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Swear Not at All: Time to Abandon the Testimonial Oath

Ian Gallacher

"SWEAR NOT AT ALL"*:
TIME TO ABANDON THE TESTIMONIAL OATH

Ian Gallacher**

*"[T]he oath is entrenched as a vehicle for the relay of the truth. . . . Nothing, it seems, is as effective in helping to ascertain the truth in the courtroom."****

"[O]aths are words, and words is wind,
And wind is mutable: then, I conclude,
*'Tis childishness to stand upon an oath.*****

INTRODUCTION

There can be few courtroom situations more familiar to Americans than the testimonial oath.[1] A person is called to the witness stand and is instructed to raise his or her right hand and to repeat the familiar words.[2] Once the ritual is concluded, the person exists is placed in an evidentiary state of grace and is temporarily transformed from a "person" into a "witness" who can speak and be heard by the court and jury, whereas before taking the oath anything they said could, and would, be disregarded. While in that state, the witness can engage in giving "testimony," something that only a sworn witness can do.[3]

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* *Matthew*, 5:34 (King James).

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*** Nadine Farid, *Oath And Affirmation In The Court: Thoughts On The Power Of A Sworn Promise,* 40 NEW. ENG. L. REV. 555, 557 (2006).

**** ANONYMOUS, ARDEN OF FEVERSHAM (sic.) Act 1 https://www.gutenberg.org/files/43440/43440-h/43440-h.htm. The line is spoken by Alice, wife of Arden, to her lover Mosbie. Alice and Mosbie spend the play attempting to kill her husband so that they might be together. They finally succeed, but are caught and, along with their accomplices, are led off to be executed at the end of the play. Interestingly, almost the same idea appears in Samuel Burler's Hudibras ("Oaths are but words, and words but wind; Too feeble implements to bind"). SAMUEL BUTLER, HUDIBRAS, Canto II, 107-8 (1664).

1 Surely the only phrase in the entire justice system that could run the oath close in familiarity is the *Miranda* incantation.

2 Exactly what words is an interesting question that is discussed more *infra* at the text accompanying footnotes 148 to 189. For now, we can assume that they will include the famous tricolon "the truth, the whole truth, and nothing but the truth."

3 "Testimony" is a word that traces its roots through Old North French back to the Latin *testimonium*, a word that combines *testis*, a "witness," and *monium,* a sufix signifying action. https://www.etymonline.com/word/testimony. The word has inescapable religious overtones but it has no relationship with *testicles*, and any suggestion that "testimony" comes to the courtroom via a pagan form of oath-taking involving the holding of male genitalia while promising to tell the truth is a modern fantasy with no historical or linguistic support.

The oath is ritually chanted[4] by witnesses in every court, state and federal, in this country, and films and television shows that focus on the doings of American courts would be less credible to their audiences if they did not show witnesses taking the oath before testifying.[5] It is hard to imagine many citizens in this country who do not know that before they can testify in court, they must take an oath to tell the truth, the whole truth, and nothing but the truth.

Why they have to take this oath, and what exactly they are swearing to, might be less clear to prospective witnesses, however. They are agreeing to tell the truth, certainly, but what is "the truth"?[6] And can the truth really be divided into portions, as the concept of "the whole truth" seems to imply?[7] And since they have sworn to tell the truth, how can the notion of telling anything but the truth be entertained?[8] Astute witnesses might also recognize that despite the oath they have taken, the questions they are asked to answer give them very little scope to actually tell the "whole truth," whatever that might mean, and any attempts they make to expand on their answers will be limited by objections from lawyers and rulings from judges.[9] And if they have experience of a trial, they likely will know that the judge will instruct the jury that, their oath notwithstanding, the jurors are free to ignore the witness's testimony if they choose to, and even if the judge does not give this instruction, the informed witness will know that jury nullification is still a possibility.[10]

And while the form of the oath is generally known to them, witnesses might be surprised to learn that their religious beliefs might be probed, in open court, in order for the court to determine what specific form of the oath should be administered, or even if they can be permitted to testify at all.[11]

Indeed, witnesses likely know, although the oath they take usually will not inform them directly of this,[12] that they are testifying under penalty of perjury. But what perjury is, and

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4 So familiar is the oath, and so reflexive is its taking, that one commentator, noting the "pro forma dispatch" with which the oath is administered, has said that oath-taking "may appear more a genuflection performed out of habit than a ceremony sacred or significant to the law. . . ." Note, *A Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century,* 75 MICH. L. REV. 1681, 1681 (1977).

5 As in real life, the form of the oath, and the nature of its administration, can vary from movie to movie and tv show to tv show: sometimes the judge administers the oath, sometimes the court clerk; sometimes the oath is given in its most simple, secular, form, given above and sometimes in the more overtly religious form of "I (state your name) do solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help me God."

6 This question is not quite as obtuse as it might at first sound. *See, infra*, text accompanying footnotes 148-174.

7 *See, infra*, text accompanying footnotes 148-174.

8 *See, infra,* text accompanying footnotes 175-179.

9 *See, infra*, text accompanying footnotes 180-189.

10 *See, infra*, text accompanying footnotes 222-237.

11 *See, infra,* text accompanying footnotes 140-146

12 One of the many interesting questions about the oath and the form in which it is usually administered is why there is no mention of perjury in the familiar oath required of testimonial witnesses. In contrast, the federal Code allows for the possibility of unsworn declarations and it articulates specifically that the information is given pursuant to the dangers of perjury. *See* 28 U.S.C. §1746 "Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is

what the penalties are for committing an act of perjury, are likely less clear to witnesses, as is the effect this knowledge, or lack of it, might have on their testimony.[13]

required or permitted to be supported, evidence, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form: (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)". (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)". This approach raises some interesting points, in particular the observation that even here, when the form of the declaration could be specified with particularity, the code is willing to accept variations, some specified (declare, but also certify, verify, or state) and, presumably, undeclared ("in substantially the following form.") This unwillingness to specify exactly what form the oath should take mirrors the approach taken by the rules of evidence: "Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience." Fed. R. Evid. 603. In one significant sense, though, the Code deviates from the testimonial approach, in that the witness makes this declaration after providing information ("the foregoing is true and correct") rather than swearing the oath before testifying. It is also interesting to see that while this language retains a promise to tell the truth, it has abandoned the familiar tricolon(the truth, the whole truth, and nothing but the truth) and has substituted the more modern "true and correct." "Correct," here, is surely unnecessary: anything true must also be correct, and anything incorrect cannot be true. But it is a significant change to the oath form, suggesting that Congress, at least, is open to the possibility of change to the oath language.

[13] *See, infra*, text accompanying footnotes 190-219.

What the witness might not know, though, is that everyone involved in the proceeding – the judge, the lawyers, and even the jury,[14] has sworn an oath in order to be able to participate, and that these oaths – especially the jury oath – can have a profound impact on the process.[15]

In fact, for such a common act, performed thousands of times each day in courtrooms around the country, surprisingly little is known about the oath by those involved in the trials in which they are such an integral part.[16] In particular, although we rely on it to secure evidence on which decisions determining the fate of civil and criminal litigation in this country, we know little if anything about how successful the oath is in securing the "truthful" testimony it purports to produce, though anecdotal evidence suggests that many are doubtful that it has any effect at all.

Why, then, do we persist in requiring a pagan, mystical ritual that includes magical words and gestures of such, at best, questionable efficacy? And are there alternatives to the oath that might be more effective in securing reliable testimony?

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[14] *See, e.g.,* Jonathan Belcher, *Religion-Plus Speech: The Constitutionality Of Juror Oaths And Affirmations Under The First Amendment,* 34 WM. & MARY L. REV. 287 (1992); Kathleen M. Knudson, *The Juror's Sacred Oath: Is There A Constitutional Right To A Properly Sworn Jury*? 32 TOURO L.REV. 489 (2016). Indeed, as Knudson observes, "the word 'juror' identifies an individual who took an oath. . . ." *Id.* at 490 (citations omitted). And jurors are, in fact, asked to swear two oaths, one before voir dire and once before the beginning of the actual trial. *Id.* at 494. As Knudson concludes, however, while a sworn jury "is an implied constitutional requirement," there is no explicit federal Constitutional or statutory requirement that a jury be sworn. *Id*., at 490-91. *See also*, United States v. Turrietta, 696 F.3d 972 (10th Cir. 2012) (trial court's failure to administer oath to jury not plain error).

[15] The Supreme Court has held that in criminal cases, jeopardy attaches at the moment the jury is sworn. Martinez v. Illinois, 572 U.S. 833, 839 (2014)("there are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.'")(citations omitted). This might seem like a technical distinction – a formalistic bright-line rule that has little practical significance – but at least two courts have held that a defendant who was tried by an unsworn jury was in no jeopardy and accordingly, and despite acquittal, the defendant could be re-tried. *See* Spencer v. State, 40 S.E. 2d 267 (Ga. 2007), and United States v. Green, 556 F.2d 71 (D.C.Cir. 1977). Conversely, and paradoxically, conviction by an unsworn jury has been deemed to be harmless error and the conviction has been allowed to stand. Turrieta*, supra* n. 14, at 974.

[16] There is, to be fair, a substantial amount of scholarly literature devoted to the study of oaths, much of which will be cited to in this article. At the risk of seeming pessimistic, however, one must concede that the volume of legal scholarly output on any given subject is not necessarily an accurate predictor of how much is known about that subject by anyone other than legal academics. And legal academics, on the whole, are typically not participants in trials, as witnesses, litigants, or as practitioners.

This article will seek to explore these questions. After first looking at how the oath is treated by the other participants in the trial process,[17] and the oath in culture,[18] the Bible,[19] and history,[20] and examining in detail the various parts of the oath and their meaning,[21] the article will consider alternatives to the oath, including simply dropping it from contemporary trial practice and replacing it with a pre-testimony, written, declaration of an intent to tell the truth.[22] Testimony with no preceding oath might be a strange notion to those of us who grew up in the Anglo-American system of jurisprudence, and would make all filmed depictions of trials made until now seem archaic. But replacing the testimonial oath with a written declaration might be the most consistent, and honest, approach to a secular proceeding designed to produce factual accuracy.

A. Judge, Attorney, and Jury Oaths

Although the testimonial oath gets most of the attention when trial oaths are studied, and is the principal focus of this article, the oaths taken by judges, attorneys, and juries are also important, both to the trial process itself and, especially when they are ignored, to our understanding of the role the oath plays in contemporary trial culture. In order to form as clear a picture as possible about the oath's ability to bind witnesses to tell the truth while testifying, it is helpful to consider how effective the oath is in binding the other trial participants.

1. Judges

Judges take oaths of office before sitting as active judges. In federal court, and unlike the testimonial oath, the language required for the oath is specified: "I ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God."[23] The oath does not use the word "truth," but it can be implied in the obligation to discharge the duties of a judge "impartially:" judges who fail to tell the truth while performing their duties could be said to be partial to one side or the other, and therefore breaking their oath.

This might seem like an academic point, warning of a hypothetical, but not actual, danger, but perhaps it is not. In a 2015 law review article,[24] and writing about a specific case in which he was involved, Professor Albert Alschuler claimed that Judge Frank Easterbook of

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17 *See, infra*, text accompanying footnotes 23-50.

18 *See, infra*, text accompanying footnotes 51-60.

19 *See, infra*, text accompanying footnotes 61-69.

20 *See, infra*, text accompanying footnotes 70-176.

21 *See, infra*, text accompanying footnotes 148-179.

22 *See, infra*, text accompanying footnotes 238-274.

23 28 U.S.C. § 453. Interestingly, the oath gives the judge the option to swear or affirm, but requires the use of "solemnly," which indicates a religious underpinning to the oath language. That underpinning is made explicit by the inclusion of "[s]o help me God" as mandatory language at the conclusion of the oath.

24 Albert W. Alschuler, *How Frank Easterbrook Kept George Ryan In Prison* , 50 VALPO. L. REV. 7 (2015).

the Seventh Circuit "made six rulings in favor of the government the government had not sought. All of these rulings were questionable or worse."[25] The article

> also documents eight falsehoods told by Judge Easterbrook in written opinions and statements from the bench. These falsehoods included statements that the trial court gave instructions it did not, that both the defender and the government made arguments they did not make, that litigants in the Supreme Court made arguments they did not make, that the defendants and the government waived or forfeited arguments they did not waive or forfeit, that the Supreme Court said things it did not say, and that several of defendant's sentences had expired when they had not expired.[26]

Professor Alschuler also claimed that Judge Easterbrook's "appearance on the panel that heard [the defendant's] appeal was not the result of random assignment. It shows that the government played no part in producing his falsehoods. It describes the judge's bullying of counsel on both sides and urges his colleagues to recognize the problems his conduct poses for their court."[27]

These allegations against Judge Easterbrook were the latest in a string of concerns expressed about the judge's behavior. A 1994 bar association evaluation by the Chicago Council of Lawyers described Judge Easterbrook's "use of precedent as 'unreliable and inappropriate.' . . . They also claimed that he 'mischaracteriz[es] the record below in order to reach certain results.' . . . Judge Easterbook, [the report stated,] 'can communicate a lack of respect for the facts of a case and for precedent.'"[28]

Professor Alschuler does not specifically accuse Judge Easterbrook of violating his oath, but he does say of the judge that "[t]he truth is not in him.[29] And it is possible to see how, if the allegations made by Professor Alschuler are accurate, a case could be made that Judge Easterbrook had, at least in this one case, failed to act impartially and had violated his judicial oath.[30]

At least one judge has openly suggested that judges should be permitted some leeway with regards to the truth when writing a judicial opinion. Judge Easterbrook's former colleague on the Seventh Circuit, Judge Richard Posner, commenting on Judge Cardozo's writing technique in the Palsgraf case,[31] observed that Judge Cardozo's famous positioning of Mrs.

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25 *Id.* at 8.

26 *Id.*

27 *Id.* The defendant in the case Professor Alschuler wrote about was former Illinois Governor George H. Ryan. *Id.* at 7.

28 *Id.* at 9-10, quoting Chicago Council Of Lawyers, *Evaluation Of The United States Court Of Appeals For The Seventh Circuit*, 43 DEPAUL L. REV. 673, 747, 757-8 (1994).

29 *Id.* at 49.

30 Without any knowledge of the facts of the case other than that offered by Professor Alschuler's article, of course, it is impossible for the casual observer to form any definite conclusion.

31 Palsgraf v. Long Island R. Co., 248 N.Y. 339 (1928). Judge Posner observes that Cardozo's presentation of the facts of that case "is both elliptical and slanted." RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION, 38 (1990).

Palsgraf "many feet away" from the explosion that caused all her troubles was made up by the judge, noting that it was used "to telling effect from a rhetorical standpoint."[32] He continues that "[t]he inaccurate positioning of Mrs. Palsgraf at the other end of the platform many feet away from the explosion adds to the mystery, the fascination, of the case. How did a handful of firecrackers cause a heavy scale at the other end of a long platform to collapse? At once the reader is intrigued . . . If not misled."[33] Judge Posner went on to quote Judge Cardozo's defense for misstating facts: "I often say that [a judge writing a judicial opinion] must permit[,] and that quite advisedly and deliberately, a certain margin of misstatement."[34]

There is something deeply disturbing in this casual accep0tance of an asymmetrical application of the truth during litigation. What Judges Posner and Easterbrook are saying, if Professor Alschuler is to be believed, is, in essence, that witnesses must testify truthfully under criminal penalty of perjury about the facts of a case but judges , who have also taken an oath requiring them to be truthful, can make up facts if they aid the telling of the narrative from a rhetorical perspective or, simply, because they like their facts and law better than the facts as testified to and the law as published.[35] Disturbing or not, however, that appears to be the situation.

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[32] Posner, *supra* n. 31, at 43.

[33] *Id.*

[34] *Id.,* quoting, SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE V, 339, 341 (Margaret E. Hall ed. 1947).

[35] One is left to imagine how these judges would react to a lawyer or witness brought before them accused of making up facts and who offered, as a defense, the telling effect, from a rhetorical standpoint, that their fabrications had on the case narrative.

2. Attorneys

Attorneys also take an oath before they are admitted to practice.[36] The lawyer's oath has been described as a "solemn promise of ethical conduct by the lawyer."[37] Professor Andrews notes that "many lawyers today swear to a 'do no falsehood' oath[] which is substantially the same as one recorded over 350 years ago in a 1649 English book that reported oaths 'both ancient and modern.'"[38] In contemporary American legal practice, however, the oath's role is mostly ceremonial, with the mechanism for maintaining ethical standard in the profession having been moved to rules of attorney conduct.[39] Nonetheless, Professor Andrews sees a role for the attorney oath today, noting that while it will "never regain its central position as the source of ethical guidance and regulation, . . . it can more clearly and accurately state the core ethical duties of a lawyer. In that way, the oath can better inspire lawyers to live up to the ideals of the profession."[40]

Professor Andrews' optimism is admirable, and her aspirational view of the lawyer's oath is one to be celebrated and embraced. Yet the perception that the legal profession is experiencing a crisis of professionalism[41] suggests that lawyers are willing to disregard the rules, and the oath, when they perceive an advantage to themselves -- or, perhaps more commonly, their clients -- to do so. Viewed this way, the lawyer's oath is apparently no more successful than any other oath in history in securing performance consistent with the promises sworn to.

