

# So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America

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## I. INTRODUCTION

The administration of justice in American courts depends upon truth. Witnesses must provide truthful testimony, and those holding certain offices must perform their official functions with a view toward upholding the truth: jurors must decide the facts and render verdicts, and judges must apply the law to particular circumstances, guided by what is true.<sup>1</sup> Throughout American history, courts have attempted to safeguard truth, and thereby achieve justice, by requiring judges and jurors to take an oath or affirmation prior to assuming their duties and witnesses before testifying. Following English and early American customs, the form of oaths in the United States has traditionally included an explicit reference to God while placing one's hand on a Bible.<sup>2</sup> In light of the growing religious pluralism present in modern American society, however, the question arises whether to revisit these customs. In the recent case *ACLU of North Carolina v. North Carolina*,<sup>3</sup> a Muslim woman contested a judge's refusal to allow her to swear a witness oath using the Quran.<sup>4</sup> This Article considers whether religious

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<sup>1</sup> Truth is sometimes encumbered by countervailing policy considerations, which are imposed at trial through mechanisms such as testimonial privileges, exclusionary rules, and certain evidentiary rules. Likewise, jury nullification might be seen as incompatible with a juror's duty to decide consistent with factual truth. These exceptions, however, prove the rule that truth is (or should be) at the heart of the judicial process.

<sup>2</sup> See *infra* Part III.

<sup>3</sup> 639 S.E.2d 136, 137 (N.C. Ct. App. 2007).

<sup>4</sup> The current North Carolina statute provides that only “Holy Scriptures”—the Bible—can be used when swearing an oath in a North Carolina court. See N.C. GEN. STAT. § 11-2 (2007) (“Judges and other persons who may be empowered to administer oaths, shall . . . 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.”). The substance of the state statute has existed since 1777. Nadine Farid, *Oath and Affirmation in the Court:*

artifacts, such as the Bible and the Quran, should be permitted when taking an oath in an American court. It concludes that although allowing Christians to swear on the Bible and Muslims to swear on the Quran is consistent with the purposes and rationales for oaths generally, such an accommodation is unnecessary and, on balance, unwise given the competing policy considerations.

An analysis of religious artifacts and oaths in contemporary America is especially relevant in light of cases such as *ACLU of North Carolina* and the circumstances involving Keith Ellison, America's first Muslim congressman. Congressman Ellison used the Quran during his swearing-in ceremony while taking his oath of office prior to assuming duties in the House of Representatives.<sup>5</sup> Although discussions about the Quran and other religious artifacts often revolve around the First Amendment,<sup>6</sup> a fuller consideration of the relevant issues extends far beyond questions of constitutional interpretation. Such an analysis begins by considering the forms, significance, and meaning of oaths over time and throughout the world—particularly in American history and in the context of Islam—in order to better appreciate the roles and purposes of oaths in modern American society. This Article will concentrate on these fundamental predicate matters as they relate to witness oaths, leaving constitutional issues<sup>7</sup> and an analysis of other types of oaths<sup>8</sup> beyond its scope.

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*Thoughts on the Power of a Sworn Promise*, 40 NEW ENG. L. REV. 555, 558 (2006). Legislation is now pending to change the statute as follows: "Persons empowered to administer oaths shall first require the party to be sworn to place the party's hand upon the Bible or any text sacred to the party's religious faith. If appropriate to the person's religious faith, the words 'so help me God' may be deleted." 2007 N.C. S.B. 88.

<sup>5</sup> See Martha Minow, *Tolerance in an Age of Terror*, 16 S. CAL. INTERDISC. L.J. 453, 473 (2007) (describing the details of Congressman Ellison's oath prior to taking office).

<sup>6</sup> U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .").

<sup>7</sup> For a discussion of the constitutionality of only permitting the Bible in oath taking, see Daniel Blau, Note, *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). While courts have recognized that using the Bible for oath taking does not violate the Establishment Clause (see, e.g., *Protestants & Other Ams. United for Separation of Church & State v. O'Brien*, 272 F. Supp. 712, 720–21 (D.D.C. 1967)), a government official cannot force someone to swear an oath on the Bible. *Doe v. Phillips*, 81 F.3d 1204, 1210 (2d Cir. 1996). For a discussion of the Free Exercise Clause and the forms of oath taking in courts, see *United States v. Ward*, 989 F.2d 1015, 1018–20 (9th Cir. 1992).

<sup>8</sup> For example, the use of religious artifacts, such as the Quran, during swearing-in ceremonies for oaths of office, as was done by Congressman Ellison, is beyond the scope of this Article. It should be noted, however, that the procedures (as contrasted to the substance) associated with these types of oaths have an important political component,

Part II of this Article surveys oaths and oath practices throughout history, with a particular focus on their development in Western culture. The Part begins by considering the origin, rationale, and utility of oaths generally as they evolved over time, as well as describing various oath forms from around the world. It concludes by comparing the oath practices in Western and non-Western traditions in order to demonstrate their basic universality.

Part III narrows this historical overview by concentrating on the development and use of witness oaths in America. It begins as any comprehensive discussion of American law must—in England—by examining the influence of the common law tradition and Christianity during colonial times. It then traces the evolution of American oaths from the nation's founding to the present day, considering the impact of the unique American experience, federalism, and federal evidentiary rules on American oath practices. The Part also reviews contemporary statutes and rules pertaining to oaths. It concludes by describing the alternative of affirmation, as it originated in England and was later incorporated into American law.

Part IV continues the historical overview but focuses on Islam and the sources of moral and legal authority for Muslims. In particular, it explicates the unique role of the Quran in Islam and its significance to Muslims generally. It also describes the importance to Muslims of telling the truth and giving true witness, as well as swearing oaths in light of Islamic law, particularly in a courtroom setting. Further, it explains that although it is not essential for Muslims to use the Quran when taking oaths, this practice has become widely accepted in Islamic culture. The Part concludes by providing examples of oath taking by Muslims in various political and legal contexts.

Part V applies this historical understanding to present-day America. The Part affirms the continuing significance, purpose, and relevance of oaths, and it offers a new definition for oaths based on a modern appreciation of their essence and purposes. It also addresses the acceptability of permitting Christians to use the Bible and Muslims to use the Quran while taking a witness oath in an American court. Part V concludes that such an accommodation is unnecessary, however, and that the many disadvantages associated with such a permissive rule would outweigh its limited benefits. Accordingly, it proposes that the better approach is to allow a non-specific invocation of God, without the use of any religious artifacts, while offering witnesses the alternative of an affirmation.

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and as such must comport with the rules established by the relevant political body and be acceptable to the sensibilities of the office holder's electorate.

## II. THE HISTORY OF JUDICIAL OATHS AND THE ARTIFACTS ON WHICH THEY WERE SWORN

In his seminal work on the history of oaths, Professor James Endell Tyler proposes the following definition: “An oath is an outward pledge given by the juror that his attestation [or promise] is made under an immediate sense of his responsibility to God.”<sup>9</sup> At its core, therefore, the oath acts as a guarantor of truth; it guards against testimony that is either false or wavers from the truth by juxtaposing the individual’s dishonest motive against his sense of moral culpability and fear of divine punishment. While the form and meaning of oaths vary across societies and have changed over time, the practice is a “natural and universal custom” that has been found virtually everywhere human society exists.<sup>10</sup>

The universality of oaths can be explained by their close connection to two dominant aspects of human nature: a natural inclination for truth and a misdirected self-interest that is sometimes opposed to it. The first of these—a yearning to discover, relate, and promote the truth—comes from man’s innate desire for knowledge.<sup>11</sup> Truth’s worth does not depend on man-made laws or artificial constructs. Rather, its value is transcendent; it is essential to personal virtue and the common good, and leads toward a “perfection of understanding.”<sup>12</sup> The natural and universal longing for truth and knowledge

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<sup>9</sup> JAMES ENDELL TYLER, OATHS: THEIR ORIGIN, NATURE, AND HISTORY 15 (1834) (brackets in original). St. Thomas Aquinas succinctly distinguishes between oaths and vows or promises: “There is no parity between a vow and an oath: because by a vow we direct something to the honour of God, so that for this very reason a vow is an act of religion. On the other hand, in an oath reverence for the name of God is taken in confirmation of a promise. Hence what is confirmed by oath does not, for this reason, become an act of religion. . . .” THOMAS AQUINAS, THE SUMMA THEOLOGICA II-II, Q. 89, art. 5 (2d ed., Fathers of the English Dominican Province trans., 1920); see also *id.*, art. 8.

<sup>10</sup> Thomas Raeburn White, *Oaths in Judicial Proceedings and Their Effect upon the Competency of Witnesses*, 51 AM. L. REG. 373, 378 n.9 (1903).

<sup>11</sup> See Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects’ Dignity*, 41 VAL. U. L. REV. 1, 59–63 (2006). The Article adopts a realist philosophical position, noting that nature has an order which both exists and is knowable. Ergo the law itself, which properly seeks to ascertain truth, has designed systems and practices to promote such discovery. The Article further deduces that the desire for truth springs from a natural desire for knowledge, and truth is found at the joining of human intellect and reality, and thus it is determinate.

<sup>12</sup> JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 156 (1998). Professor Finnis continues, “Discussions of the virtue, unless they are guided by consideration of the underlying norm of practical reason, provide no sufficient indication whether or not a *specific type of act*, specifiable in terms which do not presuppose its rightness or wrongness, is wrong (contrary to virtue), and if wrong generally is also wrong universally.” *Id.* (emphasis in original).

is reinforced by other instinctive influences that enhance truth telling: indolence (it is cognitively easier to tell the truth than not); fear of disgrace (a rational fear of having one's virtue or honor impugned if caught in a lie); and religious faith and fear of divine punishment.<sup>13</sup> All of these inclinations help undergird the cardinal principle that justice requires truth, and thus that which encourages truth telling must itself be encouraged.<sup>14</sup>

Human experience nevertheless demonstrates that truth does not always prevail over falsity, particularly in the face of venal self-interest.<sup>15</sup> An egoistic orientation, in which serving oneself may easily (and even reflexively) replace truth as the guiding principle, breeds distrust of others and skepticism of what they say. The reality of egoistic self-interest requires the institution of practical procedures that promote truth, apart from the internal and natural inclinations and influences that do this.<sup>16</sup> One such

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<sup>13</sup> White, *supra* note 10, at 400–02.

<sup>14</sup> See Milhizer, *supra* note 11, at 63–66. Aquinas states, “as regards the point to be confirmed by oath, that it be neither false, nor unlawful, and this requires both truth, so that one employ an oath in order to confirm what is true, and justice, so that one confirm what is lawful. A rash oath lacks judgement [sic], a false oath lacks truth, and a wicked or unlawful oath lacks justice.” AQUINAS, *supra* note 9, II-II, Q. 89, art. 3.

<sup>15</sup> White, *supra* note 10, at 373 (“Self-interest is perhaps the fundamental fact in human nature. Every man naturally seeks to promote the welfare of himself and his family before that of his neighbor. . . . [H]e will, if necessary, tell a lie for that purpose.”). Cf. John Locke, who, while rejecting self-interest as the basis for natural law, accepts that self-interest plays a role in the law of nature. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 13, at 6 (Tom Crawford ed., Dover Publications 2002) (1689) [hereinafter, LOCKE, *SECOND TREATISE*]. For example, Locke contends that if every individual were given the power of the executive, as in the state of nature before civil government, “self-love will make men partial to themselves and their friends: and on the other side, that ill-nature, passion, and revenge will carry them too far in punishing others.” *Id.* Aquinas found that inordinate self-love is the root cause of sin: “[E]very sinful act proceeds from inordinate desire for some temporal good. Now the fact that anyone desires a temporal good inordinately, is due to the fact that he loves himself inordinately: for to wish anyone some good is to love him. Therefore it is evident that inordinate love of self is the cause of every sin.” AQUINAS, *supra* note 9, II-I, Q. 77, art. 4. Finnis calls Aquinas’ description of self-love in a society “egoism,” and he explains that not only can egoism be chosen but such a choice is irrational, “for it treats the basic reasons for action as if they directed me, not towards a universal human good which includes my own good as one amongst other instantiations, but rather just towards my good—as if the principle came specified with a proper name (mine!).” FINNIS, *supra* note 12, at 111–12.

<sup>16</sup> See TYLER, *supra* note 9, at 6 (“It is because we do not place confidence in the veracity of men in general, when they profess to speak the truth; it is because we cannot rely upon their good faith, when they make a bare promise, that we are driven to seek for something more satisfactory to ourselves, by imposing upon them a more binding responsibility than that of their mere word.”).

procedure is the oath, which obliges divine punishment if the person swearing it makes a false statement and thus fails to satisfy his promise to fulfill his truth-telling obligation.<sup>17</sup>

### A. *The Origin of Oaths: Ancient Oaths and the Practices of Swearing Them*

Oaths are a virtually universal custom, which precede the type of recorded history that would allow for a complete analysis of their origin. The evidence of oaths among prehistoric cultures survives today only to the extent that the custom itself has endured, often through the venerable practices of primitive tribes.<sup>18</sup> The ancient manner of making an oath typically involved an individual calling upon a beast or thing of nature (the sun, a river, etc.) to witness the truth of what was spoken and wreck havoc on the individual—through consumption or some other form of destruction—if his words were false.<sup>19</sup> These self-curse customs acted as a guarantor of truth insofar as the witness believed that a false statement would result in his imminent peril; as such, the person demanding the pledge would insist on the oath being sworn in the name of the entity that the witness most feared.<sup>20</sup>

The earliest recorded oaths are preserved in the texts that comprise the ancient religious canons known as the Christian Old Testament in the Bible or the Jewish Tanakh. The Old Testament description of a conversation between Abraham and King Sodom<sup>21</sup> recalls the first oath made to the God

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<sup>17</sup> Criminal sanctions for perjury use temporal punishment to promote the truth. *See, e.g.,* WHARTON'S CRIMINAL LAW §§ 574–602 (15th ed. 1996) (also commenting on the role and necessity of an oath in proving perjury). The deterrent effect of man-made sanctions, as with divine sanctions, depends on the individual. Additionally, one might reason that perjury sanctions become more important when the fear of divine sanctions becomes less significant or controlling. It is safe to say, however, that external sanctions are not a zero-sum game, and that although the strength of deterrence of one kind or another will vary by individual and society, external deterrents play an important role in procuring truth.

<sup>18</sup> White, *supra* note 10, at 374.

<sup>19</sup> *Id.* For example, Professor White notes that the Siberian tribe of Ostyaks would bring a wild boar's head to court when a tribal member wished to make an oath, imitate the actions of a boar eating, and call upon boars in general to consume the witness if he spoke falsely. *Id.*

<sup>20</sup> *Id.* at 374–75.

