similar to obstruction of justice.<sup>183</sup> A defendant should be able to be charged with committing perjury by omission just as a defendant could commit obstruction of justice by omission. In *Williams*, the defendant obstructed justice when she reported a crime but failed to disclose that she knew the perpetrator's identity.<sup>184</sup> A questioner in a perjury by omission case may have more reason to know information, such as a witness's relationship to a perpetrator, than a questioner in an obstruction of justice by omission case. However, a witness could still fail to disclose pertinent information under oath. For example, a first-hand witness to a crime may consistently withhold exculpatory evidence that investigators or attorneys would never have any access to. Investigators and attorneys might not have any other way of learning of this exculpatory evidence because only the witness observed the crime taking place. If during trial and under oath that witness provides literally truthful

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180. *Id.* at 493.

181. *Id.*

182. *See* *Bronston v. United States*, 409 U.S. 352, 358–59 (1973).

183. *See* *Mermelstein & Decker*, *supra* note 143, at 31 (explaining that the major differences between obstruction of justice and perjury are that any action can constitute obstruction of justice, and a defendant may not use the literal truth as an affirmative defense to a charge of obstruction of justice).

184. *People v. Williams*, 795 N.Y.S.2d 561, 566 (N.Y. App. Div. 2005).

and responsive answers yet continues to omit the exculpatory evidence, the witness could have committed perjury by omission.

Ultimately, in order to charge a defendant with perjury by omission, the defendant would have to be under oath. Further, a defendant would commit perjury by omission only in rare instances when the questioner has no reason to know the material information that the defendant is withholding and nothing about the defendant's answers signal the attorney to ask clarifying questions. Because of these restraints, a defendant is less likely to be charged with perjury by omission than to be charged with making a false statement or obstruction of justice. Yet the option should still be available. Because of perjury's similarities to these statutes, defendants should be able to be convicted of perjury by omission as well.

### 3. *Ethical Obligations*

A defendant who omits a material fact under oath presents serious ethical issues for his or her attorney. An attorney violates his or her ethical obligation when he or she fails to disclose that one of the witnesses provided the court with false information during testimony.<sup>185</sup> While under this obligation, an attorney does not have to disclose that the witness provided a literally true, yet misleading answer to the court, the attorney faces an ethical predicament if this misleading answer becomes a material reason why the court makes its ultimate decision. For example, in *Bronston*, if the Court had explicitly said that "the basis of our decision is Bronston's convincing testimony that he does not have an international bank account," the attorney could face ethical repercussions if the case was appealed. In that circumstance, the attorney could not use the basis of the lower court's decision in his or her favor because the outcome-determining statement is false, and the attorney would be obligated to clarify the statement if it is brought up on appeal.

Similarly, under Rule 8.4 of the Model Rules of Professional Conduct, an attorney may not involve himself or herself in dishonest, fraudulent, or deceptive behavior.<sup>186</sup> One way an attorney may become involved in such behavior is by permitting a client to mislead a court or a jury by omitting material information. For example, if Bronston's attorney had advised him to utilize the literal truth, the attorney may have been subject to ethical review under Rule 8.4. Similarly, if an attorney is under oath, he or she may violate rule 8.4 by omitting material information in order to mislead the jury or the court. Therefore, literally truthful, intentional, and outcome-

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185. MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2018).

186. *Id.* r. 8.4(c).

determinative omissions, whether by an attorney or one of his or her witnesses, could implicate an attorney's ethical obligation.

### *C. Revising the Federal Perjury Statutes*

#### *1. State Statutes and Perjury by Omission*

State legislatures and courts have demonstrated a willingness to expand perjury statutes and case law to include perjury by omission. In fact, some states' perjury statutes explicitly contain language referencing incomplete or misleading testimony.<sup>187</sup> Meanwhile, other state courts have found omissions to be the basis of perjury even where their statutes seemingly require a verbal statement.<sup>188</sup>

South Carolina's perjury statute explicitly encompasses "incomplete" and "misleading" testimony. The statute states that "[i]t is unlawful for a person to wilfully give false, misleading, or incomplete testimony under oath in any court of record, judicial, administrative, or regulatory proceeding in this State."<sup>189</sup> Because a statement can be the basis of a perjury charge in South Carolina if it is "false, misleading, or incomplete," a literally true but unresponsive answer could qualify as perjury because it is an incomplete answer and could create a negative implication.

Oklahoma's perjury statute leaves room for perjury by omission in its mens rea requirement. The statute provides that a statement is perjury if it is made under oath when the witness "does not believe that the statement is true or knows that it is not true or intends thereby to avoid or obstruct the ascertainment of the truth."<sup>190</sup> Although the statute explicitly allows for a literal truth defense,<sup>191</sup> the mens rea element could allow juries to decide whether the witness intended to mislead the questioner. Oklahoma case law has considered "suppression of the truth" as a basis for a perjury charge.<sup>192</sup> These cases illustrate how the language of Oklahoma's perjury statute could allow for convictions when a witness intends to suppress the truth with a literally truthful but unresponsive answer.

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187. See, e.g., S.C. CODE ANN. § 16-9-10(A)(1) (1993).

188. See, e.g., *People v. Meza*, 234 Cal. Rptr. 235, 242 (Cal. Ct. App. 1987) (finding that silence can amount to a perjury charge).