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36 For a detailed discussion about the history of the lawyer's oath and its contemporary functions, see Carol Rice Andrews, *The Lawyer's Oath: Both Ancient And Modern*, 22 GEO. J. LEGAL ETHICS 3 (2009).

37 *Id.* at 4.

38 *Id.,* quoting THE BOOK OF OATHS AND THE SEVERAL FORMS THEREOF, BOTH ANCIENT AND MODERN FAITHFULLY COLLECTED OUT OF SUNDRY AUTHENTIC BOOKS AND RECORDS NOT HERETOFORE EXTANT, COMPILED IN ONE VOLUME 29-30 (1649).

39 *Id.* at 50.

40 *Id.*

41 Professor W. Bradley Wendell has identified what he calls "a burgeoning (academic) genre – the 'profession in crisis' jeremiad. W. Bradley Wendell, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 3 (1999). Without wishing to join this lamentation, I should note that academics are not alone in decrying the state of lawyering at present. See, e.g., Benjamin H. Barton, *The ABA, The Rules, And Professionalism: The Mechanics Of Self-Defeat And A Call For A Return To The Ethical, Moral, And Practical Approach Of The Canons*, 83 N.C.L.REV. 411 (2005); Marc Galanter, *The Faces Of Mistrust: The Image Of Lawyers In Public Opinion, Jokes, And Political Discourse,* 66 U. CIN. L. REV. 805 (1998); Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283 (1998). These articles are a tiny fraction of those that could be cited to support the perception that lawyer misconduct is high. And, of course, support for this perception can also be found, by those who chose to look for it, in the records of state disciplinary bodies charged with monitoring attorney conduct.

3. Juries

As with judges and lawyers, juries must swear an oath before participating in the trial process.[42] That oath "is not a mere 'formality' which is required only by tradition. The oath represents a solemn promise on the part of jurors to do their duty according to the dictates of the law to see that justice is done. This duty is not just a final duty to render a verdict in accordance with the law, but the duty to act in accordance with the law at all stages of trial."[43]

But jurors do not always act in accordance with the oath they have taken, and jury nullification is often the result. Jury nullification is defined as "a jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness."[44]

Jury nullification is not a new phenomenon. It became "commonplace" in the seventeenth and eighteenth centuries,[45]when juries – much like juries today – would render a verdict against the evidence "to nullify what [they] viewed as the unjustifiably harsh result that would flow from an 'honest' enforcement of a penal statute."[46] Because nullification involved the implicit violation of the jurors' oath, it was called "pious perjury" by a 1711 commentary on the law.[47]

Pious[48] or not[49], and regardless of whether the jury believes itself to be – or perhaps even is – justified in nullifying a verdict that would be proper under the facts and law of the case,

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42 See, e.g., Jonathan Belcher, *Religion-Plus Speech: The Constitutionality Of Juror Oaths And Affirmations Under The First Amendment,* 34 WM. & MARY L. REV. 287 (1992); Kathleen M. Knudson, *The Juror's Sacred Oath: Is There A Constitutional Right To A Properly Sworn Jury?* 32 TOURO L.REV. 489 (2016). Indeed, as Knudson observes, "the word 'juror' identifies an individual who took an oath. . . ." *Id.* at 490 (citations omitted). And jurors are, in fact, asked to swear two oaths, one before voir dire and once before the beginning of the actual trial. *Id.* at 494. As Knudson concludes, however, while a sworn jury "is an implied constitutional requirement," there is no explicit federal Constitutional or statutory requirement that a jury be sworn. *Id*., at 490-91. *See also*, United States v. Turrietta, 696 F.3d 972 (10th Cir. 2012) (trial court's failure to administer oath to jury not plain error).

43 People v. Pribble, 249 N.W. 2d 363, 366 (Mich. Ct. App. 1976).

44 Jury Nullification, BLACK'S LAW DICTIONARY (10th ed. 2014).

45 James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom*, 12 L. & HIST. REV. 95, 105 (1994).

46 *Id.*

47 *Id.* at 106 (citations omitted).

48 Contemporary scholars use different words but still convey approval of jury nullification. *See, e.g.,* David Brody, *Sparf and Daugherty Revisited: Why the Court Should Instruct the Jury of its Nullification Rights,* 33 AM. CRIM. L. REV. 89,91 (1995)(jury nullification an "act of mercy"); Arie Rubenstein, Note, *Verdicts of Conscience: Nullification and the Modern Jury Trial,* 106 COLUM. L. REV. 959 (2006)

49 Kimberley Del Frate makes the point that while scholars and commentators tend to be supportive of jury nullification, judges "commonly define jury nullification as a lawless, anarchical practice." Kimberly del Frate, Comment, *The Elephant in the Room: Attorney Accountability for Jury Nullification Arguments in Criminal Trials,* 52 CAL. W. L. REV. 163, 171 (2016).

jury nullification is still a violation of the jury's oath to reach a verdict based solely on the law and the evidence of the case.

So we have a situation where every participant in the trial process – judge, attorney, jury, and witness – has taken an oath of one sort or another, and all appear willing, under the right circumstances, to violate that oath and to do what they want, unconstrained by their promise to not do the very thing they are now doing.[50] It seems reasonable to ask, therefore, what on earth we think we are doing when we make people take oaths and what benefits we honestly believe we are gaining from this practice.

B. The Oath in Culture

Despite its dismal record of failure throughout history to secure truth-telling in court, it is certainly true that the oath has been with us for a while. The oath, in fact, has been a feature of human interaction for at least as there is a written historical record, with its use being traced to "a pre-religious, indeed pre-animistic period of culture."[51] The present-day testimonial oath has two parts, with a ritual gesture (the raising of the right hand) and a three-fold promise to tell the truth, the whole truth, and nothing but the truth,[52] but the original form of the oath had a third part, in which the oath-taker invoked a curse that would kill or harm the speaker of the oath was broken. As Silving notes, "[c]urses were not symbols of magic, but rather operative magic performances. . . . Thus, by use of a particular curse, man could determine both disaster and victim. Indeed, that victim could be himself. The oath was a self-curse, uttered in conditional form, operating irrevocably upon occurrence of the condition. Thus the self-curse could be utilized as a means of guaranteeing that a promise would be performed."[53]

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50 An example of this, albeit in a case involving the citizenship oath rather than the testamentary oath, can be found in the case of Faisal Shahzad, who attempted to blaw up a car bomb in New York's Times Square. Shazad was born in Pakistan, but settled in the United States and became an American citizen, swearing an oath of allegiance to the United States when he did so. MARK BOWDEN, THE FINISH: THE KILLING OF OSAMA BIN LADEN, 137 (2012). When asked by the judge who was about to sentence him to life in prison about that oath of allegiance, Shazad said "I sweared . . . but I didn't mean it." Id. Astonishingly, this angered Osama bin Laden, who wrote to one of his followers: "[Shazad] was asked about the oath that he took when he obtained American citizenship . . . [a]nd he responded by saying that he lied. You should know that it is not permissible in Islam to betray trust and break a covenant. . . . In one of the pictures, brother Faisal Shahzad was with commander Mehsud . . .; please find out if Mehsud knows that getting the American citizenship requires taking an oath to not harm America. This is a very important matter because we do not want *mujahidin* to be accused of breaking a covenant." Id., at 137-8. It is impossible to know quite what to say about such a remarkable assertion as this, coming from the man responsible for the deadliest attack on America and Americans since Pearl Harbor.

51 Helen Silving, *The Oath: I,* 68 YALE L. J. 1330, 1331 (1959)(citation omitted).

52 This is the standard form of the oath although there are many variations to be found in different state statutes. There is no standard federal court oath, with the rules of evidence requiring only that "[b]efore testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience." Fed. R. Evid. 603.

53 Silving, *supra.* n. 51, at 1330(citations omitted).

1. Children in English-Speaking Cultures[54] and the Oath

Children in English-speaking cultures, much more clearly than adults, remember and still utilize the self-curse as a means of securing truth-telling.

> Children reinforce the truth by swearing upon their honour [sic.], their heart, their Bible, their own life, or, preferably, their mother's. Spitting, linking fingers, holding their hand up to God, and making crosses upon their body, accompany their declarations. . . . If this catalogue seems impious, it should be emphasized that the asservations . . . are not treated lightly by those who use them. An imprecation such as 'May I drop down dead if I tell a lie' is liable to be accorded the respect of its literal meaning, and distinct uneasiness may follow its utterance, even when the child concerned is fairly certain that he has not departed from the truth.[55]

While examples of the self-cursing nature of oaths taking effect are rare, they are not unheard of.[56] And while the childish forms of securing truthful testimony rarely outlive adolescence, there are examples of those surviving into adulthood as well.[57]

Interestingly, the truth-telling effect of children's oaths appears not to have been extensively studied by those seeking to test the reliability of children as witnesses at trial.[58]

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54 I do not mean by this limitation that children in other countries do not retain a cultural awareness of the history of the oath that is at least as developed as children in English-speaking countries. Rather, it is an attempt to keep this article to a reasonable length.

55 IONA AND PETER OPIE, THE LORE AND LANGUAGE OF SCHOOLCHILDREN, 121 (1959). The authors' use of "fairly" certain in that last sentence is one of the most telling, and delightful, signs that they have spent many hours working with the ten and eleven year old children that were the subjects of this book.

56 The Opie's note one such instance in their book. "The fate of Ruth Pierce on 25 January 1753 was inscribed on the Market Cross of Devizes, Wiltshire, 'as a salutary warning against the danger of impiously invoking the Divine vengeance.' According to the inscription she protested that she had paid her full share for a sack of wheat she was buying with three other women, and said that she might drop down dead if she had not. 'She rashly repeated this awful wish, when, to the consternation of the surrounding multitude, she instantly fell and expired, having the money concealed in her hand.' In a report of the Coroner's inquest in *The Western Flying Post*, 29 January 1753, the further detail is added that the amount Ruth Pierce was concealing in her hand was three pence." Opie, *supra* n. 55, at 122, n. 1(citations omitted). The Market Cross, with its cautionary tale, still stands in Devizes today, although the cross itself was built after Ms. Pearce's unfortunate death, n 1814. https://en.wikipedia.org/wiki/Devizes.

57 "During the proceedings of the Lynskey Tribunal held in London in 1948 to inquire into abuses at the Board of Trade, Mrs. John Belcher, wife of the ex-Railway Clerk, Parliamentary Secretary to the Board of Trade, won the sympathy of everyone present with her frank evidence as she twice licked her fingers and crossed her throat in this schoolgirlish affirmation of honesty." Opie, *supra,* n. 55, at 127, n. 1. It is impossible to tell how many witnesses, if any, take the testimonial oath with their fingers crossed behind their backs, although one suspects that the number might not be zero.

58 See, e.g., Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence,* 73 S. CAL. L. REV. 1017 (2000). This article surveys the field of literature concerning the ability of children to distinguish between telling the truth and lying and the ability of a court to test the potential reliability of a child's testimony. The author states that "[m]ost courts do not require young children to understand the meaning of the word 'oath,' . . . and many allow children simply to promise to tell the truth. . . . Although researchers have established that even older children have difficulty with the term 'oath,' . . . surprisingly little research has explored

And while asking children to pinky swear, or to take an oath on their mother's life, might seem incongruous with the might, grandeur, and seriousness of a contemporary court,[59] if such an oath were to allow a child to testify to information about which only it knew, then surely the judicial system would be better served than it would by requiring the child to remain mute.[60]

2. The Oath in the Bible[61]

The Bible provides contradictory advice concerning the oath, confirming that oath taking was something done frequently in the pre-Christian world but also suggesting that Christians should avoid taking oaths. In Genesis, for example, Abraham takes an oath to deal fairly with Abimelech[62] and a fair amount of oath taking is reflected in the rest of the

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whether promising is meaningful to children." *Id.* at 1057-8. The research analyzed in the article, though, is based in psychology, and one wonders is a sociological approach, like that offered by, for example, the Opies, would give a more nuanced view of the ability of children to distinguish between telling the truth and lying.

[59] When confronted with an issue like this, it is worth recalling the laudable flexibility of Fed. R. Evid. 603, which only requires that the oath taken by the witness "must be in a form designed to impress that duty [to tell the truth] on the witness's conscience." The court, then, can craft an oath that is effective for each individual witness, including children.

[60] The Opies record one instance in which a child-like oath was apparently taken seriously, although it must be said that the newspaper reporting on this incident, the News of the World, is not one known in Britain for the depth or rigor of its reporting. "How seriously [oaths taken on the life on a child's mother] are regarded by adults also, in some levels of society, may be seen in the police court report on a 16-year-old Dorset boy accused of murder. It was his mother who asked: 'Will you swear over my dead body you did not do it?' The boy replied: 'I tell you I didn't. I swear over your dead body.' *News of the World*, 14 February, 1954, p.2" Opie, *supra* n. 55 at 126, n.1. By contrast, a New Jersey judge's attempt to elicit truthful behavior from a six-year-old after her mother had told her to cross her heart and tell the truth, in a case involving two alleged instances of child molestation, was not permitted. New Jersey v. Zamorsky, 159 N.J. Super. 273, 387 A.2d 1227 (Sup. Ct. N.J. 1978). The court established that the child had not heard the word "oath" and did not know what it meant, but that she had crossed her heart and hoped to die and that this meant that "you will tell the truth." *Id.* at 1231, 282. Despite this, the New Jersey Superior Court, Appellate Division, did "not understand the trial judge's statement that [the child] was not old enough to take an oath, in view of his finding that the child was qualified as a witness, which necessarily entailed the ability on her part to communicate and an understanding by her of her duty to speak the truth." *Id.,* at 1231, 282-3. The court then engaged in a distressingly formalistic analysis of the oath, its purpose, and its method of administration, and concluded: "[s]ince the traditional forms by which an oath is to be taken or an affirmation made are designed to accomplish [the purpose of testifying truthfully,] we perceive no sound reason for deviating from them by eliciting the commitment to tell the truth in some other manner, such as, in this case, by crossing one's heart. We think the practice should not be encouraged." *Id.* at 1232, 285. Had the court adopted the Federal Rules' approach of flexibility with regard to form, found in Fed.R.Evid. 603 (the oath "must be in a form designed to impress that duty [to tell the truth] on the witness's conscience"), the outcome might have been different and the child might have been able to testify about the molestation she alleged had taken place.

[61] As with limiting the discussion of oath-taking among children to the English-speaking world, I limit the discussion here to the Bible because of its centrality to the Anglo-American tradition of testimonial oath-taking, not from a belief that the Bible is a more important source of information or religious belief than any other.

[62] *Genesis,* 21:22-24 (King James) ("And it came to pass as that time, that Abimelech and Phicol the chief captain of his host spake unto Abraham, saying, God *is* with thee in all that thou doest: Now therefore swear unto me here by God that thou wilt not deal falsely with me, nor with my son, nor with my son's son; but according to the kindness that I have done unto thee, thou shalt do unto me, and to the land wherein thou hast sojourned. And Abraham said, I will swear.")

Old Testament,[63] but in the New Testament we are told on at least two occasions not to swear oaths.[64] Yet elsewhere in the New Testament, oaths are offered freely in support of various propositions, with Saint Paul being particularly inclined to offer an oath to bolster whatever he is saying.[65]

It is unfair to expect consistency from a document composed over time, and reflecting a variety of cultures and beliefs. But the Bible, and its ambivalent approach to oath-taking, is crucial to our understanding of how this practice came to form such a crucial role in contemporary secular trials. When the Emperor Constantine decided to enshrine the Christian practice of oath taking into the Justinian Code, he did so in error since, as we have seen, the Christian world was at best ambivalent about the value of oaths.[66] Nonetheless, the Justinian code claimed historical precedence when it stated that "[w]e have long since directed that witnesses, before they give their testimony, must be put under the sanctity of an oath. . . ."[67] And while, as Silving notes, the Roman adoption of the oath in the Fourth Century was not the exclusive source of oath taking in the West,[68] the Justinian Code became the source for the oath's adoption "by all of European Christendom."[69]

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63 See, e.g., *Deuteronomy*, 6:13 (King James) ("Thou shalt fear the Lord thy God, and serve him, and shalt swear by his name."); *Ecclesiastes,* 5:4 (King James) ("When thou vowest a vow unto God, defer not to pay it: for he hath no pleasure in fools: pay back that which thou hast vowed."); *Ezra*, 10:5 (King James) ("Then arose Ezra, and made the chief priests, the Levites, and all Israel, to swear that they should do according to this word. And they swore."); and *Joshua*, 6:22 (King James) ("But Joshua had said unto the two men that had spied out the country, Go into the harlot's house, and bring out thence the woman, and all that she hath, as ye swore unto her.")

64 *Matthew*, 5:33-37 (King James) (Christ says "[a]gain, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you. Swear not at all; neither by heaven; for it is God's throne: Nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil.") *James*, 5:12 (King James) ("But above all things, my bretheren, swear not, neither by heaven, neither by the earth, neither by any other oath: but let your yea be yea; and your nay, nay; lest ye fall into condemnation.")

65 *See, e.g., Romans*, 1:9 (King James) ("For God is my witness, whom I serve with my spirit in the gospel of his Son, that without ceasing I make mention of you always in my prayers."); *2 Corinthians*, 1:23 (King James) ("Moreover I call God for a record upon my soul, that to spare you I came not as yet unto Corinth."); *Galatians*, 1:20 (King James) ("Now the things which I write unto you, behold, before God, I lie not."); *Philippians*, 1:8 (King James) ("For God is my record, how greatly I long after you all in the bowels of Jesus Christ."); *1 Thessalonians* 2:5 (King James) ("For neither at any time used we flattering words, as ye know, not a cloke of covetousness; God is witness"); *1 Thessalonians*, 2:10 (King James) ("Ye are witnesses, and God also, how holily and justly and unblameably we behaved ourselves among you that believe.").