<sup>21</sup> *Genesis* 14:22–23 (Catholic Study Bible). After prompting by the king to take a share of the spoils of a defeated enemy, Abraham replies, “I have sworn to the LORD, God Most High, the creator of heaven and earth, that I would not take so much as a thread or a sandal strap from anything that is yours, lest you should say, ‘I made Abram rich.’” *Id.*

of the Christians and Jews, and it is likely the oldest recorded example of an oath.<sup>22</sup> In the story, Abraham refuses the king's instruction to avoid contravening a vow he previously swore to God. Some translations of the event describe Abraham as raising his hand to God, a solemn practice of invoking the supernatural that spans from biblical times to the present day.<sup>23</sup> This ancient account, as well as many of the early examples of oaths discussed later, demonstrates that by the time of Abraham (circa 2000 BC)<sup>24</sup> the practice of swearing oaths and accompanying customs, such as raising one's hand toward heaven, were widely used and understood by at least two different cultures. The invocation of a deity is another milestone in the development of early oaths, as the replacement of natural things with

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<sup>22</sup> TYLER, *supra* note 9, at 96–97 (explaining that the earliest oaths on record are preserved in the form of the Holy Scriptures, naming this passage—*Genesis*: 14:22—as the first example of an oath in the Old Testament). *But see* White, *supra* note 10, at 376, who references *Genesis* 21:22–24 as the earliest satisfactory record of an oath in the Old Testament, evidently discounting Tyler's choice of *Genesis* 14, seven chapters earlier, even though Tyler is repeatedly cited as a preeminent authority throughout White's article. In *Genesis* 21:22–24, Abimelech is quoted as saying, "God is with you in everything you do. Therefore, swear to me by God at this place that you will not deal falsely with me or with my progeny and posterity . . .," to which Abraham responds, "I so swear." (Catholic Study Bible). *Cf.* also 1 RABBI SHLOMO YITZHAQI [Rashi], THE METSUDAH CHUMASH/RASHI 88 (Avrohom Davis & Avrohom Kleinkaufman trans., 1991), who cites the Talmud (Shavous 36(a)), which relates to the Biblical account of Noah, as the first recorded oath: "When the LORD smelled the sweet odor, he said to himself: 'Never again will I doom the earth because of man, since the desires of man's heart are evil from the start; nor will I ever again strike down all living beings, as I have done.'" *Genesis* 8:21 (Catholic Study Bible). As Rashi explains, the repetition of the words "never/ever again" serves as a recorded oath made by God. YITZHAQI, *supra* note 22. These examples present three viewpoints as to what is the earliest oath recorded in *Genesis*. According to Rashi, God's proclamation may qualify as an oath, depending on one's definition of the term, even though oaths generally presuppose that a human swears and invokes God as the witness, rather than God making the oath. In Tyler's choice, a human explains why he cannot break a previously-made oath to God, which he describes. Finally, White's selection presents an occasion likely typical of ancient oath-swearing where one person compels another to make an oath to an entity that the latter finds binding—in this case Abraham's God, in whom Abimelech likely did not believe—although there is little ceremony beyond the act of swearing. Regardless of which account is accepted as the best first record of an oath, they all confirm that the Old Testament of the Bible, and in particular the book of *Genesis*, contains the best first account of a recorded oath; chronologically, however, choosing Rashi's account of *Genesis* 14 would move the date back considerably from the time of Abraham to that of Noah.

<sup>23</sup> *See* TYLER, *supra* note 9, at 97.

<sup>24</sup> 4 BERNHARD W. ANDERSON, UNDERSTANDING THE OLD TESTAMENT 7 (1998) (although *Genesis* was not written by Moses until circa 1300 BC).

supernatural entities allowed oaths to evolve compatibly with monotheistic traditions.<sup>25</sup>

As the above-described examples suggest, oath taking is ubiquitous throughout the scriptures and ancient Jewish culture.<sup>26</sup> In pre-Christian Israel, as in many societies prior to the rise of the ordeal of trials, accusations against one's "neighbor" could be made on one's word, and sometimes the court's judgment could hinge upon testimony given under oath. This latter practice is sometimes called a "decisory oath," best described as an oath taken by a party under certain prescribed conditions—for example, if a bailee is accused of theft, the item cannot be found, and witnesses do not exist—which may result in a decision on the case.<sup>27</sup> A decisory oath thus constitutes direct and additional evidence in a proceeding, rather than serving as a guarantor of witness credibility. Indeed, Jewish law did not even provide for the swearing of witnesses in criminal cases.<sup>28</sup> As will be shown later in this

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<sup>25</sup> See Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1331–33 (1959). Discussing the utility of the oath in monotheistic religions, Aquinas observes, "Now nothing is confirmed save by what is more certain and more powerful. Therefore in the very fact that a man swears by God, he acknowledges God to be more powerful, by reason of His unfailing truth and His universal knowledge; and thus in a way he shows reverence to God." AQUINAS, *supra* note 9, II-II, Q. 89, art. 4.

<sup>26</sup> Although not relating directly to oaths, among the most important of all scriptural passages concerning the obligation to tell the truth is found in the Ten Commandments, *Exodus* 20:1–17, which contains an unequivocal prohibition on bearing false witness: the Eighth Commandment states, "You shall not bear false witness against your neighbor." *Exodus* 20:16 (Catholic Study Bible). This prohibition, of course, involves the concept of truth-telling and a natural law perspective on truth, as well as ancient conceptions of trials. The prohibition expresses *absolute law*, i.e., law that has no exceptions; it is a commandment asserting that it is always wrong to lie. See also AQUINAS, *supra* note 9, II-II, Q. 110, art. 3; FINNIS, *supra* note 12, at 154–63 (expounding on the concept that lying is always wrong). For other examples of Old Testament oaths, see, for example, *Genesis* 21:23–24, *Joshua* 2:12, 23:7, 1 *Samuel* 30:15, 2 *Samuel* 19:8, 1 *Kings* 2:42, *Psalms* 63:12, *Jeremiah* 12:16, *Amos* 8:14, *Zephaniah* 1:5 (Catholic Study Bible). See also *Ecclesiastes* 5:3–4 (Catholic Study Bible) ("When you make a vow to God, delay not its fulfillment. For God has no pleasure in fools; fulfill what you have vowed. You had better not make a vow than make it and not fulfill it.").

<sup>27</sup> Silving, *supra* note 25, at 1333, 1338–39; White, *supra* note 10, at 384. See, e.g., *Exodus* 22:9–10 (Catholic Study Bible) ("When a man gives an ass, or an ox, or a sheep, or any other animal to another for safe-keeping, if it dies, or is maimed or snatched away, without anyone witnessing the fact, the custodian shall swear by the LORD that he did not lay hands on his neighbor's property; the owner must accept the oath, and no restitution is to be made.").

<sup>28</sup> White, *supra* note 10, at 384. Rather than being sworn to tell the truth, witnesses were "cautioned and warned of the sin of lying and were rigidly cross-examined, but no oath had to be taken." *Id.* at 384. Reminding the witness of the sin of lying and particularly bearing false witness was judged sufficient to deter false testimony, even



Article, decisory oaths were not unique among the Jews, but were found as well in Babylonian,<sup>29</sup> Roman, and Muslim practices.

The Old Testament describes the use of other outward signs for making oaths. These include placing hands on an object or person or shaking hands to signify the swearing of a solemn oath to God followed by a spoken response of “Amen, Amen” after a magistrate has repeated the words of an oath.<sup>30</sup> The Jews accorded a greater importance to the swearing of a judicial oath, which was done in the name of Jehovah, as contrasted to “ordinary” oaths, which invoked other religious entities such as Jerusalem, heaven, or the temple.<sup>31</sup>

Similar to the practices of the Jewish monotheistic society, the oaths of nearly every ancient culture are characterized by a superstitious reverence for their deities. It was widely believed that a god, when called upon, would witness the truth of the speaker’s statement and, if the speaker spoke falsely, would smite him.<sup>32</sup> These ancient oaths thus reinforced and heightened a natural duty to tell the truth by invoking supernatural retribution if the duty was breached. In other words, divine punishment was feared as a consequence of taking false oaths, and not necessarily as a result of lying.<sup>33</sup>

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where the fate of an innocent man facing a criminal conviction stood precariously in the balance. “In civil cases, however, witnesses appear to have been sworn.” *Id.* at 384–85.

<sup>29</sup> See generally THE CODE OF HAMMURABI, KING OF BABYLON (Robert Francis Harper trans., 1904). For example, if a merchant gives money to an agent he shall return the principal to the merchant, but if “when he goes on a journey, an enemy rob him of whatever he was carrying, the agent shall take an oath in the name of god and go free.” *Id.* at §§ 102–03. Several provisions of the recovered Code refer to instances where witnesses must give their testimony “in the presence of god” or otherwise swear an oath to god to attain relief or remove responsibility. See *id.* at §§ 9, 23, 103, 106, 107, 120, 126, 131, 249, 266. In other instances a person must swear to another to remove responsibility. See *id.* at §§ 20, 206, 207, 227. These laws, rediscovered in 1901, were promulgated during the time of their namesake, who ruled from circa 1792–1750 BC, and thus constitute the earliest known legal code that has survived in a virtually complete form. WILLIAM SEAGLE, MEN OF LAW: FROM HAMMURABI TO HOLMES 16 (1947). For an account of the many oaths that existed in various Middle Eastern legal systems, see generally A HISTORY OF ANCIENT NEAR EASTERN LAW (Raymond Westbrook ed., 2003).

<sup>30</sup> TYLER, *supra* note 9, at 103–08.

<sup>31</sup> *Id.* at 113.

<sup>32</sup> White, *supra* note 10, at 381 n.11 (noting also an interesting dichotomy of utility for these oaths: such beliefs of immediate divine intervention and punishment were “soon abandoned” by the educated classes, but as long as the individual taking the oath believed severe punishment was pending should he speak falsely, the purpose of the oath—ensuring truthful testimony—remained intact).

<sup>33</sup> *Id.* at 382. Professor White explains, “The exact truth of these observations may be clearly seen from two well-known facts in history: (1) The great sacrifices which the ancients would make to avoid breaking their oaths; (2) The utter disregard for honor or

The oaths of ancient Greece are characterized by idolatry of their deities, leaders, and heroes, and they were popularized by legendary poets, authors, and philosophers. The word “*orkos*” expresses the ancient Greek understanding of both the word for “oath” and the “object by which one swears.”<sup>34</sup> As a mark of their importance in Greek jurisprudence, “[e]videntiary oaths were outside the competence of Athenian law” because they “remained under the direct control of the gods.”<sup>35</sup> To invoke a deity when taking an oath in ancient Greece, a person would lay his hand upon the altar while swearing on the honor of that god.<sup>36</sup> This practice was one of the most widespread and well-documented methods of swearing on a religious artifact in the ancient world, and indeed may be representative of the custom’s broader usage.<sup>37</sup> It likewise remained highly acceptable and solemn to swear by the sword, the souls of the departed, and the river Styx,<sup>38</sup> with the list of suitable artifacts proliferating over time to the point of frivolity.<sup>39</sup>

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truth which they exhibited when by some technicality they had been excused, as they imagined, from the performance of an oath.” *Id.* at 382 n.12. St. Augustine, commenting on the Trojan forefathers of Rome, observed that ancient pagan forms of oaths did not necessarily produce a truthful or honorable result: “For it seems that the ancient practice of taking oaths has been preserved even in the midst of the greatest corruption, not for the sake of restraining wickedness by religious fear, but to complete the tale of crimes by adding that of perjury.” SAINT AUGUSTINE, *THE CITY OF GOD* 75 (Marcus Dods trans., Modern Library 1993).

<sup>34</sup> MATTHEW A. PAULEY, *I DO SOLEMNLY SWEAR: THE PRESIDENT’S CONSTITUTIONAL OATH: ITS MEANING AND IMPORTANCE IN THE HISTORY OF OATHS*, 43–44 (1999) (referencing H.G. LIDDELL & R. SCOTT, *A GREEK-ENGLISH LEXICON* (8th ed. New York, American Book 1882)). Zeus, the chief god, was the *orkos* for men, while the river Styx—the river separating the world of the living from the world of the dead—served as the *orkos* for the gods themselves. *Id.* at 44.

<sup>35</sup> S.C. TODD, *THE SHAPE OF ATHENIAN LAW* 310 (1993).

<sup>36</sup> TYLER, *supra* note 9, at 116–18.

<sup>37</sup> *Id.* at 118–19. Although there is contradictory evidence from sources as prominent as Cicero and Juvenal as to whether the practice was widespread in ancient Rome, the evidence that the practice existed outside of Greece is not in doubt. *Id.* Livy notes, for example, that Hannibal (of Carthage, now northern Africa) swore upon sacred things that he would soon be Rome’s enemy. *Id.* at 119.

<sup>38</sup> *Id.* at 123–26.

<sup>39</sup> *See id.* at 121–23 (noting that those who ultimately swore oaths by “whatever chanced to strike the mind of the individual” were drawn to that self-interested desire to be believed while knowingly speaking falsely). One might suppose that the likelihood of false swearing increases as the artifact used is more profane and remote to the oath taker, and the divine nature of the punisher and punishment diminishes. Again, such an understanding is based on the subjective nature of an oath taker’s conscience. A permissive use of artifacts undoubtedly contaminated the ordeal of oaths outside of Greece, and this may account for the later standardization of oaths and oath artifacts, and

The oath attained special significance in judicial proceedings, however, as judges, jurors, and witnesses rendered verdicts or provided evidence while under oath, appealing to the god “Oath” (again “*Orkos*” in Greek) to ensure the truth of their statements.<sup>40</sup>

In ancient Rome, a society noted for the power and importance of the state and fidelity to the law, swearing by the emperor and the Roman gods was a common practice.<sup>41</sup> As Montesquieu notes, nothing else bound the Romans more strongly to their laws.<sup>42</sup> And so, someone who was struck by lightning was denied a traditional burial because “such death was regarded as Zeus’ normal punishment of perjurers.”<sup>43</sup> The decisory oath appeared again in Roman judicial proceedings; rather than adding weight to the veracity of one’s statement, a judge or litigant could call on a party to make a decisory

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the discriminatory treatment of atheists and other groups, as will be discussed later. See *infra* Part III.

<sup>40</sup> JOSEPH PLESCIA, *THE OATH AND PERJURY IN ANCIENT GREECE* 33 (1970); PAULEY, *supra* note 34, at 45.

<sup>41</sup> TYLER, *supra* note 9, at 129–32; see also JAMES MUIRHEAD, *LAW OF ROME*, 50 (2d ed. 1985) (noting some of the ancient authorities, including Cicero and Dionysus, discussed the potency of the Roman oath, and that the altar of Hercules was a common destination of those who wished to bind another by oath). Important Latin terms include *jusjurandum* (oath), *votum* (a vow made to a deity), and *promissum* and *promitto* (promise, which can serve like an oath when made in the name of a god). See PAULEY, *supra* note 34, at 53–54. Also prevalent in ancient Rome and Greece were the practices of slaying an animal (representing future death if a falsehood was spoken), and swearing a multiplicity of oaths for the same purpose (to secure additional veracity in the truth of the statement). TYLER, *supra* note 9, at 127, 134.

<sup>42</sup> CHARLES DE SECONDAT, *BARON DE MONTESQUIEU, THE SPIRIT OF LAWS* 88 (Thomas Nugent trans., 6th ed. 1793) (1748) (noting the virtue of the Romans in particular, and the effect that the oath had on virtuous people in general: “Such was the influence of an oath among those people, that nothing bound them stronger to the laws. They often did more for the observance of an oath, than they would ever have performed for the thirst of glory or for the love of their country.”). This sentiment is echoed by Augustine in the story of Marcus Atilius Regulus, a Roman general. During the first Punic war, Regulus was captured by enemy Carthaginians and sent back to Rome to advocate for a prisoner exchange. Before Regulus departed, however, he was first bound “with an oath, that if he failed to accomplish their wish, he would return to Carthage.” AUGUSTINE, *supra* note 33, at 19. Upon his return to Rome, Regulus advocated on behalf of the opposite position believing it to be better for the Roman state, and then *voluntarily* returned to “his bitterest enemies” where “because he refused to act in violation of the oath he had sworn by them, was tortured and put to death by a new, and hitherto unheard of, and all too horrible kind of punishment.” *Id.* at 19–20. The supreme importance of an oath was famously demonstrated more than a millennium later in Sixteenth Century England, when Saint Thomas More submitted to being executed rather than swearing a false oath. See *generally* ROBERT BOLT, *A MAN FOR ALL SEASONS* (1960) (recounting the life and times of Saint Thomas More).

<sup>43</sup> Silving, *supra* note 25, at 1335.

oath as an alternative to evidence.<sup>44</sup> Just as Greco-Roman culture has strongly influenced the Western world generally, so too have Greco-Roman practices pertaining to oaths, along with Jewish customs, informed and influenced the Christian tradition of oath swearing.

The rise of Christianity as a dominant social force led to the widespread incorporation of Christian traditions in Western civilization, and this influence is perhaps most obvious in the practices surrounding oaths.<sup>45</sup> Once

<sup>44</sup> White, *supra* note 10, at 385.

<sup>45</sup> Early Christians were actually reluctant to swear oaths due to the prohibition on swearing issued by Jesus Christ in his Sermon on the Mount:

Again you have heard that it was said to your ancestors, "Do not take a false oath, but make good to the Lord all that you vow." But I say to you, do not swear at all; not by heaven, for it is God's throne; nor by the earth, for it is his footstool; nor by Jerusalem, for it is the city of the great King. Do not swear by your head, for you cannot make a single hair white or black. Let your "Yes" mean "Yes" and your "No" mean "No." Anything more is from the evil one.

*Matthew 5:33–37* (Catholic Study Bible).