189. S.C. CODE ANN. § 16-9-10(A)(1).

190. OKLA. STAT. ANN. tit. 21, § 491 (West 1965).

191. See *id.* (declaring that "[i]t shall be a defense to the charge of perjury as defined in this section that the statement is true").

192. See *Ostendorf v. State*, 128 P. 143, 154 (Okla. Crim. App. 1912) (explaining that, "[w]hen a person is placed in a position where it is his duty to tell the entire truth, and he willfully suppresses part of it, this is just as criminal in morals and in law as an affirmative statement of a falsehood"); see also *Flowers v. State*, 163 P. 558, 559 (Okla. Crim. App. 1917) (upholding a conviction for perjury on the grounds that "under . . . oath no man has the right to willfully, knowingly, and corruptly suppress any part of the truth, material to the issue, concerning which he is questioned").

While the plain language of California's perjury statute does not appear to leave room for perjury by omission,<sup>193</sup> there have been instances where California courts have upheld perjury convictions based on omissions. For example, in *People v. Meza*,<sup>194</sup> the defendant was convicted of perjury for failing to raise his hand to notify the court that he knew the defendant during jury selection.<sup>195</sup> In convicting the defendant, the court departed from prior state precedent that said silence could never constitute perjury.<sup>196</sup> Under specific circumstances, such as the collective jury selection process where silence is understood to mean "no," a defendant's silence could express a negative statement, which could serve as the basis of a perjury conviction.<sup>197</sup>

States like South Carolina, Oklahoma, and California have responded to the need to limit the literal truth defense through statutes and case law. These responses are the states' attempts to close the literal truth loophole, which created an overly simplified defense to a complicated offense.

## 2. Model Statute and Jury Instructions

Congress should follow suit and amend the federal perjury statute to combat the literal truth loophole and ensure that courts can convict defendants for perjury by omission. Using language from the South Carolina<sup>198</sup> and Oklahoma<sup>199</sup> perjury statutes, this federal perjury statute could read as follows:

Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false, misleading, or incomplete testimony and intends thereby to avoid or obstruct the ascertainment of the truth, makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration or omission, shall be fined under this title or imprisoned not more than five years, or both.

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193. See CAL. PENAL CODE § 118(a) (West 1990) (stating that a person commits perjury if, under oath, he "willfully and contrary to the oath, states as true any material matter which he . . . knows to be false").

194. 234 Cal. Rptr. 235 (Cal. Ct. App. 1987).

195. *Id.* at 235–36.

196. See *id.* at 242–43 (expressly rejecting *People v. French*, 26 P.2d 310 (Cal. Ct. App. 1933)); see also *supra* notes 111–18 and accompanying text (providing factual details of the *Meza* case).

197. *Meza*, 234 Cal. Rptr. at 245.

198. S.C. CODE ANN. § 16-9-10(A)(1) (1993).

199. OKLA. STAT. ANN. tit. 21, § 491 (West 1965).

The amended statute would require a prosecutor to comport with the two-witness rule and still allow a witness to recant his or her statement.<sup>200</sup> In addition, defendants could still use a narrowed literal truth defense.<sup>201</sup>

In a case in which a prosecuting attorney is arguing that the defendant committed perjury by omission, proper jury instructions would include a reading of the amended federal perjury statute, breaking down each element that the jury must find beyond a reasonable doubt.<sup>202</sup> The judge would then elaborate on the necessary elements. For example, the judge might define “material” as something that can be outcome-determinative, even if it did not actually impact the outcome of the case at hand. After reading the statute and describing the elements, the judge would list the statements and/or omissions in dispute, explaining that the defendant cannot be guilty unless the jury unanimously agrees on which statements or omissions ran afoul of the statute. The judge would still give jurors instructions regarding the recantation and literal truth defenses.

#### CONCLUSION

Perjury, as it currently stands, permits sophisticated deponents or witnesses, such as President Clinton and Judge Kavanaugh, as well as defendants and others who testify, an opportunity to omit facts without facing perjury charges. The Supreme Court solidified this position in its *Bronston* decision, which created the literal truth defense—a perjury loophole used by “wily witness[es]” to mislead juries with half-truths.<sup>203</sup> The literal truth defense is uncontained and delegitimizes the purpose of the perjury statute.

Congress should close this loophole by amending the federal perjury statute to criminalize those who intentionally provide incomplete and misleading testimony under oath. Amending the federal perjury statute to fill this gap would prevent shrewd defendants from exploiting this technicality. Statutes that are similar to perjury, such as false statements and obstruction of justice, have been successful in criminalizing omissions in certain circumstances, demonstrating that perjury can do the same.

This revision to the perjury statute would require courts and juries to take a broader look at the context surrounding a defendant’s statement or lack thereof to determine whether the defendant meant to mislead the questioner with his or her omissions. The statute would still protect witnesses and

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200. See *supra* Part I.A.2 (explaining the two-witness rule and recantation requirements).

201. See *supra* Part II.A (setting guidelines for when the literal truth defense is applicable under the amended federal perjury statute).

202. See *supra* Part II.C.2 (providing the amended federal perjury statute).

203. *Bronston v. United States*, 409 U.S. 352, 360 (1973).

encourage honest testimony, as it would not criminalize mistakes or misunderstandings. Although the perjury statute would be broader, it would still include common protections for witnesses, such as the recantation defense and the two-witness rule, thus protecting individuals from being prosecuted for making an honest mistake.