66 Silving, *supra.* n. 51, at 1337 ("Testimonial oaths were finally institutionalized in Roman jurisprudence in the fourth century A.D., when Constantine, erroneously believing that he was following Christian practice, required witnesses' statements to be sworn.")

67 ANNOTATED JUSTINIAN CODE, 4.20.9 (Ed. Fred H. Blume), available at http://uwdigital.uwyo.edu/islandora/object/wyu%3A44372#page/95/mode/1up.

68 *See,* Silving, *supra.,* n. 51, at 1329 ("Although the testimonial oath was firmly established in Rome in the erroneous belief that it was a Christian tradition, . . . it is not exclusively derived from this Roman misconception.")

69 *Id.* at 1337.

C. The Oath in History

History certainly provides no comfort to anyone who believes that oaths serve any practical purpose. Indeed, as early as the fourth century B.C., Plato was dismayed by what he perceived as the high levels of perjury in Greecian society when he proposed a utopian society that did not include oaths:

> When a man brings a charge against someone, he should put his accusations in writing without taking an oath; the defendant should similarly write out his denial and hand it to the officials unsworn. It would be dreadful, you see, to know quite well, in view of the frequent law-suits that occur in the state, that although pretty nearly half our citizens . . . have perjured themselves, they go on mixing with each other at common meals and other public and private gatherings without the slightest qualms.[70]

Depite this early warning that oaths were not doing what they were supposed to do, trial practice in England evolved with oaths at its core. There developed, however, an asymmetrical approach to oath taking, with prosecution witnesses testifying under oath but defense witnesses forbidden to be sworn before testifying.[71] Although this rule had been criticized by Coke as early as 1644[72] it was not entirely eliminated until 1702.[73] As Langbein notes, this change in the law was likely "not for the purpose of enhancing the defensive posture of the defendants, but in order to expose defense witnesses to prosecution for perjury."[74] Even after this change, however, both in England and in America, the defendant was not allowed to testify.[75] This was, presumably, to spare defendants from putting their souls at risk because, it was assumed, they would lie in order to save themselves from punishment.[76] This prohibition lasted in England until the passage

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70 PLATO, THE LAWS, BOOK XII 457 (Trevor J, Saunders, trans. Penguin Classics 1970). Plato was not entirely opposed to oath-taking: he believed that jury members should take oaths before sitting at trial, voters in elections , and judges (of choruses and artistic performances, as well as judges of atheltic and equestrian events) should take oaths as well. Id. at 458. He also believed that aliens should be permitted to offer and accept binding oaths. Id.

71 JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL, 51-2 (2003). As Langbein notes, this gave the prosecution testimony "enhanced credibility," it could inadvertently work to the defendant's benefit, particularly in cases involving various types of harm to children when the victim was disqualified from testifying because of infancy., but also in cases involving others, such as Quakers, who were prohibited from testifying in court because of their unwillingness to swear an oath. *Id.,* n. 200 (citations omitted).

72 EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 79 (1644), *quoted by* LANGBEIN, supra n. 71, at 52.

73 1 ANNE, STAT. 2 c. 9, §3 (1702), *quoted by* LANGBEIN, *supra* n. 71, at 52, n. 204.

74 LANGBEIN, *supra* n. 71, at 52.

75 *Id.*

76 *Id.* Criminal defendants were permitted to give unsworn statements in their own defense. In People v. Thomas, 9 Mich 314 (1861), the Supreme Court of Michigan commented on the potential tactical advantage this gave a defendant. "If the people cannot compel [the defendant]to testify neither can he force his testimony upon them. Otherwise there would be no reciprocal rights, and the prisoner would possess the double advantage of offering his sworn or unsworn statement at his option." The court credited the danger of

of the Criminal Evidence Act in 1898,[77] and while most American states had lifted this prohibition sometime earlier,[78] it lasted in Georgia until 1961 when the Supreme Court intervened.[79]

The question of who was allowed to take the oath, and therefore who was allowed to testify, has been a complicated one. The early English position was that because the oath was a religious act, only Christians could take the oath because only they possessed the belief necessary to activate the relationship between the witness and God that would secure the truthfulness of the testimony. In 1609, Edward Coke made his view clear: "All infidels are in law *perpetui inimici*, perpetual enemies . . . for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace."[80]

Despite the broad language of Coke's opinion that only Christians were qualified to take the oath, and therefore be witnesses in court,[81] Jews were allowed to testify in criminal cases as early as 1667,[82] although it took until 1744, and the case of Omichund v. Barker[83] to allow for the general swearing-in of witnesses of any religion, as long as the witness believed in a god, believed in the obligations inherent in oathtaking, and were otherwise competent. The court reasoned that regardless of the religion and the form the oath might take, "still the substance is the same, which is that God in all of them is called upon as a witness to the truth of what we say."[84]

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allowing a defendant to choose either to testify under oath or giving an unsworn statement "if safety or caution suggested it" as a reason for continuing to prohibit defendants from testifying under oath. *Id.* at 315.

77 *Id.,* citing, CRIMINAL EVIDENCE ACT, 61 & 62 VICT., c. 6 (1898).

78 LANGBEIN, *supra* n. 71, at 53. The first state to permit defendants to testify under oath appears to have been Maine, in 1859. Ferguson v. Georgia, 365 U.S. 570, 577 (1961), *citing* Maine Acts 1859, c. 104. "Before the end of the century, every State except Georgia has abolished the disqualification." *Id.*

79 Ferguson, *supra* n. 78, 365 U.S. at 595.

80 Calvin's Case, 77 Eng. Rep. 377, 397 (KB 1609), *quoted in* THE LAW REFORM COMMISSION, IRELAND, REPORT ON OATHS AND AFFIRMATIONS, 7 (1990).

81 Coke repeated and clarified his opinions several times. He wrote that the oath is "an affirmation or denial by any Christian . . . calling Almighty God to witnesse, that his testimony was true." 3 EDWARD COKE, INSTITUTES OF THE LAW OF ENGLAND 165 (London 1797), quoted by Note, A RECONSIDERATION OF THE SWORN TESTIMONY REQUIREMENT: SECURING TRUTH IN THE TWENTIETH CENTURY, 75 MICH. L. REV. 1681, 1686 n. 25 (1977).

82 *See, e.g.,* Note, *supra* n. 81, at 1686, n. 25 (court held that "Jews sworn on the Old Testament had sufficiently invoked the necessary obligations and sanctions required by law." *citing* Robeley v. Langston, 84 Eng. Rep. 196 (K.B. 1667)). In an untitled case heard at the Old Bailey in 1679, a victim and his witnesses, all Jews, were sworn on the Pentateuch in order to be allowed to claim that a prostitute had stolen a ruby valued at £14 as well as a silver plate "and some other things." https://www.oldbaileyonline.org/browse.jsp?id=t16791210-3&div=t16791210-3&terms=pentateuch#highlight. The offhand way in which this process was described suggests that, Coke notwithstanding, the practice was commonplace and not worthy of significant comment, and the conviction secured at the end of the case suggests that once sworn, a Jew's word was considered to be as good as anyone else's.

83 Omichund v. Barker, 125 Eng. Rep. 1310 (Ch 1744).

84 *Id.* at 1314. Significantly, though, the witness was still required to be religious, since any person who did not believe that God, or whatever god they believed in would punish them for testifying untruthfully were not bound or obligated to tell the truth after taking the oath. *Id.* at 1315.

Although Omichund was a case from the Court of Chancery, it clearly had a rapid and general effect, and on February 27, 1765, in the Old Bailey, a Muslim named John Morgan was sworn on the Koran and allowed to testify after being asked about the manner of swearing in Islam.[85]

In America, Coke's view of oath taking was soundly rejected in favor of the Omichund decision, with the Illinois Supreme Court writing, in 1856, that Coke's opinion was "a rule as narrow, bigoted and inhuman as the spirit of fanatical intolerance and persecution which disgraced his age and country."[86] And in December of the same year, the North Carolina Supreme Court wrote that any test that prevented a witness who held non-traditional religious beliefs[87] was "wholly repugnant to the tolerant and enlightened spirit of our institutions and of the age in which we live."[88] In reaching this decision, the court concluded that had the North Carolina Legislature intended

> to exclude Jews and infidels, who believe in a God, and Christians, who do not believe in future rewards and punishments, from the *privilege* of taking the oaths which are required to enable them to testify as witnesses, or to take any office or place of trust or profit, in other words, to degrade and persecute them 'for opinion's sake,' then it is clear that the statute, so far as this purpose is involved, is void and of no effect, because it is in direct contravention of the 19 sec of the Declaration of Rights: 'That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own conscience.'[89]

But lest we become too smug about our historically enlightened approach to oath taking in general, and in North Carolina in particular, it is worth remembering that in 2003, a Muslin woman named Syidah Matteen declined to swear on the Bible prior to giving testimony in a courtroom in Guilford County, North Carolina, preferring to swear on the Qur'an.[90] Because no Qur'an was available, Ms. Mateen affirmed to tell the truth.[91] Later, however, Ms. Mateen returned to court with a number of Qur'ans that an Islamic Center had donated

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85 https://www.oldbaileyonline.org/browse.jsp?id=t17650227-5&div=t17650227-5&terms=alcoran#highlight. Morgan testified that "I touch the book, the Alcoran, with one hand, and put the other hand to my forehead; then I look upon it [and] I am bound to speak the truth." Id. The court's acceptance of an unsworn witnesses description of an oath ritual with which it likely was unfamiliar is striking, and appears to speak more to the expediency required to process a large number of trials than it does to a careful examination of oath practices in other cultures. A search of The Old Bailey Proceedings database suggests that, in addition of this case, the court heard an additional 46 trials on February 27, 1765. *Id.*

86 Central Military Tract R.R. Co. v. Rockafellow, 17 Ill 541, 552 (1856).

87 In this case, the witness did not believe in punishment for sin after death, and believed that "in another world all would be happy and equal to the angels." Shaw v. Moore, 49 N.C. 25, 25 (1865).

88 *Id.* at 31.

89 *Id.* at 30.

90 Frederick B. Jonassen, *"So Help Me?": Religious Expression and Artifacts in the Oath of Office and the Courtroom Oath,* 12 CARDOZO PUB. L, POL. & ETHICS J. 303, 345 (2014). See also, Daniel Blau, *Holy Scriptures and Unholy Strictures: Why the Enforcement of a Religious Orthodoxy in North Carolina Demands a More Refined Establishment Clause Analysis of Courtroom Oaths*, 4 FIRST AMEND. L. REV. 223 (2006).

91 *Id.* at 346.

so that Muslim witnesses would have them available for swearing.[92] The court declined the donation and, when Ms. Mateen was called to give testimony in a later case, the court refused to allow her to take her oath on the Qur'an and, in July 2005, the American Civil Liberties Union of North Carolina filed suit on Ms. Mateen's behalf seeking, among other things, a declaration that a witness could swear on religious texts other than the Bible.[93] The case bounced up and down the North Carolina court system until, in 2007, a Superior Court judge ruled that in North Carolina, oaths are to be administered "in a form, and upon such sacred texts, including texts other than the Holy Bible, that a witness or juror holds to be 'most sacred and obligatory upon their conscience.'"[94] How it is that a case could spend two years in the North Carolina court system with nearly 150 year-old binding precedent making this a non-issue is not something any trained lawyer or judge should be comfortable about.

92 *Id.*

93 *Id.* at 348.

94 *Id.* at 349, *quoting* Declaratory Judgment at 17, ACLU of N.C. v. North Carolina, No. 2005 CVS 9872 (Super. Ct. Div. May 24, 2007), available at www.aclu.org/files/images/asset_upload_file287v3.pdf.

Until we are confronted with another situation in which a judge ignores an oath and fails to adhere to the law,[95] we are left with a situation, at least in North Carolina, where witnesses are expected to take a solemn oath[96] with their hands on "Holy Scriptures"[97] and take an overtly religious oath,[98] unless they have "conscientious scruples" about taking the oath, in which case they might choose to affirm instead of swear.[99] Because of Mateen, witnesses who are adherents to religions other than Christianity can swear on books that constitute their religion's version of "Holy Scriptures."

It is possible to look at the cultural and historical background of oath-taking and conclude that people only break oaths for selfish or self-interested reasons. But life is more nuanced and complex than this simplistic view, and history is also replete with examples of people who broke oaths out of personal conviction that the circumstances that had caused them to take the oath had changed and their conscience would not permit them to honor their oaths any longer.

In this country, for instance, George Washington provides an interesting, though somewhat opaque, example. There is no documentary proof that Washington took an oath of allegiance to the British monarch, although it would have been almost unthinkable for him not to have taken not one but several of these oaths.

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95 North Carolina judges swear an oath to carry out their duties to "the best of my ability and understanding, and consistent with the Constitution and laws of the State; so help me, God." N.C. Gen Stat § 11-11 (2018). It would be difficult to argue that a judge who ignored almost 150-year-old binding precedent was carrying out their duties to the best of their ability or consistent with the laws of North Carolina. Yet there is nothing in the record or the scholarly literature to suggest that the judge's breach of the judicial oath in the Mateen case was investigated, or even that investigating the potential breach of the oath was ever even considered. This is, in the context of the case, somewhat ironic.

96 "Whereas, lawful oaths for discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, and whereas, lawful affirmations for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government, therefore, such oaths and affirmations ought to be taken and administered with the utmost solemnity." N.C. Gen. Stat. § 11.1 (2918)

97 "Judges and other persons who may be empowered to administer oaths, shall (except in the cases in this Chapter excepted) require the party to be sworn to lay his hand upon the Holy Scriptures, in token of his engagement to speak the truth and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of that holy book and made liable to that vengeance which he has imprecated on his own head." *Id.* at § 11.2.

98 "When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the Holy Gospel; and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth he would draw down the vengeance of heaven upon his head, and shall introduce the intended oath with these words, namely: I, A.B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known (etc., as the words of the oath may be)." I*d.* at § 11.3.

99 When a person to be sworn shall have conscientious scruples against taking an oath in the manner prescribed by G.S. 11-2, 11-3, or 11-7, he shall be permitted to be affirmed. In all cases the words of the affirmation shall be the same as the words of the prescribed oath, except that the word "affirm" shall be substituted for the word "swear" and the words "so help me God" shall be deleted. *Id.* at § 11.4.

Although Washington did not obtain a royal commission during his military career as an officer in the Virginia militia, he served alongside British officers, ranked above some British officers, and fought for the King. He mentioned his service to the King many times throughout letters that he wrote during his time in the militia.[100] For example, in a letter to Robert Orme on March 15, 1755, Washington wrote, "But besides this, and the laudable desire I may have to serve (with my best abilities) my King & Country, I must be ingenuous enough to confess that I am not a little biased by selfish considerations."[101]

Additionally, in Washington's letters, he instructs people to enlist others into the militia.[102] As a part of his instructions, he states that "all recruits, so soon as they are listed, are to take the oath, provided for that purpose, which is to be attested by the magistrate who administered them."[103] These likely were the oaths of supremacy and allegiance; there were other oaths in place at the time that someone in the militia might have to take, but only in certain situations, such as enforcing punishments on another officer for his failure to comply with certain regulations.[104] Therefore, since, any military officers were required to take the oaths of supremacy and allegiance, these are likely the oaths that Washington is referring to in his letters. The circumstantial evidence, then, suggests that Washington himself took these oaths upon being sworn into the Virginia militia.

Washington likely also took oaths of supremacy and allegiance while sitting in the Virginia House of Burgesses. Because the Virginia Assembly sat by permission of the King, all its members had to be sworn in by the Royal Governor or his deputies before convening.[105] Although there is no record specifically recording that the members of the House of Burgesses during Washington's time took the oath of allegiance, it would surprising were the practice of taking the oath to have fallen into disuse. So once again, while there is no direct evidence of Washington having taken an oath of allegiance to the British King, it is highly likely that he did, in fact, take such an oath on multiple occasions.[106]

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100 George Washington, *George Washington Papers, Series 2, Letterbooks 1754 to 1799: Letterbook 1,- Dec. 25, 1755*, LIBRARY OF CONGRESS, https://www.loc.gov/item/mgw2.001/ (last visited March 9, 2019).

101 George Washington, *George Washington to Robert Orme, March 15, 1755*, LIBRARY OF CONGRESS, https://www.loc.gov/resource/mgw2.001/?sp=29 (last visited March 9, 2019).

102 George Washington, *George Washington to John Carlyle, October 3, 1755*, LIBRARY OF CONGRESS https://www.loc.gov/resource/mgw2.001/?sp=210 (last visited March 9, 2019).

103 George Washington, *George Washington, September 3, 1755, Recruiting Instructions*, LIBRARY OF CONGRESS, https://www.loc.gov/resource/mgw2.001/?sp=175 (last visited March 9, 2019).

104 An Act for the Better Regulating and Disciplining the Militia, (1757), Volume 7, The Statutes at Large, 30th George II c. 3

105 *The Capital: A Manual of Interpretation*, COLONIAL WILLIAMSBURG DIGITAL LIBRARY (1990), http://research.history.org/DigitalLibrary/view/index.cfm?doc=ResearchReports%5CRR0204.xml&highlight

106 Despite his apparent inconsistent approach to his own oath-taking, Washington spoke about the importance of oaths later in life: "Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice?" George Washington, FAREWELL ADDRESS (Sept 17, 1796), transcript available at http://avalon.yale.edu/18th_century/washing.asp.