The interpretation of the Catholic Church, which has been largely followed by all but a few Christian sects, has understood Jesus' proclamation as not forbidding all oaths. Following the tradition of St. Paul, *see, e.g., 2 Corinthians 1:23 and Galatians 1:20*, the tradition of the Church does not exclude oaths made for "grave and right reasons (for example, in court)," but it does require a refusal to swear an oath when done for "trivial matters," when an "illegitimate civil authority" requires it, or when it is required for "purposes contrary to the dignity of persons or to ecclesial communion." CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2154–55 (Doubleday 2d ed. 2003); *see also* SAINT AUGUSTINE, ANCIENT CHRISTIAN WRITERS: THE LORD'S SERMON ON THE MOUNT 61 (John Jepsen trans., Paulist Press 1978):

[T]he Lord's command not to swear was given that a person might not run into using oaths as something good, and by his readiness to swear because of the habit, lapse into false swearing. Wherefore let one who realizes that swearing is to be accounted not among the better things but the necessary ones, refrain, as much as possible, from resorting to it; necessity alone should be the exception, when he sees persons reluctant to believe something which they would do well to believe, unless they are convinced by an oath.

AQUINAS, *supra* note 9, II-II, Q. 89, art. 2:

[I]t must be stated that an oath is in itself lawful and commendable. This is proved from its origin and from its end. From its origin, because swearing owes its introduction to the faith whereby man believes that God possesses unerring truth and universal knowledge and foresight of all things: and from its end, since oaths are employed in order to justify men, and to put an end to controversy (Heb. vi. 16). Yet an oath becomes a source of evil to him that makes evil use of it, that is who employs it without necessity and due caution.

Christianity was proclaimed the official religion of the Empire in 395, Christian authority filled the void left by abandoned pagan practices including oath swearing, which would thereafter be cloaked with greater solemnity than in earlier Greek or Roman societies.<sup>46</sup> The first Christian oaths invoked “[t]he truth to witness,” which amounted to a direct appeal to God, who is “The Truth.”<sup>47</sup> Mixing religion and state—which had certainly occurred by the time of Constantine, the first Christian emperor of Rome—Roman judicial proceedings required witnesses to take testimonial oaths,<sup>48</sup> with a juror laying his hand on the Gospels while lying on an altar.<sup>49</sup> These practices were received into the Code of Justinian,<sup>50</sup> which with Roman and

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Historically, while the early Christian rule was to not swear at all, or at least only on the most solemn occasions, Christians eventually took up the practice as they mingled more openly with their pagan neighbors and “departed further from their original principles.” TYLER, *supra* note 9, at 149–50. Divisions over the interpretation of Christ’s words, however, will become particularly important in developing the practice of affirmation, discussed later in Part III.C.

<sup>46</sup> PAULEY, *supra* note 34, at 64.

<sup>47</sup> TYLER, *supra* note 9, at 150

<sup>48</sup> Silving, *supra* note 25, at 1337, 1339.

<sup>49</sup> TYLER, *supra* note 9, at 152, 158–59 (As would need be, the “altar was always ready in the courts of justice, and the relics were forthcoming at the order of the judge.”).

<sup>50</sup> See, e.g., ANNOTATED JUSTINIAN CODE (Timothy Kearly ed., Fred Blume trans., 2008), available at <http://uwacadweb.uwyo.edu/blume&justinian/default.asp>. The Christian emperor worked throughout his long reign (527–565) to collect and promulgate definitive Roman jurisprudence, which ultimately included four parts: the *Codex*, the *Digest*, the *Institutes*, and the *Novellae*, which were collectively known as the *Corpus Juris Civilis* (Body of Civil Law). This work established a “normative form for the courts of the major cities and the law schools.” FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 189 (Oliver O’Donovan & Joan Lockwood O’Donovan eds., 1999). As Justinian writes in the *Codex*:

It is well known that ancient jurists did not regard the judges’ vote as valid unless preceded by an oath that they would give judgment wholly in accordance with the truth and the law. Since, then, we have found that we must take a well-trodden road, and since our previously promulgated laws about oaths have given decisive proof of their value to litigants and earned a general approbation, we have reached the point of sanctioning this law, which is to have perpetual validity . . . and, universally, all judges whatsoever who administer Roman law; shall not permit the hearing of a process to begin unless there is a copy of the Holy Scriptures placed before the judicial bench. . . . This judicial oath shall be known to all and shall be added by us as a valuable addition to the laws of Rome and observed by all judges . . . .

[Counsel who appear shall also] give an oath on the Gospels that they shall deploy their skill and render all their service to enter on their clients’ behalf what they think to be right and true, omitting no possible effort . . .

*Id.* at 193.

canon law served as the basis for incorporation into the wider Western tradition.<sup>51</sup>

Adopting the pagan custom of using physical items in making an oath, artifacts were employed by early Christians in all manner of proceedings. Common Christian artifacts included the altar, cases containing the consecrated host, the relics or tombs of a saint, the cross, and mass books.<sup>52</sup> The souls or limbs of the departed, and the souls of the saints, were also sometimes used.<sup>53</sup>

With the rise and dominance of Christianity came increasing standardization in oath practices, which notably included using the Bible. While it is true that early Christian practices often hastily appropriated pagan rituals, the custom of swearing on the Bible is also rooted in earlier Jewish practices and in scripture.<sup>54</sup> Christians and Jews alike understood the Bible to be the inspired word of God, and so its use compelled a believer to be absolutely truthful in order to avoid swearing falsely by God's name. As Tyler instructs, "[a]ncient writers tell us that Christians borrowed this practice [of swearing on the Gospels] from the Jews, who were accustomed to swear laying their hand upon the book of the Law, regarding that as the only binding oath."<sup>55</sup> As the written book of the Law was for the Jews before

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In discussing rules governing witnesses, the Code similarly comments on the widespread use of oaths as one of the tools for enhancing and ensuring credibility: "We have long since directed that witnesses, before they give their testimony, must be put under the sanctity of an oath." ANNOTATED JUSTINIAN CODE, *supra* note 50, at 4.20.9. Justinian elsewhere comments about the continued use of decisory oaths. *See* THE INSTITUTES OF JUSTINIAN 4.6.11 (Thomas Collett Sandars trans., 1883) ("[I]f any one, when called upon by his adversary, makes oath that the debt which he sues for is due and unpaid, the praetor most justly grants him an action, in which the inquiry is not whether the debt is due, but whether the oath has been made."). Justinian also notes how both sides to an action must swear oaths that they were perpetrating neither frivolous lawsuits nor frivolous defenses, and that damages and costs could be assigned against those who brought "reckless" cases. *See id.* at 4.16 and 4.16.1 ("[T]he authors and preservers of our law have always sought most anxiously to hinder men from engaging too recklessly in law-suits, and it is what we ourselves desire also. And the best method of succeeding in it is . . . sometimes by the sacred tie of an oath. . . . [Also,] under our constitution, an oath is administered to all defendants. For the defendant is not admitted to state his defence until he has sworn that it is from a persuasion of the goodness of his own cause.").

<sup>51</sup> Silving, *supra* note 25, at 1336.

<sup>52</sup> TYLER, *supra* note 9, at 119, 126, 136. In making their oaths, Christians not only swore to God, but also to the angels and archangels, the saints, and the pope. *Id.* at 136.

<sup>53</sup> *Id.* at 121–22, 126.

<sup>54</sup> *See Leviticus* 19:11–12 (Catholic Study Bible) ("You shall not lie or speak falsely to one another. You shall not swear falsely by my name, thus profaning the name of your God. I am the LORD.").

<sup>55</sup> TYLER, *supra* note 9, at 151.

them, the Gospels were sacred to Christians and swearing upon them soon became the dominant practice in Christendom. Indeed, as time passed, written history scarcely mentions Christian oath ceremonies that did not involve swearing upon the Gospels, relics, an altar, or a cross, with physical punishment or excommunication being threatened for anyone who swore outside of the permitted forms.<sup>56</sup> The dominance of Christianity in the West led to the mainstreaming of rituals including oaths customs, which insulated them from secular interference and allowed for their further refinement irrespective of ephemeral civil authorities.

### *B. Oaths Outside of the Western Tradition*

Although the pedigree of American oaths is undoubtedly tied most strongly to Western and Judeo-Christian traditions, it is also worthwhile to consider exotic oath practices, for they can provide further insight and context.<sup>57</sup> As non-native religions, particularly Christianity and Islam, spread across Asia, Africa, and South America, indigenous oath forms were adopted, modified and subsumed. Many native oath modalities have nevertheless survived and are still used throughout the world today.

The contemporary oath practices of some African tribes mirror ancient rituals. Among the simplest forms, two litigants would seize an animal (a dog or fowl), hold it by its ends, and cut it in two with a machete, which was the fate awaiting any party who should swear falsely.<sup>58</sup> The *shafa*, a wrapping of sacred objects by specifically-chosen foliage, is commonly used by many African tribes as an oath taking artifact, such as by touching the *shafa* (to

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<sup>56</sup> *Id.* at 158.

<sup>57</sup> I seek here not to catalog each oath that has been discovered or analyzed by historians and anthropologists, but rather to provide a sampling of oaths outside of the Western tradition. This brief overview will not discuss Islamic oaths and beliefs, which is reserved for a more in-depth discussion in Part IV. It is important initially to emphasize the universality and ubiquity of oaths, as this Part can describe only some of the many cultures that utilize(d) distinct oath traditions. In her research, Professor Silving accounts for only three legal systems which never used or largely abolished oaths: Slavic culture, contemporary Swiss law, and Chinese law. Silving, *supra* note 25, at 1375–81. Her conclusions are dubious given the well-documented examples of “Chinese oaths” in American courts and elsewhere. Consider also John M. Roberts’ ethnographical survey of oaths, which catalogs the vast array of cultures and societies, particularly those of non-Western heritage, that utilize(d) oaths in their legal systems. See John M. Roberts, *Oaths, Autonomic Ordeals, and Power*, 67 AM. ANTHROPOLOGIST 186, 189–205 (1965). Suffice it to say, there exist few if any examples of legal systems that did not or do not utilize some form of oath.

<sup>58</sup> A.H.M. Kirk-Greene, *On Swearing. An Account of Some Judicial Oaths in Northern Nigeria*, 25 AFR.: J. INT’L AFR. INST. 43, 44 (1955) (as practiced by the Naga of Assam).

mark the solemnity), spilling animal's blood on it, or incanting the *shafa* to seize a liar.<sup>59</sup> Oaths are also sworn on nature: for example, the River Rhum for the Kopri; the Kamale mountain peak; or a marsh inhabited by the spirit Guti, which oath takers must traverse in the Guti ordeal.<sup>60</sup> In the absence of a designated artifact, most pagan tribes swear on a steel object, such as a spear or knife.<sup>61</sup> Many older African oath practices were mainstreamed as tribes increasingly interacted with each other, and as modern nation-states assumed a more direct and pervasive role in civil affairs.<sup>62</sup>

Many of the same themes are evident in Asian countries. For example, traditional Chinese oaths involve breaking a saucer; writing sacred characters on paper and setting it afire (signifying that the witness will too burn if his oath is false); ceremonially burning straw; and cutting off a chicken's head, also known as the "Chinese chicken oath," which appears to be among the most significant of Chinese oaths.<sup>63</sup> For Hindus, oaths often involved "the witness drinking holy water from the Ganges, and eating of the leaves of a sacred plant, the water and the leaves being both administered by a Brahmin" or on their holy books, the Shasters.<sup>64</sup> In Samoa, the mixture of divinely-blessed artifacts, immediate retribution, and swearing produced a common

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<sup>59</sup> *Id.* at 45–49.

<sup>60</sup> *Id.* at 45–46, 48 (explaining that for the Marghi, the Guti ordeal represents the most solemn form of an oath, so feared that litigants have been known to confess to perjury rather than undergo it). Common among African tribes are oaths connected to trials by ordeal, which of course were also found throughout Western history, a thorough discussion of which is beyond the scope of this Article. One example of such (that also provides an interesting anthropological glance into African culture) is the sasswood (or red water) ordeal, an extreme and often gruesome form of judicial oath outlawed in many places by government. The accused enters a circle of people with pots of liquid at the center. He invokes the name of God three times, asks for God's wrath if he is guilty, and drinks water that is so toxic that it reduces respiratory functions until breathing ceases. If the accused becomes nauseated, he is proclaimed innocent. If he loses self-control, he is proclaimed guilty and his body is cursed, stoned, often dragged, and repeatedly "lacerated" until death. If the accused escapes without injury, however, he is thought pure and his accusers are arraigned in the same ordeal. This ordeal was seldom administered in a fair manner. *Id.* at 51–52 (relying on J.L. WILSON, WESTERN AFRICA: ITS HISTORY, CONDITIONS, AND PROSPECTS 210–32 (1856)).

<sup>61</sup> Kirk-Greene, *supra* note 58, at 44–45.

<sup>62</sup> For a more contemporary discussion of the role of oaths in a "developed" African society, see Philip Durand, *Customary Oathing and the Legal Process in Kenya*, 14 J. AFR. L. 17 (1970).

<sup>63</sup> TYLER, *supra* note 9, at 165.

<sup>64</sup> *Id.* at 166 (noting also that different methods could be prescribed depending on one's caste, although such practices may have been muddled when imperial British judges instituted reforms). Other Indian oaths used more traditional methods of swearing on animals, such as the tiger or elephant, and the tail of a (sacred) cow. *Id.* at 168–69.



oath whereby the accused would lay his hand on the village's sacred stone, declaring "If I stole the thing, may I speedily die."<sup>65</sup>

Oaths were also used in ancient South and Latin American cultures. In Aztec society, which was renowned for its profound reverence for deities and societal organization, the speaker avowed to tell the truth by touching his finger to the ground and then his tongue while invoking the Sun and Earth deities.<sup>66</sup> Beyond their common function as a verifier of truth, witness oaths in highly developed and formal legal proceedings were widely employed prior to the Spanish Conquest, with death being the sole punishment for perjury.<sup>67</sup>

The forms of oaths permitted in American courtrooms provide another interesting window into non-Western cultures. From China comes the "chicken oath,"<sup>68</sup> "joss-stick burning" (whereby one takes a joss-stick in his hand and swears upon it),<sup>69</sup> and blowing out a candle signifying that if a witness lied he too would be "snuffed out."<sup>70</sup> A Japanese witness was allowed to swear an oath consistent with his non-Christian religious beliefs.<sup>71</sup> And, from Nigeria comes the practice of swearing on the tribal icon Akolmologoba, who would destroy a liar within seventy-seven days after

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<sup>65</sup> Kirk-Greene, *supra* note 58, at 44.

<sup>66</sup> Zelia Nuttall, *Ancient Mexican Superstitions*, 10 J. AM. FOLKLORE 265, 271 (1897) (noting that this practice, although odd to Spanish citizens who observed it, was said to be a "safe and reliable test of the truth" of the assertion made). Tyler recalls precisely the same oath from a separate correspondence, thus providing additional weight that this is not only an authoritative account of this oath, but also that this oath was in wide and prominent use in Mexican society. See TYLER, *supra* note 9, at 173–74.

<sup>67</sup> R.B. Gaither, *Government and Jurisprudence of the Mexicans Before the Spanish Conquest*, 6 VA. L. REV. 422, 428, 433–34 (1920).

<sup>68</sup> *Goon Bow v. People*, 43 N.E. 593, 594 (Ill. 1896) (permitting Chinese witnesses to swear the Chinese chicken oath in addition to the regular oath after statements by defense counsel that it was the only way to ensure truthful testimony from the witnesses).

<sup>69</sup> *State v. Chyo Chiagk*, 4 S.W. 704, 708–09 (Mo. 1887) (holding that where the statute permits every witness be sworn in the manner most binding on his conscience and every non-Christian shall be sworn in the method prescribed by their religion, it was an error to compel a Chinese interpreter to be sworn in the usual way when he states that the "joss-stick burning is the true oath among the Chinese").

<sup>70</sup> *State v. Gin Pon*, 47 P. 961, 962–63 (Wash. 1897) (permitting oath taking performed pursuant "to the custom and religion of their country").