While Washington's oath-taking past is likely but uncertain, we know that Benjamin Franklin took an oath of allegiance to George the Second in 1755, because of his position at the University of Pennsylvania:

> I A.B. do truly and sincerely acknowledge, profess, testify, and declare in my Conscience, before God and the World, That our sovereign Lord King George the second is lawful and rightful King of the Realm of Great Britain, and all other his Majesty's Dominions and Countries thereunto belonging. . . . And I do swear, That I will bear Faith and true Allegiance to his Majesty King George the second, and him will defend to the utmost of my Power, against all traitorous Conspiracies and Attempts whatsoever; which shall be made against his Person, Crown, or Dignity. . . . And I will do my utmost Endeavour to disclose and make known to his Majesty, and his Successors, all Treasons and traitorous Conspiracies, which I shall know to be against him or any of them.
>
> So help me God.[107]

More recently, General Robert Lee took an oath of allegiance to the United States of America as an officer in its army before becoming an officer in the army of the Confederate States of America.[108] Lee signed the Oath of Amnesty on October 2, 1865, but was not pardoned and his citizenship was not restored until a posthumous joint Congressional resolution in 1975.[109]

And in contemporary times, we have the example of Edward Snowden, the source of information published in a series of articles in *The Guardian* and *The Washington Post.*[110] Snowden was, at the time he gathered the information, an intelligence contractor for Booz Allen Hamilton at the National Security Agency ("NSA").[111] Snowden considered himself to be a whistleblower, and asserted that "I know I have done nothing wrong."[112] Nonetheless, facing a criminal complaint Snowden, who was in Hong Kong, declined to return to the

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107 *Oaths of Trustees and Officers of the College, [10 June 1755]*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Franklin/01-06-02-0040 (lasted visited March 9, 2019).

108 A scan of the original document signed by Lee can be found at https://americancivilwar.com/authors/Joseph_Ryan/Articles/General-Lee-Service-Record/Service-Record-General-Lee.html. While President Gerald Ford said that "General Lee's character has been an example to succeeding generations, making the restoration of his citizenship an event in which every American can take pride (https://www.archives.gov/publications/prologue/2005/spring/piece-lee), some have taken the position that Lee was a traitor. *See,* Eric Lamar, *Why Praise Robert E. Lee?* Washington Post (August 23, 2017), available at https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2017/08/23/whats-politically-correct-about-praising-robert-e-lee/?utm_term=.42d9ba88a6ec

109 https://www.archives.gov/publications/prologue/2005/spring/piece-lee

110 Hanna Kim, *The Resilient Foundation of Democracy: The Legal Deconstruction of the Washington Post's Condemnation of Edward Snowden,* 93 IND. L. J. 533, 535-6 (2018).

111 *Id.* at 535.

112 Glenn Greenwald, Ewen MacAskill & Laura Poitras, *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations,* THE GUARDIAN (June 11, 2013, 9:00 AM)m, available at https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance.

United States but eventually travelled to Russia, where he apparently remains at the time of writing.

Upon entering into employment with the NSA, Snowden swore the standard civil service oath.[113] It is possible that the last sentence of 5 U.S.C. § 3331 – "This section does not affect other oaths required by law" – was missing from the card from which Snowden likely read the oath[114] This becomes significant when the other obligation Snowden admits to undertaking upon commencing to work for the NSA, embodied in Standard Form 312, [115] is considered.[116]

Snowden considers his oath to uphold the Constitution to be paramount, and that it was the NSA, with its programs that allowed "the unfettered access of the U.S. government to internet and phone records",[117] to be in violation of the Constitution.[118] In fact, as Josh Blackman observes, the situation is more complicated than Snowden might like to believe: "But the last bit [stating that "[t]his section does not affect other oaths required by law] is interesting. It says that if your oath to the Constitution conflicts with some other promise you made, the Constitution must fall to the side. Imagine that. The Code of Federal Regulations has supremacy over the Constitution!"[119]

Without trying to resolve the knotty Constitutional and statutory interpretation question here, and without even addressing the question of whether he was justified in his actions or not, [120] what seems clear is that Snowden's oath and promise did not stop him in

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113 5 U.S.C. § 3331 "An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." This section does not affect other oaths required by law."

114 Josh Blackman, an Associate Professor at South Texas College of Law and a former Department of Defense employee, remembered taking the oath but did not remember the last sentence of § 3331 being on the card. Josh Blackman, *Snowden's Oath to Secrecy and Oath to the Constitution,* http://joshblackman.com/blog/2013/12/23/snowdens-oath-to-secrecy-and-oath-to-the-constitution.

115 Standard Form 312 is what one expect, a standard form signed by civil service employees with access to secret information. The form can be found at https://fas.org/sgp/othergov/sf312.pdf.

116 The relevant language from form 312, for consideration of Snowden's case, is as follows: "I hereby agree that I will never divulge classified information to anyone unless: (a) I have officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) I have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) responsible for the classification of information or last granting me a security clearance that such disclosure is permitted." Id.

117 Eric Connon, *Are Intelligence-Community Leakers Internationally Protected Whistleblowers of Simply "Whistling in the Dark?" Assessing the Protections Afforded to Intelligence-Community Whistleblowers under International Law,* 67 CASE WEST. RES. L. REV. 897 (2017).

118 *See,* Greenwald et al, *supra* n. 112 ("That is an oath to the Constitution. That is the oath that I kept that Keith Alexander and James Clapper did not.")

119 Josh Blackman, *supra* n. 114.

120 Also not considered for our present purposes is the possibility that all of the talk about personal beliefs is simply cover for Snowden being an old-fashioned ideological spy.

revealing information he was not authorized to reveal. Snowden's personal convictions, rightly or wrongly, were stronger than his promise.[121]

A similar outcome can be discerned in the case of Kim Davies, the Kentucky clerk who, in 2015, declined to issue marriage licenses to gay couples based on her religious beliefs.[122] Ms. Davis had taken two oaths: the standard oath required by the Kentucky Constitution of all officers[123] and also the oath required of court clerks and deputies.[124] Because of the language of the oaths Davis had taken, she was in the interesting position of trying to justify her breaching of two oaths made to God by referring to her duty to God. Ms. Davis was sent to jail after she refused to issue licenses to gay couples and was only released when her assistants, acting in her absence, began issuing marriage licenses to all eligible couples who requested them, regardless of gender.[125] She lost her bid for re-election in November, 2018.[126]

As with Mr. Snowden, and without regard to personal opinions as to the correctness of her decision, Ms. Davis violated her oaths of office not out of self-interest or personal gain, but because of a deep-seated personal conviction. Nonetheless, the oaths she took were not strong enough to bind her to a course of action that diverged from her personal beliefs, and in her actions, and those of Mr. Snowden, we can see the limits of the oath's effect in

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121 In an ironic twist, Snowden was roundly condemned for his actions by General David Petraeus, the director of the Central Intelligence Agency, who said "[o]aths do matter, and there are indeed consequences for those who believe they are above the laws that protect our fellow officers and enable American intelligence agencies to operate with the requisite degree of secrecy." Message from the Director: Former Officer Convicted in Leak Case (October 23, 2012), *quoted in,* Jeffrey B. Hammond, *I Swear To It: Oaths as Fundamental Language and Power*, 31 J. L. & RELIGION 92, 93 (2016). Subsequently, though, Petraeus was himself involved in a national security scandal in which it was alleged that he had revealed national security secrets to his mistress, thereby potentially violating his oaths to the country and to his wife. *Id.*

122 *Id.* at 98.

123 "I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of this Commonwealth, and be faithful and true to the Commonwealth of Kentucky so long as I continue a citizen thereof, and that I will faithfully execute, to the best of my ability, the office of . . . according to law; and I do further solemnly swear (or affirm) that since the adoption of the present Constitution, I, being a citizen of this State, have not fought a duel with deadly weapons within this State, nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as a second in carrying a challenge, nor aided or assisted any person thus offending, so help me God." Ky Const § 228. In addition to its relevance to the Davis case, this oath has at least two interesting features. The first is that while it allows the oath taker to affirm rather than swear, it still requires that the oath taker conclude by saying "so help me God," thereby somewhat diluting the benefits of affirming. The second question that immediately arises when considering this oath is whether dueling remains such a serious concern in the contemporary Commonwealth of Kentucky that so much of its standard oath for officers and attorneys must be taken up by it.

124 "I, . . . do wear that I will well and truly discharge the duties of the office of . . . County Circuit Court Clerk, according to the best of my skill and judgment, making the due entries and records of all orders, judgments, decrees, opinions, and proceedings of the court, and carefully filing and preserving in my office all books and papers which come into my possession by virtue of my office; and that I will not knowingly or willingly commit any malfeasance of office, and will faithfully execute the duties of my office without favor, affection, or partiality, so help me God." KRS § 30A.020.

125 https://www.nbcnews.com/feature/nbc-out/kentucky-clerk-jailed-over-gay-marriage-licenses-loses-re-election-n933451,

126 *Id.*

contemporary society. Put simply, people appear to be willing to be bound by an oath if the required action conforms to their personal beliefs and self-interest. If either of those conflict with the behaviors required by the oath, however, belief or self-interest will win out over the oath.

D. Why Compel The Witness To Engage In Ritualized Behavior?

If the oath's bonds are as weak and unreliable as they seem to be, and always have been, in securing predictable behavior and truthfulness, it is reasonable to ask why we continue to persist with it. And an even more basic question also comes to mind: what does the oath actually mean? These, it turns out, are not nearly as simple questions as might at first appear. In order to answer them, we are forced to consider the nature of ritualized behavior in our secular court system, the definitions of the words used in the three-part promise witnesses make before testifying, and the evidence we have as to how the judicial system views those promises.

At first consideration, it might appear to be odd that such an old ritual as the oath has remained so much a part of the contemporary trial. And while trials are no stranger to ritual,[127] the oath is a remarkably long-lived one. The implicit assumption underlying the oath is that witnesses, left in their natural state, will lie with unpredictable regularity[128] and so the oath is necessary to elevate a mere person into a judicial state of grace whereby that someone becomes a "witness" and that person's voice, previously dumb, can be unstopped so that their words can become "testimony."[129]

This trans-substantive power of the oath appears to lie at the core of Rule 603, the only rule to discuss testimonial oaths in the federal system.[130] "Before testifying, every witness shall

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127 Trials are highly ritualistic affairs, in fact, with everyone rising when the judge enters and exits, and the choreography of attorneys marking documents for identification and evidence, and showing them to witnesses being only the most obvious rituals that come immediately to mind. See, e.g., Miriam Aziz, *Law and Art: A Postcard from Europe,* 27 YALE J. L. & HUMAN. 343, 348 (2015)("A trial is a performance, with rules of engagement that govern interaction. It is a choreography: turn the sound down and you will see a dance/theatre piece *extraordinaire* with a lot of improvisation!")

128 *See. e.g.,* NOTE, *A Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century,* 75 MICH. L. REV. 1681, 1684 (1977)("The requirement that witnesses be sworn has its foundation in the usually unexpressed assumption that all testimony is inherently corrupt due to the self-interest or indifference of the witness.") While the author of the note might be assuming too much here – the assumption is surely not that *all* witnesses will lie – the likelihood that some testimony will be untruthful, and that it is impossible to tell what testimony will and will not be affected, is enough for the oath to be required.

129 *See, e.g.,* Sanford Levinson, *Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths,* 84 MICH. L.REV. 1440, 1448 (1986). Speaking of loyalty oaths, marriage oaths, and religious oaths, Levinson writes "[p]erhaps the most interesting aspect of all these oaths is their role as signifiers of a transformed consciousness. The transformation signified is often a purportedly 'new' (or, at least, substantially changed) identity on the part of those taking the vow."

130 The qualification is important. The Fourth Amendment, of course, marks out some important territory for oaths: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons

be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with the duty to do so."[131] The assumption here, of course, is that without the oath or affirmation, the witnesses conscience will continue to slumber and the jury will not hear the truth.[132] Speaking about Pennsylvania's 1772 oath, still used in its courts in 2006,[133] one tipstaff put all this more succinctly: "It may make witnesses think before they go up there, 'Hey, maybe I should tell the truth.'"[134]

But if the concept of the transformative effect of the oath doesn't quite capture its essence, maybe we need to substitute the concept of "shibboleth,"[135] a password that shows which community one belongs to – witnesses or non-witnesses. Sherman Clark suggests that oaths "mark out and fence off the crucial borders of community membership. On this account, the oath says something like this: 'whatever else you do or believe – whatever diversity we encompass – this much you agree to. These things are fundamental prerequisites to being inside rather than outside."[136] Despite his earlier flexibility in his own oath-taking,[137] this is certainly how George Washington saw the oath in December 1775, when he wrote that "it is high time a test act was prepared and every man called upon to declare himself; that we may distinguish friends from foes."[138]

The loyalty oath Washington was speaking of is, of course, a very different thing from the testimonial oath[139], but the idea of the oath as a means of separating people into one group

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or things to be seized." FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1789). But Rule 603 is the only federal provision that oath to be administered before a witness testifies in court.

131 Fed.R.Evid. 603.

132 *See, e.g.,* Clinton v. State, 33 Ohio St. 33 (1877)("The purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God: not to call upon Him to punish the false-swearer, but on the witness to remember He will surely do so. By thus laying hold of the conscience of the witness and appealing to this sense of accountability, the law best insures the utterance of truth.")

133 "You [and each of you] do swear by Almighty God, the Searcher of all hearts, that the evidence you shall give this court [and Jury] in this issue now being tried shall be the truth, the whole truth, and nothing but the truth and as you shall answer to God on the last great day." https://www.post-gazette.com/uncategorized/2006/08/10/Truthfully-our-court-oath-is-elaborate/stories/200608100335.

134 *Id.,* quoting Patrick Boyle. While Mr. Boyle might be correct in his conjecture, this is surely a "may" and "maybe" too uncertain for something as important as a trial.

135 "And the Gileadites took the passages of Jordan before the Ephraimites: and it was so, that when those Ephraimites which were escaped said Let me go over: that the men of Gilead said unto him, Art thou an Ephraimite? If he said Nay; Then said they unto him, Say now Shibboleth: and he said Shibboleth; for he could not frame to pronounce it right. Then they took him, and slew him at the passages of Jordan: and there fell at that time of the Ephraimites forty and two thousand." *Judges,* 12, 5-6. (King James)

136 Sherman J. Clark, *Promise, Prayer, and Identity,* 38 TULSA L.REV. 579, 585-6 (2003).

137 *See*, *supra*, nn. 101-106 and accompanying text.

138 *Quoted in* HAROLD HYMAN, TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY, 74 (1959).

139 Similarly, the marriage oath, while retaining at its core the promise to do something that is common to all oaths, is a different thing from the testimonial oath. For one thing, the testimonial oath can be compelled, first by subpoena and then by the court's contempt power if a witness refuses to be sworn. *See*, Note, *supra*. n. 128 75 Mich L.Rev. at 1698-9 and cases cited therein. By contrast, marriage oaths are voluntary and even loyalty oaths cannot be compelled, although the consequences of refusing to swear such an oath have been significant. *See, e.g.,* Clark, *supra* n. 136, at 583(discussing "academics who in the 1950s refused to take loyalty oaths, and who lost their jobs as a result.")

from the other – witnesses from non-witnesses, for example – seems uncontroversial enough. And while the punishment for refusing to swear an oath is less drastic than the fate that befell the Ephraimites who could not pronounce "shibboleth," it is serious enough to suggest that saying the password by swearing the testimonial oath is a good idea for those asked to take it.

So we have the history of the oath and at least a sense of why we still have it, as a device that, we believe, awakens, transforms, and identifies witnesses to the importance of truthfulness. In order to determine whether we should retain it, though, we must look more closely at what the oath actually is, and this is where things start to turn decidedly peculiar.

E. To Swear or Affirm

The problems with the oath, and oath-taking, start early, because before we can begin to contemplate what the words the witness must say or agree to, we first have to decide what those words will be. And this, it turns out, is not nearly as simple as we might expect it to be.

As we saw when considering the Mateen case in North Carolina,[140] witnesses must elect to swear an oath or affirm before testifying. What is remarkable about this process is that it all transpires in full sight of the jury and other court participants. In other words, witnesses testifying in North Carolina, and all other states,[141] either willingly or under subpoena, must subject themselves to a public inquiry about the nature and strength of their religious beliefs and convictions before the appropriate oath form is selected and the witness takes the oath or affirmation. A witness who chooses to swear an oath on the Qur'an is revealed to everyone in the courtroom as a Muslim, a witness who chooses to affirm is revealed as someone who either does not have religious convictions or whose religious convictions compel them to not take an oath,[142] and a person who takes an oath on the Bible is revealed as someone who appears to have Christian religious convictions.[143]

The jury therefore receives a lot of information about a witness which might influence it when evaluating that witnesses testimony, even though the personal beliefs of the witness might have, and indeed most likely would have, nothing to do with the testimony the witness is offering.[144] As Professor Vestal notes, "[a]ny time the finder of fact is aware of the religious beliefs of a witness there is a possibility of prejudice influencing the credibility determination."[145] And because every juror must select the nature of his or her oath and, if

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140 *See, supra*., nn 90-99 and accompanying text.

141 All fifty states provide for a religious oath and a secular affirmation. See, Allen Vestal, *Fixing Witness Oaths: Shall We Retire the Rewarder of Truth and Avenger of Falsehood?* 27 U. FL. J. L. & PUB. POL'Y 443, 448 and Appendix B (2016).

142 Quakers, for example, often follow the instructions from Mathew, *supra* n. 64 and accompanying text, and decline to swear oaths. See, supra, n. 71.

143 A person who has no religious convictions might freely swear an oath on a Bible, because such an oath would be meaningless to them. The problem of perjury, of course, would remain for such a witness.

144 Professor Vestal offers an example of the problems this can engender. In 2011, a defendant in a sexual harassment case took the stand in his own defense. Vestal, *supra* n. 141, at 150. The defendant, Dr. Abbas Husain, is of "Indian descent but [his] religion is not disclosed in the reported decisions. . . ." *Id.* "He raised his right hand and spoke the oath but did not place his hand directly on the Bible." *Id.* After the trial, in which the jury found in favor of the plaintiff and awarded her $12,500, "one juror noted that during that . . . she was surprised that the defendant had not placed his hand on the Bible before he testified." *Id.,* quoting Davis v. Hussain, 106 A.3d 438, 441 (N.J. 2014). The trial judge let the verdict stand and Abbas appealed, claiming in part that "his action was based on his 'religious belief that the left hand should never be placed on a holy book.'" Vestal, 27 U. FL. J. L. & PUB. POL'Y at 451, *quoting* Davis, 106 A.3d at 441, n. 1. The intermediate appellate court declined to order a new trial, but the New Jersey Supreme Court, while "reluctant to engage in a presumption of prejudice under these circumstances," reversed and remanded "for further proceedings to allow an inquiry into the juror's observation and the effect, if any, on the jury verdict." *Id., quoting* Davis, 106 A.3d at 448-49.

145 Vestal, *supra* n. 141, at 452

religious, what form that oath will take, every jury member is presented with a chance to make this prejudiced[146] credibility determination with every witness at every trial.

But things are even worse than this. As things stand, the oath-taking process requires the witness to elect whether to testify under oath or whether to affirm. And if the witness elects to testify under oath, the witness must then let the court know which oath form the witness wishes to use. As the Irish Law Reform Commission concluded when looking at this practice, this is a paradoxical situation in which an as-yet-unsworn witness, who is so mistrusted that some form of binding promise is required in order to allow the witness to testify, is then asked to select – without offering support or substantial inquiry – the form of promise that will most effectively compel the witness to tell the truth.[147] Because the witness is not under oath when making this selection, and is therefore not subject to the penalty of perjury, the witness can presumably lie with impunity about which oath-form is most effective in securing the witnesses truthful testimony.

What emerges from this contemplation of the oath ritual is an image of a legal system stumbling around in a fog of its own making, trying to incorporate aspects of ancient ritual into a contemporary trial with an attempt to reconcile ancient and contemporary cultural traditions and failing to come up with a coherent process to accomplish anything valuable. In attempting to respect a witnesses religious and cultural preferences, the court subjects that witness to a potentially humiliating public inquest into those preferences, and accepts without question, and without the protection of a potential perjury prosecution, the unsworn word of the witness. To describe the process as short-sighted is generous in the extreme.

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146 As Professor Vestal notes, "[o]ne of the most corrosive features of our contemporary national life is the open hostility with which some Americans confront those whose religious beliefs differ from theirs." Vestal, *supra.,* n. 141, citing PEW RESEARCH CENTER, HOW AMERICANS FEEL ABOUT RELIGIOUS GROUPS: JEWS, CATHOLICS & EVANGELICALS RATED WARMLY, ATHEISTS AND MUSLIMS MORE COLDLY, (July 16, 2014), http://www.pewforum.org/2014/07/16/how-americans-feel-about-religious-groups/

147 "Whereas the use of the oath is on the one hand grounded in a level of distrust or suspicion of the witness, and therefore requires that he put his soul in peril, in such instances it relies on him to indicate truthfully what form of oath will bind his conscience, . . . Clumsily, if not zealously, the law then denies him the competence to testify if he cannot do so." LAW REFORM COMM'N, REPORT ON OATHS AND AFFIRMATIONS , § 4.1 (Dec. 1990)(available at https://www.lawreform.ie/_fileupload/Reports/rOaths.htm).

F. "The Truth"

But that is only the beginning of the oath's problems. Things become far worse when trying to understand the nature of the testamentary oath itself. The problems begin immediately when we get to the first of the three promises the witnesses makes: the promise to tell "the truth." It seems, at first glance, to be a simple promise to make, but even a moment's contemplation will reveal the difficulty here. Not to put too fine a point on it, but what is the "truth" the witness is promising to tell?

As a threshold matter, it is important to note that what the witness is promising to tell is "the" truth. The use of the definite article here is significant, in that the witness is not promising to tell the Austenian "a" truth,[148] or "my" (the witnesses) truth, or the "truths" of the Declaration of Independence,[149] or even a promise "to answer the questions I am asked truthfully," but rather to tell "the" truth.

This is, of course, an impossible task. A witness seeking to tell the truth would never stop talking until stopped by death or laryngitis. Were the oath taken literally, trials would turn into real-life versions of a Jim Carrey movie,[150] albeit without the humor or happy ending.

The familiar starting place for this inquiry would be the dictionary,[151] and yet a look at the Oxford English Dictionary, the most complete assembly of English language words, meanings, and origins, is of little help here. The first suggested meaning – "[t]he quality or character of being true to a person, principle, cause, etc."[152] -- does not apply at all[153] and the second meaning – "[s]omething that conforms with fact or reality"[154] – is only of general help. The etymology of the word is equally unhelpful, mirroring the Oxford English

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148 "It is a truth universally acknowledged that a single man in possession of a good fortune must be in want of a wife." JANE AUSTEN, PRIDE AND PREJUDICE (1813).

149 "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, . . ." DECLARATION OF INDEPENDENCE (1776). There are several problems with the Declaration, and the Constitution which came after it, when viewed through the lens of truth, the most glaring, perhaps, being the way slaves were treated by the Constitution and the Declaration's contention that "all" men are created equal. I am gliding over the way women were treated only because the Declaration does not explicitly mention them, although this, too, is a serious problem for the truthfulness of the document.

150 LIAR LIAR (Universal, 1997). In the movie, Carrey plays Fletcher Reede, a lawyer (of course) who lies constantly. Depressed and frustrated at his father's inability to tell the truth, even in domestic matters, Reede's son makes a birthday wish that his father can only tell the truth for a day. The wish is granted, and hilarity ensues. Somehow, a happy ending is contrived and, presumably, everyone lives happily and truthfully (although not compulsively) ever after.

151 It is impossible to pass up the chance to offer Ambrose Bierce's proposed definition from The Devil's Dictionary. The pessimism lurking behind Bierce's satire is striking for someone writing about the oath, a device designed to discover, and reveal, the truth. "Truth, n. An ingenious compound of desirability and appearance. Discovery of truth is the sole purpose of philosophy, which is the most ancient occupation of the human mind and has a fair prospect of existing with increasing activity to the end of time." AMBROSE BIERCE, THE DEVIL'S DICTIONARY, 151 (2003).

152 http://www.oed.com.libezproxy2.syr.edu/view/Entry/207026?rskey=fLzcPq&result=1&isAdvanced=false#eid

153 It is a meaning still retained in English though: "a true friend," for example.

154 *Id.*

Dictionary's recognition of the word's original meaning as "faith, faithfulness, fidelity, loyalty, veracity, quality of being true . . . ."[155] We do learn, though, that the word only acquired its contemporary connotation of "accuracy" or "correctness" in the 1560s.[156]

Seeking to deepen our understanding of the most central component of the oath, it is perhaps worth noting that the oath's use of the definite article limits the inquiry. We are not speaking simply of "truth," nor are we looking at the witnesses' "my" truth or any other form of truth, but rather "the" truth. But while this limits the inquiry into what "the truth" might be, it also complicates it, ignoring, as it does, such divisions as, for example, scientific and Christian truth.[157] Without a detailed inquiry into each individual witnesses religious or secular beliefs,[158] and what the meaning of "the" truth might be to each witness, we can only guess at what witnesses mean when they swear to tell "the" truth.

Even worse, this does not help us in our quest to understand what "truth" is. At least we have company in our confusion, because the meaning of "truth" has troubled us for a long time: when Jesus comes before Pilate, he is asked "Art thou a king, then?" and he answers "Thou sayest that I am a king. To this end was I born, and for this cause came I into the world, that I should bear witness unto the truth." And Pilate said to him "What is truth?"[159]

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155 https://www.etymonline.com/word/truth#etymonline_v_17903. "True" comes to us through Mercian and Old English and Proto-Germanic ("treuwaz") and, eventually back to the Proto-Indo-European "drew-o, a suffixed form of the root 'deru-' 'be firm, solid, steadfast." Id. Professor Nancy Cook, relying on Webster's Dictionary, suggests that the etymological root of truth is the word for "tree." Nancy Cook, *The Call To Witness: Historical Divides, Literary Narrative, And The Power Of Oath,* 98 MARQUETTE L. REV. 1585, 1623 (2015). More correctly, it seems that the two words share a common root – the Proto-Indo-European "drew-o," but by the time the words had reached the Proto-Germanic stage they had diverged, with the root for tree being "trewam." https://www.etymonline.com/word/tree#etymonline_v_17903. Thus, while "truth" and "tree" are, at a very distant remove, related, it is unlikely that we can use the one meaningfully to help define the other.

156 *Id.*

157 *See, e.g.* George F. Thomas, *The Meaning Of Truth,* 36 THE CHRISTIAN SCHOLAR 172, 172 (1953). "The conception of the *nature* of truth that has increasingly dominated the modern world is mainly a product of scientific ways of thinking. According to this view, truth consists of the aggregate of truths about the various aspects or fields of reality; it is specialized knowledge of facts and laws, information about many different subjects." *Id.* at 172 (emphasis in original). Professor Thomas contrasts this with the Christian conception of truth, which, affirms, "in the first place, that the *primary value* of truth lies, not in the power it gives us, but in the life it opens up to us. 'I am the Way, the Truth, and the Life,' says Christ in the Fourth Gospel. It is no accident that 'truth' is associated with 'life' and 'the way' to life, that eternal life which is more than food and raiment and without which it profits a man nothing to gain the whole world." *Id.* (emphasis in original). Perhaps unhelpfully, Professor Thomas concludes his brief contemplation of the difference between scientific and Christian truth by remarking that we should "beware of contrasting 'sacred' with 'secular' truths." *Id.* at 175. The problem here lies in the Christian's insistence that Christ is "the" truth, leaving the secular witness, or those listening to that witnesses testimony, to wonder what "the" truth means to that witness.

158 Even though we enquire into the witnesses religious beliefs, that inquiry cannot reasonably be said to be a detailed one.

159 *John*, 18:37-38. (King James) Given the context of the question, Professor Thomas is surely correct in classifying the question as "cynical" when asked by Pilate. Thomas, *supra* n. 157, at 172. Nonetheless, as Professor Thomas notes, the question can also be asked "in a spirit of honest perplexity." *Id.* "I believe that most men and women in academic circles who raise the question in our time are not cynical but perplexed." Id. This is good to hear. Nonetheless, I cannot help feeling a certain uneasiness upon realizing that my question aligns so closely with that of Pontius Pilate.

Keats' attempted answer to the question of what truth is poetic and has aesthetic elegance but fails to advance our more prosaic need to understand what the word actually means:

> "'Beauty is truth, truth beauty, -- that is all
> Ye know on earth, and all ye need to know.'"[160]

Bertrand Russell tried to cut the Gordian knot binding up the meaning of truth in this bravura passage: "It may be said – and this is, I believe, the correct view – that there is no problem at all in truth and falsehood; that some propositions are true and some false, just as some roses are red and some are white; . . . What is truth and what falsehood, we must merely apprehend for both seem incapable of analysis."[161] Sadly for us, Russell's "youthful aberration" is swiftly cut down by Barnett Savery, who concludes (without analysis, it should be noted), that "there are no adequate grounds, nor enough inadequate ones, to substantiate a belief in such a delightful fancy."[162] Instead of Russell's simple approach, Savery gives us nine densely-argued pages in which he defines both the emotive and relativity theory of truth and suggests, perhaps unhelpfully, that "a relativity theory is more appropriate, indicating, however, that there is a very close relationship between the emotive theory and the relativity theory."[163]

The difficulty of nailing down what "truth" is can be seen in this passage by Susan Haak who is not, to be sure, attempting to make truth a difficult concept to understand but is, rather, making clear that what we sometimes think of as truth is not truth.

> I take for granted that truth, true-ness, is not to be identified with acceptance-as-true; for what is accepted as true may not be true, and what is true may not be accepted as such. Nor is truth to be identified with belief, or even with warranted belief; for what is believed, even when it is believed on good evidence, may not be true, and what is true may not be believed. Nor is truth to be identified with knowledge; for while what is known must be true, what is true may not be known. Nor is truth to be identified with agreement; for while, if we agree that p, we agree that p is true, we may agree that p when p is not true, and we may not agree that p when p is true. And neither is truth . . . to be identified with sincerity, truthfulness, or candor; for while a since, truthful person may be disposed to speak the truth as he believes it to be, if his belief is mistaken his sincere assertion will be false.[164]

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160 JOHN KEATS, ODE ON A GRECIAN URN, https://www.poetryfoundation.org/poems/44477/ode-on-a-grecian-urn.

161 BERTRAND RUSSELL, MIND, N.S. XIII, 523-4, *quoted by* Barnett Savery, *The Emotive Theory Of Truth,* 64 MIND 513, 515 (1955).

162 Savery, *supra* n. 161, at 515. Savery, it should be noted, seems not to have had the highest regard for Russell, noting earlier that he "probably during his life-time will assert all possible views about all the philosophical problems with which he concerns himself. . . ." *Id.*

163 *Id.* at 513.

164 Susan Haak, *The Whole Truth and Nothing But the Truth*, 32 MIDWEST STUDIES IN PHILOSOPHY 20, 22 (2008).

One solution to this definitional problem is to consider what need the word fills. And here we can glean a possible escape from the philosophical maze we are in by looking at the meaning of "fact," a word closely related to truth. Considered in the context of "fact," "truth" seems to take on a slightly different meaning. Indeed, the apparent dichotomy between "truth" and "fact" is so well understood that it forms a slightly ironic piece of character development in the film Indiana Jones And The Last Crusade, where the protagonist, Dr. Henry "Indiana" Jones is addressing a class of archeology students, telling them that the essence of archeology is ". . . the search for fact. Not truth. If it's truth you're interested in, Doctor Tyree's Philosophy class is right down the hall."[165] In other words, facts are the building blocks out of which truth is formed, and "truth" is the interpretation of fact. Taken this way, Indiana Jones's words would be entirely familiar in the law school classroom or courtroom, with witnesses providing facts and the jury interpreting those facts in order to determine the truth about a dispute.[166]

But the Oxford English Dictionary seems to ignore this comfortable distinction between "fact" and "truth." After its first unhelpful definitions, the dictionary offers additional pages of definitions and supporting textual references that include "something that conforms with fact or reality," "the fact or facts; the actual state of the case; the matter or circumstance as it really is," and "[c]onformity with fact, reality, a standard, a pattern, etc.[167] As far as the disctionary is concerned, then, "fact" and "truth" appear to mean essentially the same thing. And Black's Law Dictionary seems to agree, giving the definition of truth as "[a] fully accurate account of events: factuality."[168]

On one thing we would seem to be able to agree, though: "truth," whatever it might mean, is the polar opposite of lying, with a bright line separating them. To some philosophers, though, there is an indeterminate region between truth and lying: "[A]ristotle makes a rhetorical distinction between the truth in speech and the truth of belief – '*what a man says, he does not necessarily believe.*' Thus, Aristotle accuses Heraclitus of a historically ubiquitous affliction: he essentially calls the skeptic a bullshitter – not quite a liar, but a performer who speaks without recourse to representing a truly held belief or thought."[169]

Basing her work on that of Harry G. Frankfurt, Eugenie Brinkema expands on this distinction between lying and bullshitting.

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165 JEFFREY BOAM, INDIANA JONES AND THE LAST CRUSADE, http://www.dailyscript.com/scripts/Indiana%20Jones%20And%20The%20Last%20Crusade.txt (1989).

166 This comports well with the formalistic view of all litigation, but criminal litigation in particular, in which a crime cannot be said to have been committed until the jury finds someone guilty of it. So while the witnesses testify to the facts, it is up to the jury to take those facts and combine them into the truth: a crime was or was not committed, and the defendant is or is not guilty of having committed it.

167 *Id.*

168 BLACK'S LAW DICTIONARY (9th edition 2009).

169 Eugenie Brinkema, *Psychoanalytic Bullshit,* 21 J. SPECULATIVE PHIL. 61, 62 (2007), *quoting* ARISTOTLE, METAPHYSICS, IV.3.737(emphasis in original).