<sup>71</sup> Patrik Jonsson, *Raise Your Right Hand And Swear To Tell The Truth... On The Koran?*, CHRISTIAN SCI. MONITOR, July 20, 2005, at 2 ("Mochitura Hashimoto, the Japanese submarine commander who testified in the court martial of a US Navy captain in 1945, was allowed by a military tribunal to swear on his beliefs of Shinto, the ancient religion of Japan.").

taking a false oath.<sup>72</sup> In times past, some American courts seemed especially receptive to such exotic oath practices, perhaps because the importance of the religious aspects of oaths and the influence of common law rules that allowed for a broad accommodation of diverse oath forms.<sup>73</sup>

As this historical survey demonstrates, oaths have evolved over time and across cultures to promote and safeguard man's universal desire for the truth. And, as is evident from the earliest biblical accounts to reports of African tribal ceremonies, disparate cultures have developed diverse oath forms, with a common purpose of tempering egoistic self-interest and other base motivations that undermine the truth, in order to better achieve justice. Although the ceremonial modalities may vary, a divine invocation has emerged as among the most common and effective approaches for obtaining the truth. And, regardless of whether the religion is centered upon nature, pagan rituals, or highly developed and enduring monotheistic traditions like Judaism and Christianity, its artifacts are often employed to facilitate truthful testimony.

As time passed and societies "developed," their legal oath practices became more formalized, standardized, and secularized.<sup>74</sup> Simultaneously, as tensions grew between pagans and Christians with the Christianization of Rome, likewise friction increased among religious sects and societies as some persons were excluded from full participation in legal process and civil life because their religious beliefs (or lack of belief) disqualified them from taking oaths. The analysis now shifts to the history of the development of oaths in the West, with particular emphasis on English common law and American jurisprudence.

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<sup>72</sup> *Fagbemi v. State*, 778 S.W.2d 119, 120 (Tex. App. 1989) (allowing a Nigerian witness to swear his tribal oath and a standard oath, as well as the standard oath in the presence of the jury).

<sup>73</sup> These common law practices and others will be discussed in greater detail in Part III. Despite the prevalence of the common law rule and the multitude of religions and ethnicities present in the American melting pot, however, such practices were not generally memorialized unless they were litigated on appeal or otherwise discussed in a published opinion, as these examples were.

<sup>74</sup> See Richard S. Willen, *Religion and the Law: The Secularization of Testimonial Procedures*, 44 SOC. ANALYSIS 53 (1983) (arguing that the rationalization and continuing utility of the testimonial oath underscores changes in cultural meaning attached to legal processes). Willen also recognized that even as change occurred, "[t]raditional oath-taking as well as related testimonial principles set limits and gave direction to the new testimonial procedures developed" because society simply does not abandon its traditional norms in the face of change. *Id.* at 59.

### III. THE OATH AND AFFIRMATION IN AMERICA: HISTORICAL DEVELOPMENT AND CONTEMPORARY PRACTICES

#### A. *The Development and Status of Oaths in England*

The English judicial system and its common law tradition have had the most direct and pervasive influence on American oath practices. After the fall of the Western Roman Empire in the fifth century, no secular government exercised hegemony in the West. A central ecclesiastical authority, however, did ascend: the Christian Church. In short order, the Church rose within this geopolitical context to become the dominant religion (and power) in the region throughout the Middle Ages. In England, Christianity expanded through monasticism and missionary work—by, among others, St. Augustine and St. Patrick—until it superseded local pagan rituals.<sup>75</sup> The new, pervasive Christian orthodoxy helped impose a rather narrow view of who could swear oaths and what practices could be used. As oaths gained status in civil life, they continued to be shaped by Christianity—to the point of institutionalization in England—until an eighteenth-century court mandated greater multicultural tolerance with repercussions that continue to the present day.

The ubiquitous use of judicial oaths for witnesses in the West dates back to early Germanic law,<sup>76</sup> which itself was heavily influenced by post-Roman Christianity and the modes for taking oaths that had contemporaneously developed.<sup>77</sup> Like earlier Jewish decisory oaths, Germanic oaths to the Christian God helped establish one's claim or case as true, predicated on the prevailing belief that "such an appeal could not be falsely made with impunity."<sup>78</sup> The use of decisory oaths continued under early English common law.<sup>79</sup> The foundational premise for oaths had already begun to

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<sup>75</sup> See generally HENRY MAYR-HARTING, *THE COMING OF CHRISTIANITY TO ANGLO-SAXON ENGLAND* (3d ed. 1991) (noting in particular that England's tribes had abandoned paganism by the mid-seventh century, which allowed the Church to continue its ascent throughout the medieval period).

<sup>76</sup> 3 JOHN HENRY WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 1815, at 2348 (1904); see also Silving, *supra* note 25, at 1340–43, 1361.

<sup>77</sup> Roman legal thought, as influenced by the Roman Catholic Church, played an important role in shaping English law as well as the law of continental Europe. The historical record reflects, for example, the Church's influence in the drafting of the Magna Carta in 1215. See generally R.H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297 (1999) (discussing the origins of the Magna Carta).

<sup>78</sup> WIGMORE, *supra* note 76, § 1815, at 2348; see also Silving, *supra* note 25, at 1345.

<sup>79</sup> See, e.g., 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 341–42 (reprint William S. Hein & Co., Inc. 1992). Discussing the "wager of law"

change, however, from the divine-interventionist belief that to swear falsely would summon (perhaps immediate) supernatural punishment, to an understanding that an oath's efficacy rested on its capacity to link the conscience of man to God.<sup>80</sup> Reflecting both this development and the growing standardization of oaths throughout Europe, Emperor Joseph II of Austria decreed the formula "[s]o verily help me God," which was widely adopted across the continent.<sup>81</sup> By this time oaths were established as a routine practice, which was regularly demanded by courts rather than opposing parties.<sup>82</sup> Only much later, when oaths were firmly based on appeals to conscience rather than fear of divine intervention, and when the courts became more tolerant of diverse religious beliefs, would their decisory quality be fully and finally abandoned. Until then, Christians would enjoy a favored status in the oath taking regime, which was dominated by Christian beliefs and the use of Christian artifacts.

The earliest English commentators confirm the impact of Christian influences in oath taking practices—and civil government more generally—by recognizing both the elevated status of the law in society and the Bible's influence in shaping the law.<sup>83</sup> Three methods were commonly used to resolve difficult cases which had "defied other forms of decision or settlement: ordeal, battle, [and] oath."<sup>84</sup> Although all these modes for

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species of trial, Blackstone explains that "our ancestors considered, that there were many cases where an innocent man, of good credit, might be overbourne by a multitude of false witnesses; and therefore established this species of trial, by the oath of the defendant himself: for if he will absolutely swear himself not chargeable, and appears to be a person of reputation, he shall go free and forever acquitted of the debt, or other cause of action." *Id.* Blackstone further observes that decisory oaths had its roots in "the Roman Empire" and can be traced back—as is done in Part II of this Article—to "Mosaical law." *Id.* at 342. He also notes, however, that decisory oaths were not available to defendants charged with a public crime of "force and violence." *Id.* at 346.

<sup>80</sup> As Greenleaf explains, "[t]he design of the oath is not to call the attention of God to man; but the attention of man to God – not to call on Him to punish the wrong-doer; but on man to remember that He will." 1 SIMON GREENLEAF, EVIDENCE § 364, at 504 (16th ed. 1899).

<sup>81</sup> Silving, *supra* note 25, at 1354.

<sup>82</sup> *Id.* at 1341.

<sup>83</sup> JOHN HUDSON, THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA 2–3 (1996).

<sup>84</sup> *Id.* at 72. The longstanding concept of oath-helpers was particularly common in the Anglo-Saxon law. Anglo-Saxon oaths of exculpation could be taken by "the party alone or together with other 'oath-helpers.'" *Id.* at 76. While no case law exists from this time, the written laws suggest that the "party bearing proof often had to make an oath . . . and that support from others was particularly necessary for men of ill-repute. . . . The oath was a re-affirmation of the defendant's original denial, in words such as 'by the Lord, the oath which N. has sworn is clean and unperjured' . . . [choosing to

procuring the truth interjected the supernatural into judicial proceedings, the oath in particular relied on Christian practices insofar as “jurors and witnesses must be sworn according to the Christian method upon the Holy Scriptures.”<sup>85</sup>

Henry of Bracton produced the first comprehensive study of the English common law in his thirteenth century treatise, *On the Laws and Customs of England*. In his opus, Bracton reinforces the importance of oaths by referring to its three companions: truth, justice, and judgment, assigning the first two to jurors and the third to judges.<sup>86</sup> Bracton describes the oath as providing “[r]ecourse to a greater council,” which he illustrates by referring to “a certain oath which is tendered by a party to a party in judgment or by a judge to a party, in which there is no conviction. For it is sufficient for them to wait for the vengeance of God.”<sup>87</sup> Bracton charges jurors, judges, and other decision-makers to produce just and truthful outcomes,<sup>88</sup> and he offers

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swear on behalf of another oftentimes involved protecting one’s own interest that risked exposure, thus] self-interest as well as fear of God might ensure that justice was done in cases of compurgation.” *Id.* at 76–77; *see also* 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 72 (reprint William S. Hein & Co., Inc. 1976) (1883) (discussing the relative value of people of different ranks among Anglo-Saxons when swearing oaths and in ordeals, and thus the “numbers game” which had to be played when recruiting oath-helpers).

<sup>85</sup> White, *supra* note 10, at 387 (citing 3 HENRY OF BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 197 (Travers Twiss trans., 1880) (n.d.)).

<sup>86</sup> 3 HENRY OF BRACON, *supra* note 85, at 197. In support, Bracton recites a multitude of early English oath practices. *Id.*

<sup>87</sup> 4 *id.* at 407.

<sup>88</sup> Bracton describes the process of swearing jurors thusly: “when the parties have consented to the jurors, then let the assise proceed, and they ought immediately to swear in this form, and the first in these words: Hear this, ye justices, that I will declare the truth of this assise, and of the tenement of which I have made a view under the precept of the lord the king.” 3 *id.* at 187. He then describes the assises’ oath: “‘and I will for nothing omit to say the truth, so may God me help and these hallowed things.’ And afterwards let all the other jurors swear in order, each by himself, and in this manner: ‘Such oath as he our said foreman has sworn, I will keep on my part, so help me God and these hallowed things.’” *Id.* Explaining the procedure in homicide cases, Bracton states that the oath is necessary

so that the inquisition may be free from all suspicion. Twelve jurors therefore being present and four townspeople, each of the townspeople or all together, each holding up his hand, shall swear in these words. Hear this, ye justices, that we will speak the truth concerning those things, which ye shall require from us on the part of the lord the king, and for nothing will we omit to speak the truth, so God us help &c. . . . because there follows accordingly and differently his condemnation or delivery, and therefore we say to you on the faith in which you are bound to God, and in virtue of the oath, which you have taken, that you cause us to know the truth thereof, and omit not from fear, or love, or hatred, but having God only before your eyes, to

recourse to defendants who are ordered to pay substantial damages by requiring jurors to swear an oath that their decision was just.<sup>89</sup>

Although more than 350 years and many important developments in the law separate Bracton and Lord Edward Coke, no other writer made as significant or authoritative contributions to the common law as the latter.<sup>90</sup> Like commentators who came before him, Coke believed in the supreme importance of the Christian oath, explaining that a witness is bound “by his oath, which is so sacred, as he calleth Almighty God (who is truth itself and cannot be deceived, and hath knowledge of the secrets of the heart) to witness that which he shall depose.”<sup>91</sup> Coke forcefully supported the then-dominant view in English law that a “heathen” was not to be believed and thus only Christian oaths sworn on the Gospels (to avoid idolatry) should be accepted in English courts.<sup>92</sup> Coke defined the basic question as whether an

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declare to us, whether he is guilty of that which is imputed to him, or of other misdeeds.

2 *id.* at 457.

<sup>89</sup> 4 *id.* at 407 (“[I]f the jurors have pressed too heavily on the disseysor with damages . . . an oath of such kind shall be administered by the judge to the jurors, as if their finding was dubious or obscure.”).

<sup>90</sup> See John Marshall Gest, *The Writings of Sir Edward Coke*, 18 YALE L.J. 504, 506 (1909) (“Coke as a law writer was as far superior in importance and merit to his predecessors, at least if we except Bracton, as the Elizabethan writers in general were superior to those whom they succeeded, and, as the great Elizabethans fixed the standard of our English tongue, so Coke established the common law on its firm foundation.”). Even Coke’s most ardent and vocal critics, such as Lord Campbell, praised the technical merit and overall value of Coke’s writing, acknowledging Coke’s “full mind” and “mastery over his subject,” which enabled him to compose works that contained “the whole common law of England as it then existed.” *Id.* at 514.

<sup>91</sup> EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; CONCERNING THE JURISDICTION OF COURTS* 278 (The Lawbook Exchange, Ltd., 2d prtg. 2002). The works of Coke and Blackstone, although written in English, do not always use modern spelling. Some of the original spellings have been changed in this Article to conform to contemporary usage, e.g. “fwear” to “swear” or “infidell” to “infidel.”

<sup>92</sup> White, *supra* note 10, at 387. Jews were the one exception to this rule. See, e.g., *Robeley v. Langston*, (1668) 84 Eng. Rep. 196, 2 KEB. 314 (where because the witnesses were Jews, the Chief Justice swore them upon the Old Testament). Under the common law formula, Jews were candidates for exclusion since they could not in good faith swear upon the Christian New Testament, a proposition which was famously promulgated by Lord Coke but ultimately rejected by the common law. Recognizing a common heritage and shared faith in the same God, Jews were allowed to testify as witnesses. This reasoning was adopted on several occasions, including as a supporting rationale for the opinion in *Omychund v. Barker*, (1744) 26 Eng. Rep. 15 (K.B.) (in differentiating between “infidels” and Jews even though both were non-Christian, the court explained “for they [Jews] believe a God, just in the same manner the Christians do; and the Old Testament is as much the *evangelium* to them, as the New is to us; and therefore widely

“infidel or pagan prince may swear in the case by false gods, seeing he thereby offends the true God by giving divine worship to false gods;” he responded that if “a Christian should any way induce another to swear by them, herein he should grievously sin.”<sup>93</sup> Christian exclusivity was a logical consequence of this thinking, and thus only Christians could serve as jurors or be sworn as witnesses under early English common law.

Equally as important as who could testify or serve as a juror, the development of English oath practices helped formalize the prerequisite that witness testimony must be presented under oath<sup>94</sup> to jurors who likewise took an oath. Sir James Stephen addresses the *ex officio* witness oath, “by which persons who took it swore to make true answer to all such questions as should be demanded of him.”<sup>95</sup> This form was used in the various English courts but not without criticism.<sup>96</sup> Jurors routinely took oaths that included the phrase “so help me God and the Saints.”<sup>97</sup> Accordingly, although the forms of oaths, the rules surrounding them, and even their significance varied among societies, the institution of the oath and its centrality to the judicial system had by now become firmly fixed.

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different from the infidel, who has no notion of the true God.” (A more in-depth discussion of *Omychund* will soon follow.)). This distinction was generally recognized throughout continental Europe, although some countries did require Jews to swear on the Bible in order to present evidence. TYLER, *supra* note 9, at 93–95. Professor White later notes the fallaciousness in arguing that only Christians can be sworn: essentially, a witness relates evidence under the sanctity of a belief *on his part* in a superior power, and thus the witness—regardless of whether he is Christian—is sworn according to his own subjective religious belief. White, therefore, ascribes this custom to two other culprits: a judicial system running on the pre-existing practices of using Christian oaths coupled with a general feeling of Christian superiority over non-Christians. White, *supra* note 10, at 389.

<sup>93</sup> COKE, *supra* note 91, at 155 (relying on St. Augustine as authority for his position).

<sup>94</sup> White, *supra* note 10, at 388–89 (explaining that the oath was thought to be “the strongest possible guarantee of truth”).

<sup>95</sup> 1 STEPHEN, *supra* note 84, at 338, 342.

<sup>96</sup> *Id.* at 342. The *ex officio* oath “was understood to be, and was, used as an oath to speak the truth on the matters objected against the defendant—an oath, in short to accuse oneself. It was vehemently contented by those who found themselves pressed by this oath that it was against the law of God, and the law of nature. . . . In this, I think, as in most other discussions of the kind, the real truth was that those who disliked the oath had usually done the things of which they were accused, and which they regarded as meritorious actions, though their judges regarded them as crimes.” *Id.* The *ex officio* oath was eventually outlawed. See 2 STEPHEN, *supra* note 84, at 220; see also 3 BLACKSTONE, *supra* note 79, 100–01, 447) (marking a transition in legal theory from harsh rules to protections against self-incrimination, or, in other words, balancing a desire to expose the truth against respect for human dignity).

<sup>97</sup> White, *supra* note 10, at 387.

*Omychund v. Barker* marks a major change to the common law and presages modern Western oath practices.<sup>98</sup> *Omychund* set aside the extant common law practice, endorsed by Coke, which allowed only Christian oaths sworn by Christians, so that *any believer in a superior being may be sworn on whatever oath is most binding on his conscience*.<sup>99</sup> Lord Chief Justice Willes opined that limiting the oath to Christians “is contrary to religion, common sense, and common humanity; and I think the devils themselves . . . could not have suggested any thing worse.”<sup>100</sup> Unanimous in their judgment, the Justices’ opinions recognize many of the historical truths about oaths previously discussed in this Article. In particular, they acknowledge that no single oath form has been prescribed throughout history, and that oaths were enhanced by but did not originate with Christianity.<sup>101</sup> Accordingly, no

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<sup>98</sup> *Omychund v. Barker*, (1744) 26 Eng. Rep. 15 (K.B.). The history of oaths reflects their gradual development and melding of oath traditions. *Omychund* represents perhaps the one notable exception to this process of incremental change. The *Omychund* reforms did not emerge from a desire to correct a perceived injustice but rather as a response to the practical challenges facing English courts occasioned by greater international (and thus inter-cultural) trading. At issue in *Omychund* was whether the Gentoo oath practices of India should be incorporated into the strictly structured English system, in connection with a trade lawsuit involving Indian witnesses. As Aquinas once observed, “an oath is required as a remedy to a defect, namely, some man’s lack of belief in another man.” AQUINAS, *supra* note 9, II-II, Q. 89, Art. 5. The defect of distrust was perhaps most evident in the asymmetric relationship between the colonizer and the colonized.

<sup>99</sup> Professor Wigmore succinctly captures the essence and logic of the common law rule:

Such being the essentials of the belief regarded as a security for trustworthiness, it follows that the *form* of the administration of the oath is *immaterial*, provided that it involves, in the mind of the witness, the bringing to bear of this apprehension of punishment. The oath’s efficacy may depend upon both the general name and nature of the witness’ faith and formula of words or ceremonies which he considers as binding, *i.e.* as subjecting him to the risk of punishment. But it cannot matter what tenets of theological belief or what ecclesiastical organization he adheres to, provided the above essentials are fulfilled; and it *cannot matter what words or ceremonies are used* in imposing the oath, provided he recognizes them as binding by his belief. Therefore *any* form suffices which actually binds the particular witness’ conscience, even if it varies from the orthodox form.

WIGMORE, *supra* note 76, § 1818, at 2352 (emphasis in original).

<sup>100</sup> *Omychund*, 26 Eng. Rep. at 30.

<sup>101</sup> *Id.* at 42, 45, 46 (opinions of Lord Chief Baron, Lord Chief Justice Willes, and Lord Chief Justice Lee, respectively) (observing “oaths are as old as the creation” and “universally established”); *see also* *Ramskissenseat v. Barker*, 26 Eng. Rep. 13, 13–14 (1739) (an earlier proceeding from the same case, holding that the “general rule is, that all persons who believe a God, are capable of an oath; and what is universally understood by an oath, is, *that the person who takes it, imprecates the vengeance of God upon him, if the oath he takes is false*”).



specific outward act was deemed essential for a valid oath, “for this was always a matter of liberty, and several nations have used several rites and ceremonies in their oaths . . . there is but one general rule of evidence, *the best that the nature of the case will admit*.”<sup>102</sup> Finally, because evidence cannot be admitted without an oath acting as a guarantor of truth, “it would be absurd for [a non-Christian] to swear according to the Christian oath, which he does not believe; and therefore, out of necessity, he must be allowed to swear according to his own notion of an oath.”<sup>103</sup>

Sir William Blackstone’s *Commentaries on the Laws of England*, published in 1765, was a singularly important source for understanding the history and legacy of English oaths after *Omychund*.<sup>104</sup> Although it is hardly revolutionary with respect to oaths, Blackstone’s *Commentaries* addresses several topics relating to them, including the manner in which all criminal witnesses are sworn. The “ancient and commonly-received practice” at the time of Queens Mary I (1516–1558) and Elizabeth I (1533–1603) precluded defendants from calling witnesses in capital cases, until the courts “grew so heartily ashamed of a doctrine so unreasonable and oppressive that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath; the consequences of which still was, that the jury gave less credit to the prisoner’s evidence, than to that produced by the crown.”<sup>105</sup> It was not until the reign of Queen Anne (1665–1714) that “in all cases of treason and felony, all witnesses *for* the prisoner should be examined upon

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<sup>102</sup> *Omychund*, 26 Eng. Rep. at 33 (opinion of Lord Chancellor Hardwicke) (emphasis in original).

<sup>103</sup> *Id.* at 31 (opinion of Lord Chief Justice Willes).

<sup>104</sup> Blackstone’s *Commentaries* are widely recognized as being both influential in England and the preeminent source of English law in early America. See THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 287 (Little, Brown & Co. 5th ed. 1956) (1929). Justice Scalia has described Blackstone as “the Framers’ accepted authority on English law and the English Constitution.” *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part). As future-Chief Justice Harlan Stone once noted, Blackstone (along with Coke) found the common law system to be “the perfection of reason”; they would undoubtedly be pleased to learn of their far-reaching impact, often through Blackstone’s *Commentaries*, on early American legal philosophy, which looked to the “past as the means, not only of securing a needful continuity of legal doctrine, but as affording the measure of experience which is to guide the next step in the development of the law.” Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 11–12 (1936).

<sup>105</sup> 4 BLACKSTONE, *supra* note 79, at 359–60. Blackstone attributes the discrepant treatment of prosecution and defense witnesses to “ancient” practices. Although the literature is otherwise silent on this point, one can assume, based on Blackstone’s account, that such distinctions among witnesses were widely recognized, at least among the progenitors of the English common law.

oath, in like manner as the witnesses *against* him.”<sup>106</sup> These changes reflect the increasing status and inclusivity of oaths in English (and thus American) courts.

Although Blackstone, unlike Coke and others before him, provides scarce examples of the words that composed an oath, he does offer extensive commentary concerning their usage and purposes. In an Aquinas-like fashion, Blackstone explains that the “oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the *whole* truth; so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not.”<sup>107</sup> He also recognizes the ubiquity of oaths throughout the legal system, for both private and public wrongs,<sup>108</sup> and notes their particular importance in the discovery process.<sup>109</sup>

Blackstone also observes, however, that the oath practices in the post-*Omychund* England continued to exclude atheists and other non-believers.<sup>110</sup>

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<sup>106</sup> 4 *id.* at 360 (summarizing the statute that leveled the playing field: Witnesses on Trial for Treason, etc. Act, 1702, 1 Anne, s. 2, c. 9) (emphasis in original); see also 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN § 29, at 434 (1726).

<sup>107</sup> 3 BLACKSTONE, *supra* note 79, at 372; see also *Dickson v. Pinch*, 11 U.C.C.P. 146, 157 (1861).

<sup>108</sup> See, e.g., 3 BLACKSTONE, *supra* note 79, at 374 (noting that, although “the oath of jurors to find according to their evidence was construed to be,” they may consider outside knowledge without offending their oaths); *id.* at 437 (discussing oaths in courts of equity as a means by which the court could appeal to the “conscience” of the parties in order to expose the “truth of the transaction”); *id.* at 80–83 (describing oaths used in certain special and private courts that “vary from the course of common law,” for instance, where the “county-clerk and twelve suitors” shall summarily examine the parties and witnesses while under oath, even though otherwise formal proceedings were not used); *id.* at 345 (noting that children under the age of 21 cannot give evidence because “he cannot be admitted to his oath”); 4 *id.* at 137–38 (commenting on the importance of “lawful oath[s]” that were properly administered in prosecuting perjury); *id.* at 213 (noting that a rape victim may be admitted as a competent witness when her evidence is given under oath).

<sup>109</sup> See 3 *id.* at 446–47 (discussing oaths in the discovery process through, especially in an answer to the plaintiff’s complaint); *id.* at 382 (In his description of an alternate means of case resolution that does not include a jury’s verdict, Blackstone laments that the “want of a complete discovery by the oath of the parties” is one of the “principal defects” of this system.).

<sup>110</sup> 3 BLACKSTONE, *supra* note 79, at 360–70; *Omychund*, 26 Eng. Rep. at 31 (As Lord Chief Justice Willes explained, “[t]hough I have shewn that an Infidel in general cannot be excluded from being a witness, and though I am of opinion that infidels who believe a God, and future rewards and punishments in the other world, may be witnesses; yet I am as clearly of opinion, that if they do not believe a God, or future rewards and punishments, they ought not to be admitted as witnesses.”). As discussed later, this sentiment continued as the standard for years following *Omychund*, and it was not put to rest in America until well into the twentieth century. For example, Rapalje explained that

These persons were judged to lack the capacity to take an oath because their invocation of God presumably would have no effect on their consciences. Thus, while *Omychund* allowed non-Christian oath practices and traditions in English (and later American) courtrooms, it adhered to the principle that an oath must be predicated on a belief in a higher power and a responsibility to answer to a divine entity should one's oath be false. The juror's oath was thought to be so indispensable that a refusal to take it would result in a contempt citation and the imposition of a fine.<sup>111</sup> This understanding was imported to America, where it would be retained for decades. Likewise, the common law practice of allowing a witness to be sworn by whatever means were most binding on his conscience would be brought to the New World.

### B. Oaths in America: From the Founding Fathers to the Federal Rules

English common law was the law of colonial America.<sup>112</sup> With some modifications, the common law was "assumed by the courts of justice . . . or declared by statute" as the law of every original colonial state, and it was specifically adopted as "one entire system" by Massachusetts, New York,

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an exclusion of this sort was commonly categorized as a "defect" of "religious belief" or "religious sentiment," which makes one "insensible to the obligation of the oath" and thus unfit to take an oath or participate in the legal process. STEWART RAPALJE, A TREATISE ON THE LAW OF WITNESSES 11–12 (1887).

<sup>111</sup> 2 HAWKINS, *supra* note 106, § 15, at 146.

<sup>112</sup> Justice Story is among the many scholars and commentators who have noted that the "whole structure" of American "jurisprudence stands upon the original foundations of the common law." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 157, at 110 (5th ed., William S. Hein & Co., Inc. 1994) (1891). In his *Commentaries*, Kent defines the common law as "those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature." 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 471 (12th ed., O.W. Holmes, Jr. ed., 1873) (1826). Harlan Stone described the "distinguishing characteristics" of the common law as "its development of law by a system of judicial precedent [which is the heart of Kent's definition], its use of the jury to decide issues of fact, and its all-pervading doctrine of the supremacy of law . . . [that government and individuals alike] must conform to legal rules developed and applied by courts." Stone, *supra* note 104, at 5. Such a broad understanding of the common law is fitting given the scholarly debate over the precedential role it played in each of the states both before and after the American Revolution. One commentator describes the question as such: did the adoption of the common law have the effect of making the decisions of different states uniform (as binding authority or *stare decisis*), or did its adoption provide guidance as a "scientific system of law" that each state can shape separately and distinctly (thus, persuasive authority)? Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6, *passim* (1910) (finding that the latter more accurately describes the role of the common law in early America). See also Stone, *supra*, at 10–13.

New Jersey, and Maryland via their constitutions.<sup>113</sup> The overtly religious character of the Colonies and early America, as well as the blending of church and state during this period, was also influential inasmuch as in “some of the colonies the law of God was preferred to the common law.”<sup>114</sup> It should come as no surprise, then, that the common law’s oath requirement—the religiously-oriented oath with the accompanying witness competency requirements—was embraced first in the Colonies and then in the States. Later, when America established its first laws and legal procedures regarding oaths, it continued to borrow extensively from its English forbearers.

The value of the common law in early America, and thus common law traditions such as the oath “was not [derived], for the most part, [from] an appeal to the decisions of English courts in matters of private rights, but [rather as a system used to protect] . . . matters affecting the personal liberty and *political privileges of the citizens*.”<sup>115</sup> The “political privilege” or civic responsibility of proffering testimony, serving as a juror, holding public office, and the like all required oaths, and therefore oath practices and traditions were immediately needed and adopted.

Oaths attained prominence in the United States Constitution through their use in inaugurating some of the most significant government obligations.<sup>116</sup> Although the Constitution does not prescribe it, George

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<sup>113</sup> 1 KENT, *supra* note 112, at 472–73.

<sup>114</sup> Pope, *supra* note 112, at 16–17; see also Harry S. Stout, *Word and Order in Colonial New England*, in *THE BIBLE IN AMERICA* 19, *passim* (Nathan O. Hatch & Mark A. Noll eds., 1982) (“Throughout the colonial period the vernacular Bible interpreted by a learned ministry remained the mainstay of New England Culture. . . . Despite divisions between the people and their ministers . . . all shared in an unbroken allegiance to the Bible as the inspired Word of God and infallible rule for all issues of life.”); FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* (2003) (discussing the role of religion in colonial America and the particular religious heritage from England).

<sup>115</sup> Pope, *supra* note 112, at 16 (emphasis added).

<sup>116</sup> The United States Constitution and its Amendments incorporate oath requirements, albeit not testimonial or evidentiary, at four places: art. I, § 3, cl. 6 (Senators “shall be on Oath or Affirmation” when sitting for the purpose of impeachment); art. II, § 1, cl. 8 (the President shall take the enumerated oath or affirmation before entering office); art. VI, cl. 3 (Senators, Representatives, members of State legislatures, and all federal and State executive and judicial officers “shall be bound by Oath or Affirmation, to support this Constitution”); amend. IV (requiring an oath or affirmation to obtain a warrant). See also amend. XIV, § 3 (prohibiting a person from serving in an elected office articulated in Article VI when “having previously taken an oath” of such an office and participated in an insurrection, rebellion, or “given aid or comfort to the enemies thereof”). See generally 2 STORY, *supra* note 112, §§ 1843–46, at 613–15 (discussing the importance of oaths and thus oath requirements in the

Washington's famous addition of the phrase "so help me God" at the conclusion of the Presidential oath of office initiated an overtly religious tradition that continues to this day.<sup>117</sup> As previously noted, Washington was not the first oath taker to invoke God, but his status as the original American hero may explain the addition of a divine invocation to all types of American oaths. Judicial oaths (both testimonial and otherwise) continued to be governed by the post-*Omychund* common law rule, which was reinforced by the preeminent contemporary philosophers.<sup>118</sup>

The usual form of oaths for criminal cases, upon which American oaths were based, provided that "[t]he evidence you shall give between our

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Constitution); PAULEY, *supra* note 32 (providing a thorough discussion of the Presidential oath of office and developments in oaths of office). Interestingly, one of the few changes to the United States Constitution made by the Confederate States of America was the addition in their preamble of an explicit reference to God. James E. Pfander, *So Help Me God: Religion And Presidential Oath-Taking*, 16 CONST. COMMENT. 549, 551 (1999).

<sup>117</sup> PAULEY, *supra* note 32, at 108–09; *see also* Pfander, *supra* note 116 (arguing that the Constitution's conspicuous omission of any reference to God, particularly in the presidential oath, was likely a deliberate attempt to refrain from creating a religious test for office, and that without Washington's addition some of America's ceremonies may be vastly different today).

<sup>118</sup> John Locke, for one, supported the common law rule. Although Locke was not an American, his influence on the founding fathers (like that of the Enlightenment philosophers in general) is well-documented. Commenting on atheists and their ability to partake in political institutions, Locke agreed with the common law rule and the necessity of the oath's religious component to society, declaring that those people

are not at all to be tolerated who deny the being of a God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all; besides, also, all those that by their atheism undermine and destroy all religion, can have no pretence of religion whereupon to challenge the privilege of toleration.