> Bullshit is, however, distinct from lying – and the value of Frankfurt's essay is largely in how carefully he distinguishes the two – because 'the essence of bullshit is not that it is *false* but that it is *phony*." . . . Again, it is in a relation of the speaker and not a rhetoric of the sentence that the telltale mark is to be found, for 'a fake or a phony need not be in any respect (apart from authenticity itself) inferior to the real thing . . . what is wrong with a counterfeit is not what it is like, but how it was made. . . . On the level of production, lying contains none of this indifference to truth: 'telling a lie is an act with a sharp focus. It is designed to insert a particular falsehood at a specific point in a set or system of beliefs, in order to avoid the consequences of having that point occupied by the truth . . . the liar is inescapably concerned with truth-values. . . . In other words, the liar addresses him – or herself to the field of truth in order to deceive through contradiction to that truth (one could not, by this definition, lie by accident). The bullshitter, by contrast, 'is not constrained by the truths surrounding that point or intersecting it.'"[170]

This is all grist to a philosopher's mill, making for a fascinating theoretical inquiry, but it also has some practical significance for the lawyer trying to identify the meaning of "truth" in the context of the testamentary oath. A witness who claims to hold an advanced degree from a well-respected university, for example, is telling the truth if the facts bear out the claim, and is lying if the facts show that the witness never matriculated at the university. But what of the witness who matriculated and attended classes, but did not complete all requirements for the degree and left without graduating? If that witness subsequently claims to have the degree, is the witness lying or, in Brinkema's analysis, bullshitting?

Some New York judges, at least, appear to accept an area lying between truthfulness and lying. "one must 'distinguish puffing and elaboration from purposeful misstatement.' . . . 'Perjury is hard to prove. . . . It's expected that people must lie to avoid embarrassments, support family and friends, and protect their interests. . . . Perjury, or at least exaggerated claims are commonplace in motor vehicle personal injury cases, a direct if unintended consequence of the No Fault Insurance statute which requires a showing of serious injury before any recovery can be had for pain and suffering.'"[171]

In other words, true testimony is not the opposite of untruth necessarily, but rather is the opposite of perjured testimony. The judges quoted above would appear to take the pragmatic course of accepting a degree of puffing and elaboration – what Brinkema and Frankfurter would call bullshitting – but would draw the line at perjury. This has the advantage of tying the question of what is truth back to an objective standard: rather than engage in subjective inquiry of the witness, we can simply look to the law of perjury. If the testimony we are considering constitutes perjury, it is not true.

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170 *Id*. at 63, *quoting* HARRY G. FRANKFURT, ON BULLSHIT (2005).

171 The Committee on Criminal Advocacy, *The State Of Truth: Judges Speak*, 56 THE RECORD 38, 45 (2001)(reporting the opinions of fifty-nine federal, state, and city judges located in the New York metropolitan area).

The appeal of this approach, though, fades quickly upon a closer look. Without getting a detailed discussion of whether or not the threat of perjury is sufficient to compel a witness to tell the truth,[172] a quick look at the crime, at least as defined by Congress, reveals a more complex reality than this simple approach might suggest.

[172] For that discussion, *see, infra*, the text accompanying nn. 190-219.

The United States Code sets out the meaning of "perjury" in federal proceedings.[173] But even a scan of this language demonstrates the problem: "perjury," it seems, involves the willful subscription as true anything that the witness does not believe to be true. This is subtly, but significantly, different from what we might have thought "truth" might mean, in that "truth," and especially "the truth," is, we might reasonably assume, a condition apart from human interpretation. The truth simply is the truth, no matter what we might think. "Perjury," on the other hand, requires us to interpret the evidence, conclude that it is not true, and testify to it regardless.

The problem can be seen in this unlikely, but not impossible, situation. A is called as a witness in D's trial for causing a traffic accident. A knows and dislikes D, and is determined to do D harm. Accordingly, when A is asked to testify about the color of the traffic light D drove through immediately prior to the accident, A testifies that the light was red, even though A believes the light was green. Under the definition of perjury supplied by the Code, A has testified to something as true that he does not believe to be true, and has therefore committed perjury. Subsequent evident in the form of a traffic camera, however, shows that at the crucial moment A's view was blocked by a passing vehicle and that the traffic light was, in fact, red as A had (he believed falsely) testified. A's testimony was, therefore, true, and yet A could, at least under the definition of perjury supplied by the Code, be prosecuted for perjury for intending to testify falsely.[174]

Whether or not such a hypothetical situation could ever arise in reality, even the possibility of it suggests that perjury is not a helpful concept when trying to determine what is, and is not, "truth." Perhaps, after all, Russell's approach is the most effective: we just have to figure out what "truth" is for ourselves, and we have to recognize that our answer might not match that of others. It is not the most comfortable of conclusions to reach when considering this word that is central to our understanding of the oath and all it entails, but it appears to be the best we can do.

What we can be sure of, at least, is that "truth" is the antithesis of "untruth," – the "matter" to untruth's "anti-matter" -- and that a witness who swears to tell the truth must, *ipso facto* also be swearing not to tell anything other than the truth.

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[173] "Whoever-- (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. " 18 U.S.C. § 1621

[174] So much for theory. In practice, as one would expect and hope, the federal courts have held that "[a] person cannot be convicted of perjury if his answers are legally truthful." Blumenfeld v. United States, 306 F.2d 892, 897 (8th Cir. 1962)(other citations omitted). While this result is not helpful for our purposes here, it is reassuring for purposes of practical lawyering: to hold otherwise would leave the actual business of conducting trials open to philosophical attacks of the sort best contained in academic articles like this.

G. "The Whole Truth"

At least we could be sure of that until the witness swears the next part of the oath. If "truth" is the opposite of "untruth," then anything that is less than the truth is untruth, and is surely excluded from testimony by the promise to tell the truth. In what appears to be a belts-and-suspenders approach that complicates rather than simplifies matters, though, the oath now requires the witness to promise to tell the "whole truth."

The idea that truth can be divided has been around for a while: the Oxford English Dictionary traces the concept back to 1658[175] ("[h]alf-truth hath filled the world with looseness")[176] and the ambiguous nature of the concept is also reflected in the dictionary's reference to a quotation from Cardinal Newman: "[a] half-truth is often a falsehood."[177] Cardinal Newman's "often" here is surely being too optimistic: if the notion of "half-truth" has any meaning at all, it must surely include the reality that if only half of a concept is true, the other half must *ipso facto* be untrue and, since "truth" is a unitary concept that cannot allow the possibility of something that is less than the truth to exist in its universe, a half-truth can never be "the truth."

Yet philosophers continue to cling to the idea that truth is divisible. Here is Jacques Lacan in 1973: "I always speak the truth. Not the whole truth, because there's no way, to say it all. Saying it all is literally impossible: words fail. Yet it's through this very impossibility that the truth holds onto the real."[178] Whatever else Lacan might mean here, it's clear that he accepts the ability to divide truth into segments smaller than the whole without doing damage to the notion of "truth."[179]

The same must be said of the law, even in the face of a logical argument that if "truth" means "conformity with fact" or something akin to the absence of falsity, then anything less than truth is not truth, and would therefore fail the first part of the oath. Viewed this way, adding "the whole truth" to "the truth" is an unnecessary and confusing complication.

But at least when taken together, there can be no question that the witness is swearing not to say anything that is not truth. That much surely is clear from the first two parts of the oath.

H. "Nothing But The Truth"

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175 In fact, it has been around much longer. In Plato's Apology Socrates, in his defense, says that his accusers "have hardly uttered a word, or not more than a word, of truth; but you shall hear from me the whole truth . . . ." PLATO, APOLOGY (Benjamin Jowett, trans.) available at http://classics.mit.edu/Plato/apology.html.

176 http://www.oed.com.libezproxy2.syr.edu/view/Entry/83528?redirectedFrom=half+truth#eid, *citing* T. Manton, Pract. Comm. Jude 4.

177 *Id.*

178 JACQUES LACAN, TELEVISION: A CHALLENGE TO THE PSYCHOANALYTIC ESTABLISHMENT, (Jacques-Alain Miller, ed., Russell Grigg, trans. 1973), *quoted by*, Brinkema, *supra*, n. 169, at 70.

179 Interestingly, the Oxford English Dictionary has no entry for the "whole truth."

Apparently not, though, because the witness is then required to swear to testify to "nothing but the truth." Logically, this third of the oath promises can, and does, add nothing to the oath. If the witness is to be trusted, then the promise to tell the truth should be enough, and the promise to tell the whole truth – while not necessary under any reasonable definition of "the truth" – is at least a backstop to the original promise. But there is no logical reason for the witness to go on to promise to tell nothing but the truth.

The recurrence of the number three as a significant phenomenon in the human experience has often been noted.[180] In rhetoric, the tricolon, or grouping of three statements, is recognized as having especial value.[181] The tricolon gives us faith, hope, and charity,[182] blood, sweat, and tears,[183] "we few, we happy few, we band of brothers,"[184] and "truth, justice, and the American way."[185] We have the good, the bad, and the ugly, we have eat, drink, and be merry, and we have the truth, the whole truth, and nothing but the truth.[186]

Other languages are susceptible to the power of the tricolon as well, giving us Latin's "Veni, vidi, vici,"[187] France's "liberté, égalité, fraternité,"[188] and Germany's unfortunate "[e]in volk, ein Reich, ein Führer."[189] Viewed through a rhetorical prism, then, it is hardly surprising that the stock oath structure forms a tricolon, with "nothing but the truth" functioning as the third leg of the oath's tripod.

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180 The best and simplest description of the importance of groupings of three can perhaps – as is so often the case – be found in the work of Schoolhouse Rock. *See,* BOB DOROUGH, THREE IS A MAGIC NUMBER, https://www.youtube.com/watch?v=aU4pyiB-kq0.

181 *See, e.g.,* Mark FORSYTH, THE ELEMENTS OF ELOQUENCE, 84 (2013)("Three is the magic number of literary composition . . . .")

182 *1 Corinthians 13* (King James). In the Bible, the grouping is faith, hope, and love.

183 Speech by Winston Churchill to the House of Commons, May 13, 1940. https://winstonchurchill.org/resources/speeches/1940-the-finest-hour/blood-toil-tears-and-sweat-2/ As if to prove the point, Churchill actually offered the British people nothing by "blood, toil, tears, and sweat," but this tetracolon was presumably less effective than the reordered tricolon, and that is what most people remember today. *See* FORSYTH, *supra*, n. 181, at 87. The rock band from the 1960s doubtless helped to cement this form of the phrase in some minds. https://en.wikipedia.org/wiki/Blood,_Sweat_%26_Tears.

184 WILLIAM SHAKESPEARE, HENRY V, Act IV, Scene iii, 60.

185 THE ADVENTURES OF SUPERMAN, https://en.wikipedia.org/wiki/Superman. The radio broadcasts of Superman give us their own trio of famous tricolons. In addition to "truth, justice, and the American way," we also get "[f]aster than a speeding bullet! More powerful than a locomotive! Able to leap buildings in a single bound!" and "It's a bird! It's a plane! It's Superman!" *Id.* Rhetoric is not limited to the speeches of the great, the mighty, or the important.

186 That sentence was originally "[w]e have the good, the bad, and the ugly, and we have the truth, the whole truth, and nothing but the truth" but upon editing the article I realized that the sentence flowed poorly and I added "we have eat, drink, and be merry" and the flow of the sentence improved. An example of the proof being in the pudding.

187 This much-paraphrased expression, meaning I came, I saw, I conquered, is first attributed to Julius Caesar by Appian, who described Caesar's use of it in a letter to the Senate after the Battle of Zella. https://en.wikipedia.org/wiki/Veni,_vidi,_vici.

188 The national motto of France and the Republic of Haiti, first used in a speech by Maximillian Robespierre in 1790. https://en.wikipedia.org/wiki/Liberté,_égalité,_fraternité.

189 The literal translation is "one people, one empire, one leader." https://en.wikipedia.org/wiki/Führer#Ein_Volk,_ein_Reich,_ein_Führer But the almost total identification of Adolf Hitler with the concept of the German "Führer" meant that, in a practical sense, the phrase could also be translated as "one people, one empire, one Hitler to lead it (us)."

But rhetorical completeness notwithstanding, the phrase "nothing but the truth" adds nothing to the oath's two previous promises and is, in fact, a tautology: testimony that is "the truth" could not be anything but the truth, and testimony that is "the whole truth," even though that phrase itself carries little meaning in light of the oath's first promise to tell the truth, similarly could not contain anything but the truth. So this third part of the oath's trio of promises is meaningless and, potentially, confusing in that its existence suggests that something other than the truth is possible, despite the assurances of the first two promises. At best, then, this third promise is a pointless afterthought, added to bring rhetorical, but not logical, completeness to the oath, and at worst it is affirmatively harmful to the oath's integrity. And while there might appear to be little harm in appeasing the rhetorical principle of organizing lists in groups of three, it does suggest a distressing lack of faith in the oath to actually do the job it exists to do and insure that the witness will tell the truth. The addition of two extraneous promises to the original promise to tell the truth is a rhetorical clue that the legal system has little faith in the oath.

I. The Illusory Threat Of Perjury

The existence of a ready-made secular punishment for the breaking of the testimonial oath is another sign that the system has little faith in the oath's ability, on its own, to produce truthful testimony. But with the threat of criminal prosecution, and a maximum prison term of five years to back it up,[190] perjury should be a useful prop to support the oath.[191]

The reality, though, is somewhat different. Although perjury is a relatively easy crime to describe, both generally[192] and specifically as it has to do with testimony in court,[193] it is

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190 *Infra*, n. 192.

191 The Supreme Court certainly subscribes to this view. *See, e.g.,* United States v. Mandujano, 425 U.S. 564, 576 (1976)("The power of subpoena, broad as it is, and the power of contempt for refusing to answer, drastic as that it – and even the solemnity of the oath – cannot insure truthful answers. Hence, Congress has made the giving of false answers a criminal act punishable by severe penalties; in no other way can criminal conduct be flushed into the open where the law can deal with it.") Of course, one is forced to ask that if the oath cannot insure truthful testimony why we bother to continue to administer it. The anticipated answer – as a condition precedent to the imposition of perjury sanctions – surely is not correct: the existence of a perjury sanction should be enough of a condition precedent, given that ignorance of the law is no excuse and, in any case, the oath in its most standard form gives no actual warning of the existence of the perjury sanction awaiting (in theory) oath breakers.

192 18 U.S.C. § 1621 sets out the general definition of the federal crime of perjury: "Whoever — (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

193 18 U.S.C. § 1623 deals with false declarations before a grand jury or court, and provides "(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) any proceeding before or ancillary to

not a much prosecuted one. In the five years between 2007 and 2011, for example, there were 56, 47, 38. 30, and 26 prosecutions for perjury.[194] For the sake of comparison, in the same period there were 1,573, 1,498, 1,511, 1,558, and 1,490 federal prosecutions for drunk driving[195] and 5,204, 5,079, 5,005, 4,693, and 4,464 prosecutions for the possession of a firearm by prohibited persons.[196]

These numbers are in line from those reported in the 1960s and the 1930s. In the five years between 1966 and 1970, 355 cases of perjury were commenced in federal district court.[197] And in 1937, 187 cases of perjury were prosecuted in a total of 28 states and the District of Columbia.[198]

Judges today are well aware of the problems of perjury in their courts. In a telling study, published in 2001,[199] fifty-nine New York judges, thirty-six federal and twenty-three state, responded to a questionnaire sent to them by the Committee on Criminal Advocacy.[200] Judges were asked to respond to a series of questions, defining perjury as "testimony that you reasonably believed was intentionally false with respect to a material matter."[201] The judges were also given the chance to provide more narrative answers to several

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any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both. (b) This section is applicable whether the conduct occurred within or without the United States. (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if-- (1) each declaration was material to the point in question, and (2) each declaration was made within the period of the statute of limitations for the offense charged under this section. . . . In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true. (d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed (e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence."

194 Federal Judicial Center Caseload Statistics, Table D-2.

195 *Id.*

196 *Id.* To put these numbers in context, there were 197 perjury prosecutions during this time, out of a total of 364,867 total criminal prosecutions, meaning, if my math is correct, that perjury made up 0.0005% of federal prosecutions.

197 Note, *Perjury: The Forgotten Offense*, 65 J. CRIM. L. & CRIMINOLOGY 361, 361 (1974).

198 Id., n.7.

199 The Committee on Criminal Advocacy, *The State of Truth: Judges Speak*, 56 THE RECORD 38 (2001).

200 *Id.* at 38.

201 *Id.*

questions.[202] And although the number of responding judges was relatively low, the results are fascinating and, for proponents of the oath, a little depressing.

Most of the responding judges reported that they had encountered perjury "occasionally" in both pre-trial matters and during trial.[203] Of judges who presided over both civil and criminal cases, "43% . . . responded that perjury was more prevalent in civil cases; 30% . . . reported that it was more prevalent in criminal cases; [and] 27% . . .reported no difference."[204]

In civil trials,"82% of judges . . . reported that they occasionally encountered perjury at trial by plaintiffs, while 80.5% . . . reported occasional perjury by defendants. . . . An equal 82% of judges . . . reported occasional perjury at trial by plaintiffs' fact witnesses, while 83% . . . reported occasional perjury by defendants' fact witnesses."[205]

By contrast, "17.5% . . . of the judges reported that criminal defendants frequently commit perjury at trial, while 42.5% of the judges reported that defendants commonly commit perjury at trial[, and] 40% of the judges reported that defendants occasionally commit perjury."[206] Disturbingly, the judges also reported that they experienced perjury from law enforcement personnel, with 81% reporting that they experienced occasional perjury, 5% suggesting that perjury from law enforcement personnel was frequent and 7% reporting that such perjury was common.[207] "[A]n equal 7% . . . reported that [law enforcement personnel] never commit perjury."[208]

The judges' narrative comments went some way to explaining how the judges were able to respond that they had experienced perjury without, apparently, referring the case to a prosecutor's office. "The problem is *proving* that a witness has committed perjury. There are many times that you 'know' that perjury is being committed but do not have enough to make the necessary referrals."[209]

The study makes for depressing reading, but it is also no surprise that those directly involved in the criminal justice system perceive perjury to be a problem. The report merely reflects one of the more recent attempts to catalog a perennial problem: in 1955, for example, Alfred David Whitman claimed that "[p]erjury runs rampant throughout our judicial system" and that "[f]ew crimes except fornication are more prevalent or carried off with greater impunity;"[210] a writer in England, in 1934, noted that "[i]t may be that having

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202 *Id.*

203 *Id.* at 42.