JOHN LOCKE, A LETTER CONCERNING TOLERATION 32 (William Popple trans., Kessinger Publishing 2004) (1689); *see also* JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF JOHN LOCKE'S POLITICAL THOUGHT 217–43 (2002) (explaining how Locke viewed divine sanctions as key to the law, how oaths—which ensure and remind the individual of sanctions—lend stability to human affairs, and how alternatives to oaths and traditional forms of hierarchy are insufficient to support social cohesion). Locke restates the overriding importance of oaths and what they represent, even to the rulers of a society, in his infamous *Second Treatise*, originally published the same year: "No body, no power, can exempt them [the "princes"] from the obligations of that eternal law. Those are so great and so strong in the case of promises that omnipotency itself can be tied by them. Grants, promises, and oaths, are bonds that hold the Almighty." LOCKE, SECOND TREATISE, *supra* note 15, § 195, at 89.

sovereign lord the king and the prisoner at the bar shall be the truth, the whole truth, and nothing but the truth, So help you God!'; upon which the witness kisses the book."<sup>119</sup> In civil cases, the form varied slightly: "The evidence that you shall give to the Court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth; So help you God!"<sup>120</sup> The profound religious character of the time informed early American practices, and given this milieu, oath forms that included Christian preferences were readily accepted in the new republic.<sup>121</sup> Indeed, oaths were

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<sup>119</sup> JOSEPH CHITTY, CRIMINAL LAW 616 (4th American ed., 1841). Professor Wigmore noted, in 1904, that the "custom of kissing the Book is now coming to be generally recognized as both repulsive and unsanitary; celluloid covers are sometimes provided. But it should be clearly understood that the ceremony of kissing is for most persons a wholly unessential feature." WIGMORE, *supra* note 76, § 1818, at 2353 n.3 (citing 20 Montreal Legal News 274).

<sup>120</sup> WIGMORE, *supra* note 76, § 1818, at 2353.

<sup>121</sup> It is appropriate to pause and consider the religious nature of America at its founding. The political revisionism in contemporary times portrays early America as apathetic to religious belief and hostile to religious expression in the public square, as characterized by the absolutist "wall of separation." It also helps explain a trend of increasingly secular oath taking in America. Quite to the contrary, any objective study of early America reveals that the country was founded with Christian principles in mind, and these beliefs helped inform the establishment of American political and civil institutions. In his *Commentaries*, Justice Story describes this sentiment:

In fact, every American colony, from its foundation down to the revolution, with the exception of Rhode Island, if, indeed, that state be an exception, did openly, by the whole course of its laws and institutions, support and sustain, in some form the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the states down to the present period, without the slightest suspicion that it was against the principles of public law or republican liberty. (citation omitted). Indeed, in a republic, there would seem to be a peculiar propriety in viewing the Christian religion as the great basis on which it must rest its support and permanence, if it be, what it has ever been deemed by its truest friends to be, the religion of liberty. . . . But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men or to punish them for worshipping God in the manner which they believe their accountability to him requires.

2 STORY, *supra* note 112, §§ 1873–76, at 629–31. Chief Justice John Marshall similarly observed that the "American population is entirely Christian, & with us, Christianity & Religion is identified. It would be strange, indeed, if with such a people, our institutions did not presuppose Christianity, & did not often refer to it, & exhibit relations with it." Letter from John Marshall, Chief Justice, United States Supreme Court to Jasper Adams (May 9, 1833), *quoted in* DANIEL DRIESBACH, RELIGION AND POLITICS IN THE EARLY REPUBLIC: JASPER ADAMS AND THE CHURCH-STATE DEBATE 113 (1996). These characterizations of early America are consistent with those of other founding fathers. *See also* Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An*

held in such high regard by the Framers that a bill regarding oaths of office was the first legislation passed by the inaugural Congress and signed by President Washington.<sup>122</sup>

The history of oaths in America after its founding, like that of American law generally at this time, is defined by the transition from appropriated English common law to distinctively American jurisprudence. This process did not signal the abandonment of America's English heritage; rather, it reflected the unique American experience that helped shape the trajectory of the young nation's law in light of its economic and social challenges, particularly after the Civil War.<sup>123</sup> The decentralization of political and legal authority emerged as a dominant theme. As contrasted to a "common" law of England, America's law developed within a federalist system, and thus its oath forms and practices evolved in divergent ways within different jurisdictions. By the turn of the twentieth century, almost every State had adopted some legislation pertaining to oaths.<sup>124</sup> As Professor Wigmore commented, the "provisions sometimes are inconsistent, sometimes duplicate

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*Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927 (1996).

Any attempt to reduce the founders' religious views to a single proposition, however, oversimplifies the diversity of their backgrounds and opinions about the appropriate role for religion in public life. See generally Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989) (describing the three primary (and divergent) groupings of the founders' attitudes toward religion's role in public life, but noting that all three were devoted to the idea of America being a country based on the principles of religious liberty). Nevertheless, one must consider the dominant role of religion when this country was founded—and the preeminent status of the Christian Bible—as this influenced civil traditions such as oath practices.

<sup>122</sup> 2 STORY, *supra* note 112, § 1845–46, at 614–15 (noting also that one of the perceived weaknesses of the Articles of Confederation was that no oath of office was required, the Constitution prescribes an oath of office, and Congress's first act (Act of 1st June, 1789, c. 1), which passed "without much opposition," specified the time and manner of oath taking); Dreisbach, *supra* note 121, at 979.

<sup>123</sup> See Stone, *supra* note 104, at 11

If one were to attempt to write a history of the law in the United States, it would be largely an account of the means by which the common-law system has been able to make progress through a period of exceptionally rapid social and economic change. . . . In the brief space of about seventy years [after the Civil War] our law has been called upon to accommodate itself to changes of conditions, social and economic, more marked and extensive in their creation of new interests requiring legal protection and control, than occurred in the three centuries which followed the discovery of America.

<sup>124</sup> WIGMORE, *supra* note 76, § 1828, at 2364. For a thorough synopsis of oath requirements at the turn of the century catalogued by state, see *id.* at 2364–71 n.1.

each other without need, [and] sometimes are merely declaratory of the common law.”<sup>125</sup>

Continuing the trend that began with *Omychund*, developments in the law pertaining to oaths often concerned matters of capacity and competency. Attention was focused on children, the mentally incompetent, and non-believers. At least thirty-three states and territories, via their constitutions or statutes, resolved that non-believers had the capacity to take oaths, while slightly more than a dozen jurisdictions retained the more exclusive common law rule.<sup>126</sup> State constitutions typically protected individual civil capabilities and rights from religious discrimination, while state statutes concentrated on oath practices, language, and other practical features. Specific oath forms were often specified by law and generally required the most “obligatory” variation of the oath be used when necessary.<sup>127</sup> These developments continued well into the twentieth century, where States, and sometimes the federal government,<sup>128</sup> modified their rules to excise religious criteria as a basis for determining capacity. Despite the many cultural and legal trends toward greater inclusivity, as recently as 1961 the United States Supreme Court was called upon to strike down a narrow, religiously-based oath requirement that closely resembled the English common law rule.<sup>129</sup>

With the promulgation of the Federal Rules of Evidence, standardization would again be promoted with respect to the basic principles governing oaths, if not the specific forms of oaths themselves. The Federal Rules were developed by the Supreme Court and formally adopted in 1975. The Rules applied directly to the federal courts and served as model rules for the states, where they were widely incorporated in varying degrees. As the Rules were evidentiary in nature, they focused on the competency of witnesses to testify rather than the qualifications of judges and jurors.

Regarding witness competency, Rules 601 and 610 provide general guidance that is, in many respects, consistent with the holding in *Omychund*. These Rules mitigate the common law approach, which held that certain people, such as minors and those without religious convictions, were

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<sup>125</sup> *Id.*, § 1828, at 2364.

<sup>126</sup> White, *supra* note 10, at 395, 395–401 n.41. As Professor White’s analysis makes clear, finding the precise number of states or territories that had adopted a specific rule was difficult at the time given the ambiguity of courts’ interpretation of state constitutions and statutes.

<sup>127</sup> WIGMORE, *supra* note 76, § 1829(2), at 2373.

<sup>128</sup> See, e.g., 18 U.S.C. § 3481 (2007) (establishing that an accused shall be deemed competent to testify at his trial).

<sup>129</sup> *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (holding that the requirement of declaration of a belief in the existence of God, as a test for office, invaded the freedom of belief and religion of the petitioner).



categorically incompetent and thus could not take a witness oath or proffer testimony. Rule 601 provides instead that *all* people shall be deemed competent unless the contrary can be demonstrated.<sup>130</sup> The Advisory Committee's notes characterize the Rule as a "general ground-clearing," which was undertaken because a "witness wholly without capacity is difficult to imagine" and thus discretion should be "exercised in favor of allowing the testimony."<sup>131</sup> The Committee notes also recognize that an oath or affirmation's efficacy rests on its capacity to impress upon a witness the moral duty to testify truthfully.<sup>132</sup> Further, Rule 610 both protects against disqualification of witnesses based on religious beliefs and prohibits the introduction of such evidence to discredit or enhance testimony.<sup>133</sup>

Federal Rule 603 codifies the requirement that every witness shall have to swear an oath or affirm that he will testify truthfully.<sup>134</sup> The Rule does not prescribe a particular oath, providing instead that the form used shall be one that is "calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so [testify truthfully]."<sup>135</sup> This approach affords "the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children"<sup>136</sup> for a variety of

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<sup>130</sup> FED. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules.").

<sup>131</sup> FED. R. EVID. 601 advisory committee notes (1973).

<sup>132</sup> *Id.* ("Standards of moral qualification in practice consist essentially of evaluating a person's truthfulness in terms of his own answers about it. . . . This result may, however, be accomplished more directly, and without haggling in terms of legal standards, by the manner of administering the oath or affirmation under Rule 603.").

<sup>133</sup> FED. R. EVID. 610 ("Evidence of the belief or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.").

<sup>134</sup> FED. R. EVID. 603 ("Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."). Note that Rule 604 makes the oath or affirmation requirement applicable to interpreters. FED. R. EVID. 604. Note also that Rule 603 has an additional purpose besides encouraging truthful testimony; it responds to the Supreme Court holding that the use of an oath or affirmation is an essential part of the Sixth Amendment protections relating to confrontation. *California v. Green*, 399 U.S. 149, 158 (1970) ("Confrontation . . . insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury").

<sup>135</sup> FED. R. EVID. 603 & Advisory Committee Notes (1973) ("no special verbal formula is required").

<sup>136</sup> FED. R. EVID. 603 Advisory Committee Notes (1973).

issues involving oaths.<sup>137</sup> Rule 603 does not, however, mandate the *best* means of swearing a witness, or for a court to accept whatever oath form the witness may prefer because it is claimed to be more personally efficacious. Rather, the Rule simply requires that any oath to be used is reasonably calculated to awaken the conscience of the witness.<sup>138</sup> The Rule's deliberate lack of specificity has provoked considerable litigation regarding the form for oaths and testimonial disqualifications.<sup>139</sup> Rule 603 favors religious

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<sup>137</sup> Federal Rule 104(a) grants the court (judge) the duty to reach conclusions on "[p]reliminary questions concerning the qualifications of a person to be a witness," and thus under this authority the court can determine the appropriate form of an oath or affirmation. The Rules are silent regarding who should administer the oath, what words should be employed, what gestures or artifacts (if any) should be used, etc., and thus the court may inquire as to what is proper given the specific situation, and ultimately what is likely to awaken the witness's conscience.

<sup>138</sup> *U.S. v. Saget*, 991 F.2d 702, 710 (11th Cir. 1993) (the court did not err in allowing the testimony of an atheist witness who took an oath to God to tell the truth). Similarly, it need not be demonstrated that the oath did, in fact, awaken the conscience of the witness.

<sup>139</sup> *See, e.g., Moore v. United States*, 348 U.S. 966, 967 (1955) ("no requirement that the word 'solemnly' be used in the affirmation"); *Spigarolo v. Meachum*, 934 F.2d 19, 24 (2d Cir. 1991) ("When children testify, the trial court may fashion an oath or affirmation that is meaningful to the witness."); *United States v. Looper*, 419 F.2d 1405, 1406 (4th Cir. 1969) (where witness had religious objections to words employed in oath and raising his hand, trial court erred in refusing to permit witness to testify on grounds he would not raise his hand and take an oath); *United States v. Fowler*, 605 F.2d 181, 185 (5th Cir.), *cert. denied*, 445 U.S. 950 (1979) (witness was properly prevented from testifying when he refused to declare he would tell the truth and would only state "I am a truthful man" and "I would not tell a lie to stay out of jail"); *Gordon v. Idaho*, 778 F.2d 1397, 1401 (9th Cir. 1985) (holding that deponents need not raise their right hands when making an affirmation; the district court "should have explored the least restrictive means of assuring that Gordon would testify truthfully at his deposition"); *United States v. Ward*, 973 F.2d 730, 731, *amended and superceded on other grounds*, 989 F.2d 1015 (9th Cir. 1992) (holding that the district court had to yield to defendant's First Amendment right to substitute "fully integrated honesty" for the word "truth" in the traditional witness oath); *Wilcoxon v. United States*, 231 F.2d 384, 387 (10th Cir.), *cert denied*, 351 U.S. 943 (1956) (holding that failure to object to the admission of unsworn testimony effectively waived defendant's right to appeal the issue where foreign-language witnesses were sworn in without a translator); *State v. Sands*, 467 A.2d 202 (N.H. 1983) (signed statement with notice of penalty equivalent to an oath); *Staton v. Fought*, 486 So. 2d 745, 745 (La. 1986) ("Instead of requiring an oath, the trial judge may permit the use of the following: 'I, \_\_\_\_\_, do hereby declare that the facts I am about to give are, to the best of my knowledge and belief, accurate, correct and complete.'"); *State v. Paoletta*, 561 A.2d 111, 118-19 (Conn. 1989) (informal colloquy between judge and child witness sufficient to satisfy oath requirement); *Commonwealth v. Chuck*, 323 A.2d 123, 126 (Pa. Super. Ct. 1974) (stating in dicta that a witness may be barred on the basis of religion if his faith commands him to not tell the truth where the witness was a member of Satanism); *Collins v. State*, 465 So. 2d 1266, 1268 (Fla. Dist. Ct. App. 1985) (a mere assertion of

tolerance, both in declining to impose a specified form of oath, as well as, together with Rule 601, decoupling moral considerations from testimonial competency determinations. Accordingly, although oath forms and practices still vary among jurisdictions, rules favoring inclusivity and a presumption of competence and capacity have been widely adopted.

The common law approach affording flexibility so as to encourage truth, as it is expressed in the Federal Rules, is likewise found in most contemporary state statutes and rules. Neither the United States Constitution nor modern federal statutes require any particular form of oath.<sup>140</sup> Certain state statutes permit, and sometimes even encourage, accommodating various oath forms in order to bind more closely the conscience of oath-takers. For instance, Alabama provides that an oath or affirmation to tell the truth is necessary before testifying, and that the “court may frame such affirmation according to the religious faith of the witness.”<sup>141</sup> Likewise, Arizona specifies that an “oath or affirmation shall be administered in a manner which will best awaken the conscience and impress the mind of the person taking the oath or affirmation, and it shall be taken upon the penalty of perjury.”<sup>142</sup>

Many present-day courtroom oaths do not require the use of the Bible,<sup>143</sup> which is explicitly permitted by statute only in seven states:

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truth, without an attestation to that effect by an unequivocal act for which a prosecution for perjury will lie, is not sufficient as an oath).

<sup>140</sup> See FED. R. EVID. 603; *United States v. Ward*, 989 F.2d 1015, 1018–20 (9th Cir. 1992) (elucidating the factors relevant to a determination of whether one’s religion or religious beliefs should compel the use of an idiosyncratic oath). While there is no required form, the American Jurisprudence Pleading and Practice Forms suggest two common variations:

“You do solemnly swear to testify to the truth, the whole truth, and nothing but the truth. So help you God.”

“You do solemnly \_\_\_\_\_ [*swear or affirm*] that the evidence you \_\_\_\_\_ [*shall or are about to*] give in this \_\_\_\_\_ [*matter or issue*], pending between \_\_\_\_\_ and \_\_\_\_\_, shall be the truth, the whole truth, and nothing but the truth, so help you God.”

AM. JUR. PL. & PR. FORMS 25B *Witnesses* § 155–56 (2007).

<sup>141</sup> ALA. CODE § 12-21-136 (1975).

<sup>142</sup> ARIZ. REV. STAT. ANN. § 12-2221(A) (2003). Similarly, the Arizona state constitution explicitly provides that the form of oath should be that which is “most consistent with and binding upon the conscience” of the oath taker. ARIZ. CONST. art. 2 § 7.

<sup>143</sup> See, e.g., *Cox v. State*, 79 S.E. 909, 909 (Ga. Ct. App. 1913). See also *State v. Davis*, 418 S.E.2d 263, 265 (N.C. Ct. App. 1992), *pet. denied*, 426 S.E.2d 710 (N.C. 1993) (noting that “it is not necessary for a witness to understand the obligation to tell the truth from a religious point of view.”).

Arkansas,<sup>144</sup> Delaware,<sup>145</sup> Kansas,<sup>146</sup> New Jersey,<sup>147</sup> North Carolina,<sup>148</sup> Pennsylvania,<sup>149</sup> and Virginia.<sup>150</sup> State laws usually grant considerable latitude concerning an acceptable form for oaths and affirmations.<sup>151</sup> Indeed, most make no reference to any sacred artifacts, allowing oath takers simply to refer to God, affirm they will tell the truth, or use some other method intended to promote truthful testimony.<sup>152</sup> In two of the seven states that

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<sup>144</sup> ARK. CODE ANN. § 16-2-101(a) (2007) (“The usual mode of administering oaths practiced by the person who swears, laying his hand on and kissing the Gospels, shall be observed in all cases in which an oath is or may be required by law to be administered, except as otherwise provided in this chapter.”).

<sup>145</sup> DEL. CODE ANN. tit. 10, § 5321 (2007) (“The usual oath in this State shall be by swearing upon the Holy Evangelists of Almighty God. The person to whom an oath is administered shall lay his or her right hand upon the book.”).

<sup>146</sup> KAN. STAT. ANN. § 54-102 (2006) (“All oaths shall be administered by laying the right hand upon the Holy Bible, or by the uplifted right hand.”).

<sup>147</sup> N.J. STAT. ANN. § 41:1-4 (2004) (“It shall not be necessary to the solemnity or obligation of an oath administered in any court of justice or any legal proceeding, civil or criminal, in this state, for the person taking the oath to kiss the holy scriptures, but the taking of such oath, while the hand shall be held upon the book, shall answer all the purposes and requirements of the law, any usage or custom to the contrary heretofore notwithstanding. If any persons so sworn shall swear falsely they shall be guilty of perjury as though the book had been kissed.”).

<sup>148</sup> N.C. GEN. STAT. ANN. § 11-2 (2005) (“Judges and other persons who may be empowered to administer oaths, shall . . . 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.”).

<sup>149</sup> 42 PA. CONS. STAT. ANN. § 5901(a) (2007) (“Every witness, before giving any testimony shall take an oath in the usual or common form, by laying the hand upon an open copy of the Holy Bible, or by lifting up the right hand and pronouncing or assenting to the following words: ‘I, A. B., do swear by Almighty God, the searcher of all hearts, that I will, and that as I shall answer to God at the last great day.’”).

<sup>150</sup> VA. CODE ANN. § 49-10 (2007) (“No officer of this Commonwealth, or any political subdivision thereof, shall, in administering an oath in pursuance of law, require or request any person taking the oath to kiss the Holy Bible, or any book or books thereof, but persons being sworn for any purpose may be required to place their hand on the Holy Bible.”).

<sup>151</sup> See, e.g., *H.A.M.S. Co. v. Electrical Contractors of Alaska, Inc.*, 563 P.2d 258, 262 (Alaska 1977), *order supplemented*, 566 P.2d 1012 (Alaska 1977) (holding that “substantial compliance” with those elements necessary to form the legal document would be sufficient to satisfy the broadly formulated statutory requirements).

<sup>152</sup> See, e.g., CAL. CIV. PROC. CODE § 2094 (2007) (“(a) An oath, affirmation, or declaration in an action or a proceeding, may be administered by obtaining an affirmative response to one of the following questions: (1) ‘Do you solemnly state that the evidence

expressly allow for the use of the Bible in courtroom oaths, their laws permit non-Christians to be sworn according to the peculiar ceremonies of their religions.<sup>153</sup> Such statutory and judicial accommodations encourage witnesses to tell the truth by allowing them to swear an oath or make an affirmation in a form that they consider most binding on their consciences.

### *C. Affirmation: From a Religious Exception to Taking Exception to Religion*

Like an oath, affirmation acts as a guarantor of truth; unlike an oath, affirmation does not involve an invocation of a divine authority. Affirmation does retain all of the other key elements that provide significance to an oath: a *public* proclamation that is *formally* made in a way designed to *awaken the conscience* of the person affirming, under the *penalty* of perjury.

The contemporary origins of affirmations can be traced to an attempt to accommodate particular Christian sects, most notably the Quakers, which prohibit the swearing of oaths.<sup>154</sup> At common law, Quakers and other minor Christian sects who refused to swear an oath—even an unconventional or “heathen” oath—were not only precluded from giving testimony but could also be fined or otherwise punished.<sup>155</sup> Ironically, popular sentiment at the time held Quakers in high regard, and they were widely “recognized to be the most truthful.”<sup>156</sup> As a consequence, Quakers received parliamentary relief

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you shall give in this issue (or matter) shall be the truth, the whole truth, and nothing but the truth, so help you God?” (2) ‘Do you solemnly state, under penalty of perjury, that the evidence that you shall give in this issue (or matter) shall be the truth, the whole truth, and nothing but the truth?’ (b) In the alternative to the forms prescribed in subdivision (a), the court may administer an oath, affirmation, or declaration in an action or a proceeding in a manner that is calculated to awaken the person's conscience and impress the person's mind with the duty to tell the truth. The court shall satisfy itself that the person testifying understands that his or her testimony is being given under penalty of perjury.”).

<sup>153</sup> Delaware's statute provides that “[a] person believing in any other than the Christian religion, may be sworn according to the peculiar ceremonies of such person's religion, if there be any such.” DEL. CODE ANN. tit. 10, § 5324 (2007). Arkansas's statute makes similar accommodation: “Every person believing in any religion other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if there are any such ceremonies, instead of any of the other modes prescribed in this section.” ARK. CODE ANN. § 16-2-101(e) (2007).

<sup>154</sup> See *supra* note 45, for a complete discussion of Christ's prohibition against swearing oaths and how that statement has been interpreted by Christian philosophers and most modern Christian churches.

<sup>155</sup> White, *supra* note 10, at 420 & n.85.

<sup>156</sup> *Id.* at 421.

during the reign of William and Mary and after the *Omychund* decision. As Tyler notes:

Perhaps the incongruity of receiving the evidence of a mendacious Hindoo swinging the tail of a cow in his hand, or of a Chinaman burning a joss stick or cracking a saucer and invariably grinning as he did it, and refusing to hear that of the plain, simple, straightforward Friend, finally forced itself upon the prejudiced minds of the British legislators.<sup>157</sup>

The evident need to modernize the law to permit these sects full political participation continued a trend that first allowed groups like the Jews, and later other non-Christians full access to courts. Thus in 1688, Parliament passed the first of several reforms permitting the substitution of a “declaration of fidelity” for an oath of allegiance, which was extended in 1696 to allow for affirmations more generally.<sup>158</sup> The initial accommodation of orthodox religions was expanded to include other sects (e.g., Moravians and Separatists), those who have a conscientious objection to swearing, and eventually atheists and other non-believers.<sup>159</sup>

Just as the United States received its oath heritage from England, so too did England provide the basis for American legal standards for affirmations. In 1682, prior to the Quaker legislation, predictably only Pennsylvania—designated a Quaker province by William Penn—attempted to allow for affirmation in their founding laws; this provision was repealed by the English government in 1693.<sup>160</sup> Shortly thereafter, the American colonies received legislation passed by Parliament in 1696, which had the full effect of colonial law and granted the privilege of affirmation to Quakers.<sup>161</sup> By the time of the Declaration of Independence, Tyler observes that all of the colonies

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<sup>157</sup> *Id.* at 420.

<sup>158</sup> *Id.* at 420–21. The language was revised in 1721 so that it would be adopted for common use, as follows: “I A.B. do solemnly, sincerely and truly declare and affirm. . .” Quakers Act, 1721, 8 Geo., c. 6.

<sup>159</sup> *Id.* at 421. It was provided that

[e]very person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath.

Oaths Act, 1888, 51 & 52 Vict., c.46 (citing Oaths Act, 1888, 51& 21 Vict., c.46).

<sup>160</sup> White, *supra* note 10, at 422. The effect of this law and the English government’s delay in reacting meant that for several years after the founding of Pennsylvania, no oaths were sworn whatsoever in the colony. *Id.* at 444, n.126.

<sup>161</sup> *Id.* at 422–23.

“generally provided for the affirmation of Quakers; some included Dunkers and Mennonites, and a few all persons having religious scruples against swearing.”<sup>162</sup> Those colonies with no express provisions followed the contemporaneous common law, which permitted only Quakers to choose affirmation.<sup>163</sup>

By the time of the American founding, affirmation had become so widely accepted that it was expressly incorporated into the United States Constitution at each place where an oath is required.<sup>164</sup> Similar to the treatment of oaths in America, the options surrounding the use of affirmation—what language would be used, who could qualify to affirm, etc.—varied among jurisdictions and were expressed in state constitutions, statutes, and common law. By the turn of the twentieth century, every jurisdiction except Oklahoma that had passed a statute on the subject allowed the choice of affirmation, either to persons who were forbidden by “conscientious scruples” or anyone who may have such a preference.<sup>165</sup> These distinctions, too, were eventually discarded as affirmation became a universal privilege. Prior to the adoption of the Federal Rules of Evidence, twentieth century courts made explicit their belief about the equality between oaths and affirmations,<sup>166</sup> and Congress expressly indicated this as well.<sup>167</sup> The Federal Rules ultimately codified the coexistence of oaths and

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<sup>162</sup> *Id.* at 423.

<sup>163</sup> *Id.*; *see, e.g.*, *In re McIntire's Case*, 1 D.C. (1 Cranch) 157 (1803) (affirmation by a juror not a Quaker, and not attached to any particular religious sect, was not permitted); *In re Bryan's Case*, 1 D.C. (1 Cranch) 151 (1804) (a juror was not allowed to make affirmation in lieu of oath, on the ground that he was a Methodist, where it was not contrary to the principles of that religious society to take an oath); *King v. Fearson*, 3 D.C. (3 Cranch) 435 (1829) (affirmation instead of oath was permitted where the witness had applied for admission to full participation in the membership of the society of Quakers, and usually met with them for worship).

<sup>164</sup> *See supra* note 116 (discussing the place of oaths in the Constitution); *see also* Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83 (1789) (giving United States courts the power to “impose and administer all necessary oaths and affirmations”); ch. 20,

§ 30, 1 Stat. 88–89 (providing that “examination of witnesses in open court” shall be governed by the common law, whereby every witness “shall be . . . sworn or affirmed to testify the whole truth”).

<sup>165</sup> WIGMORE, *supra* note 76, § 1828, at 2371.

<sup>166</sup> *See, e.g.*, *Chee v. Long Island R.R. Co.*, 328 F.2d 711, 713 (2d Cir. 1964) (“No reason in law exists for differentiation in the quality of truth between oath and affirmation. Plaintiff’s capacity to tell the truth and the truthfulness of his testimony [after affirming] were not diminished in any way by his failure to take an oath and no statement that they might have been should have been made.”).

<sup>167</sup> *See* 1 U.S.C. § 1 (2007) (“In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . ‘oath’ includes affirmation, and ‘sworn’ includes affirmed.”).

affirmations in American courts.<sup>168</sup> It is indeed ironic that affirmation, which began as a means for including specified religious sects, is now the preferred means for accommodating atheists and non-believers.

In summary, oaths and affirmations are widely and interchangeably used in contemporary America in a variety of circumstances, while retaining particular significance in courtroom settings. Their ubiquity rests in part on a shared understanding of their basis, relevance, and potency, which is predicated upon the dominant influence of the Judeo-Christian heritage on the Western legal traditions. As America has become more religiously diverse, it is fitting to consider whether and how different religious traditions and beliefs should be incorporated into civil oath taking. Given the increasing presence and influence of Muslims in American culture, the question of religious diversity and oaths will be examined with respect to Islam and the Quran.

#### IV. A BRIEF HISTORY OF MUHAMMAD, THE QURAN AND ISLAM

##### A. *Muhammad and the Growth of Islam*

Because the significance of the Quran to Muslims is best understood in the context of the birth and rise of Islam,<sup>169</sup> it is appropriate to begin with a brief sketch of the history of the religion, which starts with the life of its

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<sup>168</sup> See *supra* notes 129–40 & 166, and accompanying text (discussing oath and affirmation in the Federal Rules of Evidence). The Federal Rules of Civil Procedure likewise provide that whenever an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof. FED. R. CIV. P. 43(b). Similarly, the Federal Rules of Criminal Procedure state that “‘Oath’ includes an affirmation.” FED. R. CRIM. P. 1(b)(6); see also *United States v. Kalaydjian*, 784 F.2d 53, 57 (2d Cir. 1986) (upholding the district court’s decision refusing to allow counsel to cross-exam a witness on his decision to affirm rather than swear an oath, finding that Rule 603 would be “meaningless if a witness, after exercising his right to affirm, could be cross-examined regarding the reasons underlying that decision”).

<sup>169</sup> A complete account of Islam, one of the world’s largest and most influential religions, is beyond the scope of this Article. Nevertheless, some appreciation of the historical, political, and cultural aspects of the development of Islam contributes to a fuller understanding of the religion. For the purposes of this Article, only the broadest treatment is given. For further reading, the following texts are recommended: on the history of Islam: MARSHALL G.S. HODGSON, *THE VENTURE OF ISLAM: CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION* (1977) [three volume set]; on the history of the Middle East: ARTHUR GOLDSCHMIDT JR., *A CONCISE HISTORY OF THE MIDDLE EAST* (7th ed. 2001), and PETER MANSFIELD, *A HISTORY OF THE MIDDLE EAST* (2d ed. 2004); on the life of Muhammad: MUHAMMAD HUSAYN HAYKAL, *THE LIFE OF MUHAMMAD* (Isma’il Rāgī A. al Fārūqī trans., 1976); KAREN ARMSTRONG, *MUHAMMAD, A BIOGRAPHY OF THE PROPHET* (1992), and AKBAR S. AHMED, *ISLAM TODAY: A SHORT INTRODUCTION TO THE MUSLIM WORLD*, 12–21 (2002) [hereinafter AHMED, *ISLAM TODAY*].



Prophet: Muhammad.<sup>170</sup> Born in Mecca around 570 AD,<sup>171</sup> Muhammad was orphaned at a young age and raised by his grandfather and uncle.<sup>172</sup> Later, he became a merchant and led caravans to Syria and Mesopotamia.<sup>173</sup> After marrying at the age of twenty-five, Muhammad earned a livelihood by engaging in various commercial pursuits.<sup>174</sup> Every year during the month of Ramadan, Muhammad would take his family to Mount Hira to make a spiritual retreat where he would pray, fast, and distribute alms and food to the poor who visited him.<sup>175</sup>

On one occasion of reflection, during the month of Ramadan in Muhammad's fortieth year, the Muslim faith teaches that Muhammad experienced his first revelation from the angel Gabriel, who told him that he had been appointed the "Messenger of God."<sup>176</sup> Although he was at first skeptical of their authenticity,<sup>177</sup> Muhammad quickly came to believe that he had been appointed God's Messenger, and he thereafter began to receive many more revelations.<sup>178</sup> These inspired teachings, which continued over the next twenty to twenty-three years, would eventually be collected and unified into the Quran.<sup>179</sup>

<sup>170</sup> Although the name "Muhammad" has been spelled in English in various ways, this Article will adopt the spelling "Muhammad" as used by Akbar S. Ahmed, the Ibn Khaldun Chair of Islamic Studies and Professor of International Relations at the American University, Washington D.C., in his book, *ISLAM TODAY*, *supra* note 169.

<sup>171</sup> AHMED, *ISLAM TODAY*, *supra* note 169, at 14.

<sup>172</sup> *Id.*

<sup>173</sup> ARMSTRONG, *supra* note 169, at 79.

<sup>174</sup> BRUCE LAWRENCE, *THE QUR'AN: A BIOGRAPHY* 21–22 (2006).

<sup>175</sup> *Id.*; ARMSTRONG, *supra* note 169, at 45; *but see* HAYKAL, *supra* note 169, at 70–72 (indicating that Muhammad may have spent his annual spiritual retreats alone in a cave at the head of Mount Hira).