204 *Id.*

205 *Id.*

206 *Id.* at 43.

207 *Id.*

208 *Id.* The survey also contains statistics for criminal defendant fact and expert witnesses. *Id.* at 43-4. The numbers from responding judges suggest that defendants' fact witnesses commit perjury, with only 3% of the responding judges reporting that they never perceived perjury from these witnesses.

209 *Id.* at 45, emphasis in original.

210 Alfred David Whitman, *A Proposed Solution to the Problem of Perjury in our Courts,* 59 DICK. L. REV. 127, 127 (1955).

regard to the hundreds of persons who perjure themselves in the courts every day except Sunday, the percentage of those who are punished for this offence to that of those who commit it is smaller than in the case of any other;"[211] and in 1908, W. A. Purrington observed that "[o]ur modern procedure seeks to meet real, or merely avowed, conscientious objections to oath-taking by allowing affirmations under the mundane penalties or perjury, -- pains and penalties so rarely inflicted as to have become the mere 'rumble of a distant drum.'"[212]

One senses the frustration perjury caused judges as far back as 1785 when Justice Willis, sentencing a convicted attorney, said: "[y]ou have long been an Attorney of this court, and in your extensive practice, you must have discovered, that of all crimes, Perjury is the most dangerous to society. It perverts justice – it unhinges the law – it destroys liberty and property – and in the practice of the court, it is a most dangerous evil."[213] Perhaps because their concern about perjury had reached breaking-point, the central court judges in London met at Lord Mansfield's chambers in November 1786 and "proposed a bill that would make perjury a capital crime."[214]

Even earlier, one anonymous commentator was fascinated by what he saw as "the sin of common [s]wearing and [p]erjury . . . ."[215] The writer remarked that the fact that "many are not struck dead with an Oath in their mouths, or come to some other fearful end, as some do,[216] is a luculent testimony both of God's great [p]atience, and of a [j]udgment to come; for vast numbers every day call aloud to God for [d]amnation; and great multitudes increase the black [l]ists of their [p]erjuries, till they are more in number than the [h]airs of their [h]eads, and equal the [s]and on the [s]ea-shore."[217]

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211 Note, *The Problem of Successful Perjury,* 78 SOLIC. J. 423 (1934). This appears to have been a particularly bad year for perjury. In America, Harry Hibschman, a Washington State lawyer who lived and worked in New York, wrote that "I asserted the other day in a public address that there was perjury in fifty per cent of all contested civil cases, in seventy-five per cent of all criminal cases, and in ninety per cent of all divorce cases; and the audience laughed! So notorious is false swearing in court proceedings that an intelligent group of American citizens looks upon it as a joke." Harry Hibschman, *"You Do Solemnly Swear!" Or That Perjury Problem,* 24 AM. INST. CRIM. L. & CRIMINOLOGY 901, 901 (1934).

212 W.A. Purrington, *The Frequency of Perjury*, 8 COLUM. L. REV. 67, 70 (1908).

213 MORNING CHRONICLE, NOVEMBER 28, 1885, *quoted by*, James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom,* 12 L. & HIST. REV. 95, 99 (1994).

214 Oldham, *supra*. n. 213, at 99-100. Oldham remarks that "it is hard to imagine that this was serious." *Id.* at 99. This was the time of the "bloody code," however, when crimes such as horse and sheep stealing, destroying the turnpike, cutting down trees, pickpocketing goods worth more than a shilling, being out at night with a blackened face, being an unmarried mother concealing a stillborn child, arson, forgery, and stealing from a rabbit warren – as well as murder – were all capital offenses. https://community.dur.ac.uk/4schools.resources/Crime/Bloodycode.htm. The number of capital offenses had risen from 50 in 1658, to 160 in 1765, to 225 in 1815. *Id.* In such a climate, it is surely not impossible that the judges might have given the idea at least a second thought before ultimately rejecting it.

215 ANON., PERJURY, THE NATIONAL SIN, OR, AN ACCOUNT OF THE ABUSES AND VIOLATIONS OF OATHS AMONG US OF THE NATION HUMBLY OFFERED TO THE CONSIDERATION OF THE HIGH COURT OF PARLIAMENT, 3 (1690) (copy on file with author).

216 Sadly for the anonymous author, the fate of Ruth Pierce was still sixty-three years in the future. See, *supra*, n. 56.

217 Id.

Taken together, the statistics and the anecdotal impressions of judges and commentators on the prevalence of perjury in society, going back as far as the Fourth Centry B.C. and Plato,[218] point to only one conclusion: perjury is an ineffective deterrent to truthlessness at trial. Witnesses are doubtless aware that they face the possibility of prosecution for perjury if they are untruthful at trial[219] Yet other than the threat of divine sanction of some form – perhaps not a significant threat in a secular society – and the threat of losing one's good name if one is perceived to be not telling the truth – surely not a problem to someone willing to not tell the truth during testimony – perjury is the only sanction for violating the testimonial oath. And if perjury is a sanction without meaningful teeth, there is nothing to suggest to a witness that truth-telling is more than one of a number of equally-weighted options and that self-interest, or simple personal preference, should guide the witnesses decision as to whether to tell the truth or not.

J. "You May Decide To Believe All, Some, Or None Of The Witnesses' Testimony"

Depressing though this perception of the precarious state of truth-telling in court might be, things get even worse when contemplating the way courts themselves react to the oath. Perhaps in response to the same impulse that led the New York judges responding to a perjury survey to conclude, without any empirical support for their perceptions, that perjury is rampant in today's trials,[220] courts make their suspicions of the truthlessness of much of the testimony they hear public, and invite juries to share them. In plain langauge, judges typically tell juries to suspect that witnesses have lied to them, despite the oaths they have taken.

After trial testimony and closing arguments, judges instruct juries as to the law they must follow in order to reach a decision. These instructions also include general observations about the way trial was conducted, so as to provide a context within which the jury can evaluate what they have seen and heard. One of the standard instructions is on the credibility of witnesses:

> You, as jurors, are the sole and exclusive judges of the credibility of each of the witnesses called to testify in this case and only you determine the importance or the weight, if any, that their testimony deserves. After making your assessment concerning the credibility of a witness, you may decide to believe all of that witness' testimony, only a portion of it, or none of it.[221]

So the jury is told that despite the witnesses public commitment to truth telling, the witness might nonetheless be lying and that the jury can disregard all of the witnesses testimony if it decides to. And worse, this is not an instruction crafted to respond to

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218 See, *supra*, n. 70.

219 It is worth recalling, though, that the contemporary oath does not inform witnesses that they are testifying under penalty of perjury, and does not tell witnesses what the potential penalties for not testifying truthfully might be.

220 *See supra*, nn 190-219 and accompanying text.

221 KEVIN F. O'MALLEY, JAY E. GRENIG, HON. WILLIAM C. LEE, 1A FED JURY PRAC. & INSTR. § 15:01 (6th ed.)

perceived problems with a specific witness, but is rather a generic jury instruction written to be used at every trial. The unmistakable conclusion to be drawn from this is that all witnesses have the capacity to lie, even after they have taken the oath, and the likelihood of lying is so high that every jury should be cautioned about it and told that they may freely ignore any witnesses testimony if it believes that the witnesses credibility is open to question. Significantly, the jury is not reminded that the witness took an oath to tell the truth.

The judicial system, then, has a presumption against the truthfulness of witnesses or, at the most optimistic, is agnostic as to whether the oath is effective in producing truthful testimony. This might be seen as a pragmatic response to the capacity for every witness to lie under oath, but for the advocates of the oath it is a disturbing admission that the oath is an ineffective tool for securing the truth.

K. "You Can't Handle the Truth!"[222]

But for the oath, worse is to come. Even though witnesses can be compelled to testify, and are therefore compelled to take the oath, the trial process in this country often makes it impossible for the witness to fulfill the terms of that oath. They are expected to testify truthfully, certainly, but they will rarely, if ever, be allowed to tell the "whole" truth.

This is not a new observation. In 1934, Harry Hibschman noted that

> [n]o witness is allowed to do the thing he is sworn to do, to "tell the truth, the whole truth, and nothing but the truth." The party who called him does not want him to tell the truth because if he says anything unfavorable to that party, the party cannot impeach him – for the immediate purpose the evidence of the witness must be taken as true. The other party naturally does not want the witness to tell the whole truth if it is unfavorable to him. And the court cannot ordinarily interfere to bring out what the parties litigant suppress. Every witness is, therefore, treated as a partisan, and usually becomes one.[223]

In fact, witnesses are hardly ever invited to tell whatever they know of the facts surrounding a trial. Rather, as everyone familiar with the process understands, witnesses are asked questions by attorneys, first the attorneys who called the witness, who will ask open-ended questions, and then by the attorneys for the other party or parties in the case, who will cross-examine using leading questions for which often the only available answers

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222 AARON SORKIN, A FEW GOOD MEN (Castle Rock 1992).

223 Harry Hibschman, *"You Do Solemnly Swear!" or That Perjury Problem,* 24 CRIM. L. & CRIMINOLOGY, 901, 908-9 (1934). Hibschman is surely wrong to assert that the party who calls a witness does not want that witness to tell the truth: one cannot assume that every witness possess 'truth' that would be unfavorable to a party in litigation. But certainly it is true that parties calling even witnesses with overwhelmingly positive testimony for them still want to cabin that testimony within the context of the case theory they are attempting to assert, and therefore only want the witnesses to answer the questions they are asked, and to not stray further afield in satisfaction of their oath to tell the truth, the whole truth, and nothing but the truth.

are "yes" and "no." But while cross-examination might be "the greatest legal engine ever invented for the discovery of truth,"[224] it makes it almost impossible for the witness to fulfill the terms of the oath.

This gets touchy. Lawyers are not especially popular or respected in contemporary society[225] and perhaps part of that reason is that lawyers – trial lawyers, at least -- seem little interested in the truth.[226] The reason for this is simple: one way of articulating a lawyer's job is that the lawyer works to represent a client's interests: ". . . the lawyer's duties are owed to the client and not to third parties, society as a whole, the public interest, or anything else."[227] A more cynical way of putting this when thinking about the litigation process is that "truth is at most an occasional by-product of our system, perhaps welcomed but not pursued in its own right."[228]

A lawyer at trial has a narrative to tell that explains a situation in the lawyer's client's favor and the lawyer weaves that narrative not with truth but with facts.[229] The lawyer establishes those facts through, among other things, testimony from witnesses that must be truthful but need not – indeed, for the lawyer's purposes, often must not – be "the truth," and certainly need not be "the whole truth" or "anything but the truth."

This does not mean that lawyers need to lie,[230] ask their witnesses to lie,[231] or even coach their witnesses in such a way as to give them information about a case.[232] Skillful lawyers can craft a narrative with truthful testimony that nonetheless creates a false impression. Professor Wendel gives three examples of this type of truthful testimony that leads to a false impression, drawn from the experiences of his students in law school:

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224 Cal v. Green, 399 U.S. 149, 158 (1970), *quoting* JOHN H. WIGMORE, 5 EVIDENCE § 1367, at 29 (3d ed. Little, Brown & Co. 1940).

225 *See, e.g.,* Kenneth W. Starr, *Truth and Truth-Telling,* 30 Tex. Tech. L. Rev. 901 (1999). Starr reminds us that it was not always this way, and that Tocqueville described lawyers as America's aristocracy. *Id., citing* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 279 (Philips Bradley ed., Alfred A. Knopf 1945).

226 *See*, Starr, *supra* n. 225, at 902. "My thesis today is that we have brought some of our unpopularity on ourselves. The reason is this: we have lost, or at least mislaid, some measure of our profession's traditional respect for the truth."

227 W. Bradley Wendel, *Whose Truth: Objective and Subjective Perspectives on Truthfulness in Advocacy,* 28 YALE J. L. & HUMAN, 105, 106 (2016).

228 Starr, *supra* n. 225, at 902-3, *quoting* Alan Dershowitz, debate at Yale Law School (Mar 6. 1997). Starr notes that Professor Dershowitz continued to say that "a criminal trial is anything but a pure search for truth." *Id.* at 902.

229 *See, e.g.,* Bill Mortlock, *Pronouncements from the Bench,* 21 J. LEGAL PROF. 141, 142 (1996)("[L]awyers aren't as much interested in establishing truth as in discovering facts. . . .")

230 This runs contrary to at least one controversial opinion. In 1951 Charles Curtis wrote that "I don't see why we should not come out roundly and say that one of the functions of the lawyer is to lie for his client. . . ." Charles Curtis, *The Ethics of Advocacy,* 4 Stan. L. Rev. 3, 8 (1951).

231 Subornation of perjury is itself a crime. 18 U.S.C. § 1622.

232 *See, e.g.,* Wendel, *supra* n. 227, at 117-119 (discussing the unethical behavior of lawyers in Texas law firm representing plaintiffs in asbestos litigation who prepared generic document entitled "Preparing for your Deposition" in which witnesses were given prompts like "[i]t is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER.") *Id.* at 117.

> Student A lived just outside the city limits while attending high school in town. His teacher asked him why his paper was not finished on time and he replied "I was out of town." He was home the whole time, but his home was "out of town."
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> Student B's mother asked him whether he took out the trash. He responded, "The trash is outside on the sidewalk, mom." Actually Student B was feeling lazy so he threatened to beat up his little brother if he did not take out the trash. The trash can did make its way out to the sidewalk, but Student B did not take it out.
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> Student C was asked why she had not attended class yesterday. "I was sick," she said. She was indeed sick, but two days ago. Yesterday she was sleeping off a hangover.[233]

As Professor Wendel notes, "[a]ll of these statements are either evasions of the question or outright lies with respect to the conclusion a reasonable person would draw in the context of the conversation. That is not to say that they would rise to the level of criminal perjury."[234] Had these statements been made under oath, then, they could, and likely would, be considered to be "the truth," and since the concepts of "the whole truth" and "nothing but the truth" are so ambiguous as to be functionally meaningless, answers like these would not violate the witnesses oath, even though they create an entirely incorrect impression in the minds of the jury.[235]

We are in very murky territory now. A skillful, ethical, and extremely cautious lawyer can steer the narrow course between the Scylla of suborning perjury and the Charybdis of an unfavorable outcome for the client and create an incorrect impression from "truthful" testimony.[236] Indeed, some might argue that the lawyer is under an absolute obligation to do so if the situation requires it. In a situation like this, it is legitimate to ask what value the oath might have. Not only does it fail to produce testimony that gives the jury a clear view of the broader truth of the situation, it arguably helps to obscure the truth by lulling the jury into a sense of false security: the witness took an oath to tell the truth and appears (correctly) to be telling "the truth," so surely the resulting view of the testimony must be

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233 Wendel, *supra* n. 227, at 128.

234 *Id.* at 128-9.

235 Lest this seem like a fanciful, academic, exercise, *see, e.g.,* United States v. Bronson, 409 U.S. 352 (1973). At trial, the witness was asked "Do you have any bank accounts in Swiss banks, Mr. Bronson. . . . A: No, sir. . . .Q: Have you ever? . . . A: The company had an account there for about six months, in Zurich." Id. at 354 The company did, in fact, have present accounts in Switzerland, the fact of which the witnesses answer was designed to conceal. The Second Circuit held that this was a "lie by negative implication." United States v., Bronson, 453 F.2d 555, 559 (2d Cir. 1972). But the Supreme Court reversed, noting that "[i]f a witness evades, 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." *Id.* at 358-9.

236 For a careful dissection of how narrow this course is, and of the ethical dangers inherent in attempting to navigate it, *see, e.g.,* Todd Berger, *The Ethical Limits of Discrediting the Truthful Witness: How Modern Ethics Rules Fail to Prevent Truthful Witnesses from being Discredited through Unethical Means,* 99 MARQ. L. REV. 283 (2015).

one of truthfulness. Maybe Colonel Jessup, the testifying witness in the climactic scene in "A Few Good Men," is partially correct: perhaps we can handle the truth, but many times, as lawyers, we don't want it.[237]

L. Alternatives To The Testamentary Oath

We have come a long way from the belief that "the oath is entrenched as a vehicle for the relay of truth"[238] and that "[n]othing, it seems is as effective in helping to ascertain the truth in the courtroom."[239] Rather, the oath – throughout its long history – has yielded time and again to ignoble self-interest, or well-intentioned conscience, or whatever else makes it easier or more convenient for the oath-taker to break the solemn pledge to act or not act in a particular way or, of most interest to us, to speak the truth.

We have seen that the oath itself is a string of three promises that are almost, but not quite, intelligible when taken alone, and which seem incoherent when taken together.[240] We have seen that judges,[241] attorneys,[242] and juries [243]also take oaths but feel free to break them when it suits them to do so, and that judges in particular assume that witnesses are breaking their oaths as well.[244] Indeed, as we have seen, the system has a ready-made jury instruction to the effect that despite the oath the jury has seen a witness taking, the jury may, at its sole discretion, ignore as much of a witnesses testimony as it feels is appropriate,[245] and it has a punishment, albeit a not frequently applied one, all ready to go for oath-breakers because of its certain knowledge that despite their oath, witnesses will lie.[246]

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237 This notwithstanding Lieutenant Kaffee's avowal that "I want the truth!" in A Few Good Men. *See, supra*, n. 222.

238 Farad, *supra* n. ***, at 557.

239 *Id.*

240 *See, supra*, nn. 148-189 and accompanying text.

241 *See, supra,* nn. 23-35 and accompanying text.

242 *See, supra,* nn. 36-41 and accompanying text.

243 *See, supra,* nn. 42-50 and accompanying text.

244 *See, supra,* nn. 199-209 and accompanying text.

245 *See, supra*, nn. 220-221 and accompanying text.

246 *See, supra*, nn. 190-198 and accompanying text.

And we have seen that the system does not even allow witnesses to adhere to their of their oaths, because their testimony is cabined by lawyers' questioning that is designed to elicit answers that will provide support for case theories rather than expose "the truth" in any particular proceeding.[247]

Given what we know about the oath and its ineffectiveness, it seems reasonable to ask whether it should have any future in the American justice system. The rest of this article will consider that question, and in particular will consider the costs and benefits of abolishing the oath altogether, and of radically transforming it into a written, out-of-court, declaration of truth-telling.

1. Abolish The Oath

The most radical transformation of the oath would be to abolish it. Witnesses could be informed that truthfulness while testifying is expected of them and that failure to testify truthfully would open them to possible prosecution for perjury. Their testimony could then proceed without any ceremony.

Helen Silving, author of the most comprehensive American study of the oath, concluded that "abolition of the oath should be given serious consideration."[248] Silving came to this conclusion after an extensive review of oath practices in civil and common law countries,[249] noting that, at the time of writing, Chinese,[250] Slavic,[251] and several Swiss cantons[252] had abandoned the testimonial oath. In commenting on the Swiss abandonment of the oath, Silving observed that it was "avowedly traceable to tradition and absence of pragmatic need for such a device. It is probably an outgrowth of Swiss judicial proceedings, which are realistic, plain, and averse to dramatic effects."[253]

More than her analysis of other countries' practices, though, Silving based her opinion that the oath might best be abolished in her evaluation of human psychology. "Since legal confession, however 'voluntary,' generally carries no absolution or mitigation in law, it becomes only a ritualistic performance, an admission of repressed guilt feelings, unrelated to the crime confessed. So viewed, all confessions and self-incriminatory statements may be 'involuntary.' . . . The compulsive elements of apparently voluntary self-incrimination and confession are also present in the oath."[254]

Silving concludes that "[t]he law of the oath should be reassessed in the light of the contemporary concept of man and of his dignity."[255] And while she acknowledged that "a

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247 *See, supra,* nn. 222-237 and accompanying text.
248 Helen Silving, *The Oath: II,* 68 YALE L. J. 1527, 1572 (1959).
249 *Id.,* passim.
250 *Id.,* at 1553-4.
251 *Id.,* at 1555-8.
252 *Id.,* at 1528 and Helen Silving, *supra* n. 51, ay 1376-8.
253 Silving, *supra* n. 248, at 1558.
254 *Id.,* at 1573.
255 *Id.,* at 1575.

sudden abolition of the oath practice may cause a serious disruption of legal procedures" and that "[g]radual reduction of oath taking by confining its use to important matters, and to cases where other means of truth finding are unavailable, would seem a more desirable course,"[256] Silving was adamant that "[i]n no event should the 'oath of the accused' be tolerated even during the interim period."[257] Silving believed that imposing the oath on those seeking to testify in their own defense was "an open invitation to perjury,[258] in addition to being a '*tortura spiritualis*' of the accused."[259]

To Silving's concerns might be added the concern that the judicial system degrades itself in the eyes of those who participate in it and observe it when it persists in a ritual that has no discernible effect on truthful testimony -- the thing it seeks to influence – and that, given the paucity of perjury prosecutions year-by-year, is seems unwilling to protect by action. A system that demonstrates, almost at every turn, its disdain for a ritual, calls disdain upon itself if it fails to discontinue the ritual's practice.

This approach, though, has met with little support. The Law Reform Commission of Ireland issued an extensive Report on Oaths and Affirmations in 1990.[260] After extensive consideration of the history and the scholarly literature, the Commission concluded that "three broad possibilities for reform suggest themselves. First, the law could provide that any person should be entitled to affirm, instead of taking the oath, as of right and without having to satisfy the court as to his conscientious grounds (if any) for taking that course. . . . Second, the taking of oaths could be abolished completely, all witnesses being required, however, to make some form of affirmation before giving evidence. Third, the law could be altered so as to enable all evidence to be given without the taking of any oath or affirmation."[261] Having set out this third possibility, though, the Commission immediately discarded it: "While we have mentioned the third option for the sake of completeness, it has not attracted any significant support and we do not think it merits further consideration."[262]

256 *Id.,* at 1576.

257 *Id.*

258 As we have seen, judges who experience the day-to-day testimony of witnesses, including accused defendants, agree with Silving on this. *See*, nn. 205-206 and accompanying text.

259 Silving, *supra* n. 247, at 1576.

260 *See, supra,* n. 80.

261 *Id.,* at § 4.2.4.3.

262 *Id.,* at § 4.2.4.4

While it is possible that the Commission's view, although arrived at in a different place and at a different time than the contemporary United States, would also be true here and now, a close contemplation of the oath and its deficiencies suggests that doing nothing is not a good policy.[263] The Commission chose to opt for its first option, proposing that "a prospective witness would have the choice of swearing an oath or making an affirmation without offering any reason for the choice. The witness's choice would be guided by his or her own conscience and by any instructions from the judge or from the counsel that might become necessary."[264] In this country, though, the Commission's second option would be a better choice.

2. Written Statement Before Testifying

There is no longer any reason why any witness in any trial – civil or criminal, state or federal – should be required to disclose his or her religious beliefs, either in public or in private, no matter how mainstream or idiosyncratic they might be. For that reason alone, the oath should be abolished and replaced with a universal affirmation. This is not the first time this radical step has been proposed,[265] and it is surely past time for action to remove this anachronistic and pointless ritual from our secular courts.

The mechanism for the oath's replacement is already at hand, and has been accepted as being effective – in the federal court system at least – for over forty years.[266] The provision for accepting unsworn declarations under penalty of perjury in federal court, expressed in 28 U.S.C. § 1746, has several distinct advantages over the oath, yet retains the oath's two most significant features.

Section 1746 requires a witness to declare, under penalty of perjury, that the foregoing document is true and correct and to sign the declaration.[267] Adopting this approach in lieu of the oath would mean that a witness could make a similar declaration about the testimony the witness is about to give,[268] and could make that declaration in private,

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263 Professor Allen Vestal, reporting on "numerous discussions with lawyers and judges whose judgment I respect," noted that while "[i]t is impossible to proves that . . . a ritual [where the witness commits to testifying truthfully] has a positive influence on witnesses, . . . I know that [lawyers and judges] are convinced of the value of having some affirmative commitment on the part of witnesses. If they are convinced, so am I." Vestal, *supra* n. 141, at 476.

264 Law Reform Commission Report, *supra* n. 80, at § 4.3.4.7.

265 *See, e.g.,* Vestal, *supra* n.141 at 482 ("We should complete our evolution on this issue and eliminate witness oaths and affirmations in favor of a uniform, non-religious witness representation. It is time to bid a final farewell to the rewarder of truth and avenger of falsehood. It is time for our hypocrisy and meanness, on this small point at least, to end.")

266 28 U.S.C. § 1746, adopted October 18, 1976.

267 *Id.*

268 One possible variant of this would be to have the witness declare *after* testifying that the evidence the witness testified to *was* truthful. Silving notes that this process was adopted in German criminal cases. Silving, *The Oath: II, supra* n. 247, at 1540. "Administration of the oath prior to the testimony is interpreted by some commentators as equivalent to a failure to administer the oath, which would lead to reversal of a judgment based on such testimony." *Id.,* citations omitted. There is some theoretical appeal to this approach, because the witness would not have to predict what questions would be asked at the time of making the promise to testify truthfully but rather could wait until after testimony before declaring that all answers were

outside the view of the judge or the jury, thereby making it impossible for the factfinder to form any impressions about the witnesses trustworthiness based on the way the witness takes the oath. Moreover, because the language would be standard and would make no reference to religious belief of any kind, the witnesses personal beliefs would remain private and would not be subject to a public inquiry by the court, nor would the jury be given information with which to form correct or incorrect assumptions about the depth or nature of the witnesses religious convictions. The signed document could be entered into evidence during the witnesses testimony, thus preserving the declaration as a predicate to prosecution for perjury if needed.

This will doubtless be troubling to those who still believe the Clinton v. Ohio rationale for the continued vitality of the oath, that its purpose "is not to call the attention of God to the witness, but the attention of the witness to God; not to call upon him to punish the false-swearer, but on the witness to remember that He will assuredly do so. By thus laying hold of the conscience of the witness, and appealing to his sense of accountability, the law best insures the utterance of truth."[269] But this cannot stand as a justification for the retention of the oath. If a person is truly religious, then the duty to tell the truth exists separate and apart from any oath taken in secular court, and the accountability a person of faith has for failing to tell the truth when required to do so is neither increased or decreased by the absence of a specific oath. A person of faith – whatever faith that might be – is surely already aware of God as that person imagines God to be, and no oath is necessary to call that person's attention to God.

A universal declaration also removes the paradoxical situation where an unsworn witness is asked to select the form of oath that will most effectively bind them.[270] By establishing one, secular, declaration of the intent to tell the truth, and by removing the performative aspects of oath-taking that can give juries incorrect information with which to make a credibility decision, we would remove some unnecessary complications the present process introduced and can feel at least as assured, and perhaps more so, that the witness will actually tell the truth when testifying.[271]

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given truthfully. In practice, though, it is possible to imagine some problems with this approach. Presumably, one would have to strike the testimony of witnesses who, upon reflection, declined to declare that they had testified truthfully. And while courts are familiar with the process of telling juries to disregard portions of testimony or even a witnesses entire testimony when, for example, a witness avails him or herself of the Fifth Amendment's protection against self-incrimination after testimony has commenced, it is also a danger that a jury might not be able to fully disregard testimony one it has been heard. This difficulty to "unring the bell" could lead to strategic decisions by witnesses who wanted to further their narrative by offering untruthful testimony and who then declined to declare that the testimony was truthful. It is likely that many jurors would form an adverse opinion of such a witness, but it is not impossible that some jurors – even given explicit instructions to disregard the testimony – would be unable to do so. Even the possibility of trials being adversely affected by such strategic game-playing seems reason enough to not adopt the post-testimony declaration approach.

269 Clinton v. State, 33 Ohio St, 27, 33 (1877).

270 *See,* discussion *supra,* at nn. 140-147 and accompanying text.

271 At least the declaration would be made under penalty of perjury, whereas under the current oath taking practice, a witnesses election of which religious oath will bind the witness, or whether an affirmation will be more effective, is made outside the protections of perjury. A witness who lies about the efficacy of a religious oath has not committed perjury and cannot be prosecuted if the lie is revealed.

A declaration on the lines of Section 1746 would also remove the ambiguity of the oath's tricolon of promises, replacing them with a promise to tell the truth. This is still troublesome, because the meaning of "truth" is so elusive,[272] and still does not resolve the problem caused by the process whereby a witness is examined in such a way that "the truth" might be difficult for the witness to get across to the jury.[273] A simple modification of Section 1746's language, though, might go some way to resolving these issues: instead of promising that the testimony would be "true and correct,"[274] the witness could promise to "answer all questions truthfully." This retains the problem of the meaning of truth, but limits the scope of "truth" to the specific questions asked, and it explicitly acknowledges the actual nature of a witnesses duty at trial: to answer questions truthfully.

The proposed standard declaration retains two significant features of the oath, the promise and the gesture, even though both are modified: the oath's language having been discarded in favor of a more accurate distillation of what the witness is being asked to do, and the gesture is transformed from a raised hand to a signature. And while the signing of a piece of paper might lack the grandeur and awe-inspiring force of a public oath, its primary purposes – to impose on the witness the importance of telling the truth and acting as a condition precedent to a charge of perjury if the witness should lie – are retained and clarified[275] without any of the oath's attendant problems. The use of this process for over forty years in the federal courts should give some comfort that it is not a new and untested approach to secure truthfulness. We should feel comfortable in believing that the declaration can do no worse than the oath, and stands a good chance of doing significantly better.

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272 *See, supra,* nn. 148-174 and accompanying text.

273 *See, supra,* nn. 222-237 and accompanying text.

274 28 U.S.C. § 1746.

275 A uniform declaration could retain Section 1746's warnings about testifying "under penalty of perjury," something that is implicit, but is not explicitly mentioned, in the oath.

CONCLUSION

It would be possible to take a completely cynical view of the oath and to say that it is a pointless and empty ritual because everybody lies.[276] But that is not a fair perception of the truth-telling that goes on in contemporary courts: everybody may lie about everyday things, and even about some important life choices, but it is highly unlikely that everybody lies when testifying in court.[277] In fact, the universe of witnesses can likely be divided into three: the majority, who plan to, and do, tell the truth at trial and would do so regardless of being placed under oath or not; a small minority, who plan to, and do, lie at trial and would do so regardless of being placed under oath or not; and the remainder, who are uncertain of their intentions before trial but who are captured by the oath and tell the truth at trial because of it.[278]

The continued vitality of the oath in trial depends on the size of this third group: the oath has no relevance to those who act without regard to it, whether they tell the truth or lie. And it is impossible to gauge with any precision how large this third group is. There is certainly a great deal of truth-telling that goes on in today's courts, and a fair amount of lying as well, but whether the witnesses who tell the truth fall into the first or third categories is impossible to say.

But marginal benefits are still benefits, and are to be preferred to marginal losses, assuming that the cost of obtaining them does not exceed the benefit gained. The question for us to ponder, then, is whether the costs of the oath outweigh the benefits. And the answer is surely that it does: the oath is an archaic and anachronistic ritual that imports pagan assumptions and religious ideology into secular courts of law, attempting to reconcile ancient and contemporary religious and cultural beliefs, and it does so while being, at best, an unreliable guarantee of truthfulness. Even in jurisdictions where religion

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276 *See, e.g.,* SETH STEPHENS-DAVIDOWITZ, EVERYBODY LIES: BIG DATA, NEW DATA, AND WHAT THE INTERNET CAN TELL US ABOUT WHO WE REALLY ARE, at 105 (2017)("Everybody lies. . . . People lie about how many drinks they had on the way home. They lie about how often they go to the gym, how much those new shoes cost, whether they read that book. They call in sick when they're not. They say they'll be in touch when they won't. They say it's not about you when it is. They say they love you when they don't. They say they're happy while in the dumps. They say they like women when they really like men. . . . People lie to friends. They lie to bosses. They lie to kids. They lie to parents. They lie to doctors. They lie to husbands. They lie to wives. They lie to themselves.")

277 To be sure, I have no empirical evidence to support this optimistic view of the world, just an anecdotal sense that most people want to tell the truth in such a situation.

278 In the Rumsfeldian taxonomy of knowledge, this would constitute a known unknown. Donald Rumsfeld, United States Department of Defense Press Conference (Feb. 12, 2002), quoted by https://en.wikipedia.org/wiki/There_are_known_knowns ("Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.") The framework Rumsfeld used for his statement appears to be related to the concept of a Johari window, a heuristic exercise developed by psychologists Joseph Luft and Harrington Ingham to promote a better understanding of a person's "relationship with themselves and others." https://en.wikipedia.org/wiki/Johari_window.

is removed from the language of the oath, the very existence of an oath and its secular counterpart the affirmation mean that a witness must make a public declaration, not under penalty of perjury, that one or other option will effectively require them to tell the truth, and then must make a public ritual of truth-promising that gives the jury a wealth of information, accurate or not, from which to make credibility assessments of the witness. The oath's promises themselves are largely incoherent, are inconsistent with contemporary trial procedure, and are so disbelieved that the judge has a boilerplate instruction ready to give to the jury that suggests that despite witnesses promise to tell the truth, the jury should feel free to disbelieve the witnesses testimony. Put simply, the oath process as it exists in contemporary American jurisprudence is a pointless, outdated ritual that has no place in the courtroom.

When compared to a process where a witness makes a private, written, declaration of an intent to tell the truth, under penalty of perjury, the oath's benefits are hard to discern. The jury still has the ability to determine credibility, based on the nature of the witnesses answers to questions and the way witnesses comport themselves during examination. The promise to testify truthfully is more coherent, and would be overtly made under penalty of perjury, for whatever value that might have. And the witness is not being asked to place his or her immortal soul at hazard for purposes of a secular trial. Viewed in this way, the oath offers no benefits – even marginal ones – over a declaration process. It is time for trials to shed this vestige of our pagan past and to move into the twenty-first century.