<sup>176</sup> AHMED, *ISLAM TODAY*, *supra* note 169, at 16–17. Perhaps in the interest of making Islam more familiar and presentable to non-Muslim readers, and also to describe more accurately Islamic theology, modern scholarship tends to refer to the one, supreme god of Islam as "God" rather than "Allah." *See* 1 HODGSON, *supra* note 169, at 63 ("To use 'Allah' in English can therefore imply, accordingly, the notion that Muslims honour something different from what is honoured by Christians and Jews . . . and presumably something imaginary. . . . This is essentially a dogmatic position and can be allowed only in those ready to admit its theological implications."). This Article will use the term "God" to refer to the god of Islam.

<sup>177</sup> FARID ESACK, *THE QURAN: A USER'S GUIDE* 40 (2005).

<sup>178</sup> AHMED, *ISLAM TODAY*, *supra* note 169, at 17.

<sup>179</sup> ESACK, *supra* note 177, at 32–33. The word "Quran" has numerous English translations, with the most prevalent being "Koran" (*see* KNUT VIKØR, *BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW* 31 (2005)), "Qur'an" (*see* ESACK, *supra* note 177, at 41), and "Quran" (*see* GOLDSCHMIDT, *supra* note 169, at 27). This Article

The early revelations to Muhammad centered around three principles: (1) God, who was the source of the revelations, was absolutely one,<sup>180</sup> (2) Muhammad was the true Prophet of God,<sup>181</sup> and (3) all people would be held accountable to this one God on a “Day of Resurrection.”<sup>182</sup> Following his calling as the Prophet and Messenger of God, Muhammad slowly began to convert Meccans to his discipleship.<sup>183</sup> As the religious beliefs of the Meccan tribes were so intimately tied to their political and economic power,<sup>184</sup> however, Muhammad’s eventual success as a proselytizer angered the Meccan ruling class, who held polytheistic religious beliefs.<sup>185</sup> For several years, Muhammad and his followers were religiously persecuted and socially ostracized.<sup>186</sup>

In 622, Muhammad traveled with his followers to Yathrib, a city roughly 250 miles north of Mecca.<sup>187</sup> Over the next six years, Muhammad converted much of the city to his new religion and established himself as a powerful political leader through means both peaceful and forceful.<sup>188</sup> He thereafter

will adopt the transliteration “Quran” used by Arthur Goldschmidt, Jr., Professor Emeritus of Middle East History at Pennsylvania State University. As a matter of convention, the word “Quran” is not italicized in this Article.

<sup>180</sup> Islamic monotheism has three aspects: (1) Oneness of the Lordship of God; (2) Oneness of the worship of God (none other than God has the right to be worshipped); and (3) Oneness of the names and qualities of God. THE TRANSLATION OF THE MEANINGS OF SUMMARIZED SAHIH AL-BUKHARI 1066 (Muhammad Muhsin Khan trans., 1996).

<sup>181</sup> This is sometimes interpreted as belief in the message of Muhammad as the Final Prophet. See, e.g., MUHAMMAD SAED ABDUL-RAHMAN, 1 ISLAM: QUESTIONS AND ANSWERS: BASIC TENETS OF FAITH: BELIEF 270 (2003).

<sup>182</sup> ESACK, *supra* note 177, at 45. Also, there are Five Pillars of Islam: *Shahada* (profession of faith), *Salat* (ritual prayer), *Zakat* (paying alms), *Sawm* (fasting in the month of Ramadan), and *Hajj* (making the pilgrimage to Mecca at least once during one’s life). Susanna Dokupil, *The Separation of Mosque and State: Islam and Democracy in Modern Turkey*, 105 W. VA. L. REV. 53, 56 n.3 (2002).

<sup>183</sup> ARMSTRONG, *supra* note 169, at 91, 102–04, 107. The first followers of Muhammad were relatives and friends. ABDULLAH SAEED, ISLAMIC THOUGHT: AN INTRODUCTION 2–3 (2006).

<sup>184</sup> 1 HODGSON, *supra* note 169, at 155.

<sup>185</sup> ESACK, *supra* note 177, at 45.

<sup>186</sup> *Id.*

<sup>187</sup> AHMED, ISLAM TODAY, *supra* note 169, at 17–18. This journey is called the *hijra* and marks the beginning of the Islamic calendar. Yathrib is now known as Medina.

<sup>188</sup> ESACK, *supra* note 177, at 47–51. Although many people in Medina and the surrounding areas converted to Islam peacefully, often Muhammad’s peace treaties, offered after bloody warfare, were conditioned on the defeated party or tribe converting to the Muslim faith. See 1 HODGSON, *supra* note 169, at 192–93 (“Among the tribes outside Medina, most were pagan and were increasingly required to become Muslims as a condition of entering into league with Muhammad and into his security system.”).

engaged in a series of military and diplomatic initiatives between 628 and 630 that resulted in the re-taking of Mecca,<sup>189</sup> which would soon become the religious center of the Muslim faith. To this day, faithful Muslims make a pilgrimage—*hajj*—to Mecca to pray around the *Ka'bah*, a large, black, cube-like structure that is the holiest site in the Muslim religion<sup>190</sup> because it is regarded as the first dwelling place of God on earth, built by Adam, and eventually restored by Abraham and Ishmael.<sup>191</sup>

Upon Muhammad's death in 632,<sup>192</sup> a serious division arose regarding the relationship between the religion Muhammad had established and the political regime that had been conceived and nurtured in the context of that religion.<sup>193</sup> To this day, the rupture between the Sunni and Shi'ite sects of Islam essentially centers on a dispute about who can rightfully claim to be Muhammad's true followers and what constitutes the Islamic state.<sup>194</sup> Nevertheless, certain features of Islam relevant to the Quran emerged as universal across all sects of the Muslim faith: the text of the Quran is the authoritative revelation of God, Muhammad was the true Prophet and Messenger of God, and the moral and religious instructions contained in the Quran are binding on all Muslims.<sup>195</sup>

A great religious and political force, Islam spread rapidly over the next 200 years, with a united Islamic state eventually laying political and religious claim by the eleventh century over the Arabian Peninsula, northern Africa, Mesopotamia, central Asia, Spain, and parts of Italy.<sup>196</sup> During this time, the Islamic world also experienced a cultural revolution: the Arabic language and numeric systems were developed and attained dominance,<sup>197</sup> poetry and philosophy flourished,<sup>198</sup> and the great Arabian cities were built.<sup>199</sup>

After being fractured over several hundred years by warring princes and the Crusades,<sup>200</sup> the Islamic empire suffered its greatest setback during the

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<sup>189</sup> 1 HODGSON, *supra* note 169, at 193.

<sup>190</sup> ESACK, *supra* note 177, at 187–89.

<sup>191</sup> AHMED, ISLAM TODAY, *supra* note 169, at 14.

<sup>192</sup> 1 HODGSON, *supra* note 169, at 195.

<sup>193</sup> *Id.* at 197.

<sup>194</sup> GOLDSCHMIDT, *supra* note 169, at 64; *see also* MOHAMED NIMER, THE NORTH AMERICAN MUSLIM RESOURCE GUIDE 9–11 (2002).

<sup>195</sup> JAMILA HUSSAIN, ISLAM: ITS LAW AND SOCIETY 14 (2d ed. 2004).

<sup>196</sup> BERNARD LEWIS, THE MIDDLE EAST: A BRIEF HISTORY OF THE LAST 2,000 YEARS 83 (1995).

<sup>197</sup> *Id.* at 68.

<sup>198</sup> *Id.* at 86–87.

<sup>199</sup> *Id.* at 77.

<sup>200</sup> *Id.* at 88–94.

Mongolian invasion of central Asia, Europe, and the Middle East.<sup>201</sup> The “Golden Age” of Islam had passed, and even at the apex of the Ottoman Empire, it never again enjoyed the political, religious, and social power it had attained during the several hundred years immediately following Muhammad’s death.<sup>202</sup>

Today, although there is no unified Islamic state, the Muslim faith dominates the Arabian Peninsula, northern Africa, south-central Asia (up to the border of India to the east and Russia to the north), and Indonesia.<sup>203</sup> About 1.3 billion people (roughly 20% of the world’s population) are Muslim, with about one-third residing in non-Muslim countries.<sup>204</sup> Although estimates of the number of Muslims living in the United States vary,<sup>205</sup> one authoritative source places it at 7 million.<sup>206</sup> Islam is growing in America primarily through immigration, but also as a result of a comparatively high birth rate within the Muslim community.<sup>207</sup> Because of current events, especially the tragic events of September 11, 2001, awareness and interest in Islam has increased throughout the world and especially in the United States, which helps account for the greater quantity and quality of scholarship about the religion. Accordingly, it is a fitting time to consider how Islam integrates with modern American life, and in particular with American jurisprudence.

### B. Sources of Moral and Legal Authority in Islam

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<sup>201</sup> *Id.* at 96–101. In 1206, the Mongolian prince, Genghis Khan (c. 1162–1227), united the Mongolian tribes of northeast Asia and began a series of ruthless military attacks that would eventually lead to the establishment of the Mongolian Empire (1206–1368), which would become the largest contiguous empire in the history of the world. The empire grew territorially, beginning with northern China, moving through eastern China, central Asia, and the Slavic countries, ultimately laying claim to all of China and parts of Europe as far west as Moscow and Kiev. *See also* GOLDSCHMIDT, *supra* note 169, at 96–98.

<sup>202</sup> *See generally* GOLDSCHMIDT, *supra* note 169, at 129–46.

<sup>203</sup> *See* AMIN SAIKAL, *ISLAM AND THE WEST: CONFLICT OR COOPERATION?*, map at x (2003).

<sup>204</sup> AKBAR S. AHMED, *ISLAM UNDER SIEGE* 7 (2003) [hereinafter AHMED, *ISLAM UNDER SIEGE*].

<sup>205</sup> One reason for the differing estimates is that the United States Bureau of the Census is prohibited by law from compelling respondents to disclose information bearing on their religious beliefs. 13 U.S.C. § 221(c) (2000) (“Notwithstanding any other provision of this title, no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious body.”).

<sup>206</sup> AHMED, *ISLAM UNDER SIEGE*, *supra* note 204, at 7.

<sup>207</sup> *See* Bryan S. Turner, *Islam, Religious Revival and the Sovereign State*, 97 *MUSLIM WORLD* 405, 405 (2007).

For Muslims, the Quran is the paramount religious, moral, legal, political, economic, and social authority;<sup>208</sup> it provides an entire way of life for man.<sup>209</sup> Its centrality is such that Islam may be described as essentially a “belief system with moral and practical laws that have their source in the Qur’an.”<sup>210</sup> Muslims believe that the Quran is divinely inspired and composed of the literal words of God.<sup>211</sup> Reciting passages from the Quran is a source of comfort and strength to Muslims.<sup>212</sup> Further, the Quran is religiously, and even physically, revered in a way which is analogous to the manner in which orthodox Catholics revere the relics of their saints: Muslims usually wrap the Quran in a clean cloth and elevate it in the room, do not point their feet at it, will not let it lie on a floor,<sup>213</sup> and can only touch it if they are in a state of purity.<sup>214</sup> Newspapers, magazines, pamphlets, or other texts containing verses of the Quran cannot be disposed of in the trash.<sup>215</sup>

Besides the Quran, Muslims regard with great reverence the *sunnah*—the way Muhammad lived his life: his customs, deeds, and practices, which are considered to be “a tangible form and the actual embodiment of the Will of [God].”<sup>216</sup> In addition to the *sunnah*, reverence is given to the *hadith*,<sup>217</sup> or narrations about the life of Muhammad, his words and sayings, along with the verbal approval or disapproval he gave to the words and actions of others.<sup>218</sup> Although Muslims do not believe that the dictates of the *sunnah*

<sup>208</sup> See AHMED, ISLAM TODAY, *supra* note 169, at 28–29 (“the Quran is the message of God. . . [its] messages cover all aspects of life”); SAEED, *supra* note 183, at 15.

<sup>209</sup> ‘ALLĀMAH SAYYID M.H. TABĀTABĀ’I, THE QUR’AN IN ISLAM: ITS IMPACT AND INFLUENCE ON THE LIFE OF MUSLIMS 17 (1987).

<sup>210</sup> *Id.*

<sup>211</sup> SAEED, *supra* note 183, at 15.

<sup>212</sup> AHMED, ISLAM TODAY, *supra* note 169, at 32.

<sup>213</sup> *Id.*

<sup>214</sup> 7 SHAYKH ‘ABDUL-‘AZIZ BIN ‘ABDULLAH BIN BAZ, SHAYKH MUHAMMAD BIN SALIH AL-‘UTHAIMIN & SHAYKH ‘ABDULLAH BIN ‘ABDUR-RAHMAN AL-JIBREEN, FATAWA ISLAMIYAH: ISLAMIC VERDICTS 16 (Muhammad bin ‘Abdul-‘Aziz Al-Musnad ed., 2002) [hereinafter “Al-Musnad, ISLAMIC VERDICTS”].

<sup>215</sup> *Id.*

<sup>216</sup> 1 SAHIH MUSLIM *ix* (Abdul Hamid Siddiqi trans., 1972).

<sup>217</sup> “Like the Qur’an, the *ahadith* (singular: *hadith*) were originally written and have been preserved in Arabic. Ismail al-Bukhari’s compilation of *ahadith* is considered the most authoritative collection.” Bilal Zaheer, Note, *Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(J)*, 2007 U. ILL. L. REV. 497, 501 n.23 (2007).

<sup>218</sup> 1 SAHIH MUSLIM, *supra* note 216, at *ix*. The belief that Muhammad was the Prophet of God includes the belief that Muhammad was inspired not only in the recitation of the Quran but also in all that he did and said. See ESACK, *supra* note 177, at 36 (“Most

and *hadith* are revealed by God in the same way as is the Quran, they nevertheless assign a profound moral and religious authority to these works.<sup>219</sup> The teaching of the scholars and jurists who followed Muhammad's death is also given considerable weight.<sup>220</sup> This source of Islamic law—*ijtihad*—reflects their attempt to formulate a legal opinion that applies God's law to particular circumstances.<sup>221</sup> Although *ijtihad* are only probable applications of God's law, they nevertheless carry significant legal authority.<sup>222</sup> A consensus by Muslim scholars and jurists on a certain issue is referred to as *ijma* and must be followed.<sup>223</sup> These teachings, together with the *sunnah*, *hadith*, and the Quran, constitute the heart of Islamic law, which is commonly known as *shariah*.<sup>224</sup> Linguistically, *shariah* is associated with words such as “the path,” “the way,” or “the road.”<sup>225</sup> Considered within the context of Islamic law, *shariah* is the divine guidance provided by the Quran, the *sunnah*, *hadith*, and authoritative interpretations of these sources, which are generally expressed in commands and prohibitions—it is, therefore, “the path to be followed.”<sup>226</sup>

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Muslims hold that Muhammad was born and lived out his mission in the broad daylight of history and that details of his life are encapsulated in the body of knowledge known as the *Sirah*, which has also acquired the status of sacred history.”)

<sup>219</sup> There has been, and to some extent still is, a dispute within the Muslim community regarding what are the “true” *hadith*. Nevertheless, a true *hadith* will always satisfy the following conditions: (1) it cannot contradict the Quran or be contrary to reason, nature, experience, or accepted traditions; (2) it cannot praise any individual tribe, person, or place; (3) it cannot detail or date future events; and, (4) it cannot be inconsistent with the principle that Muhammad is the Prophet of God. See HUSSAIN, *supra* note 195, at 33–34.

<sup>220</sup> *Id.* at 34.

<sup>221</sup> Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67, 69–70 (2006).

<sup>222</sup> *Id.* at 70–71.

<sup>223</sup> SAEED, *supra* note 183, at 49. A fourth source of law for the Sunni schools is *qiyas*, or reasoning by analogy performed by Muslim jurists to address various situations individuals and societies encounter. A comprehensive treatment of the various schools of Islamic thought is beyond the scope of this Article. For further discussion, see *id.* at 43–83.

<sup>224</sup> HUSSAIN, *supra* note 195, at 33–34; see also SAEED, *supra* note 183, at 44–45. The teachings and rulings of scholars and jurists examining the Quran and *sunnah* and the principles therein came to be known as *fiqh*, or Islamic jurisprudence. *Shariah* in modern terms refers “generally to the commands and prohibitions not just as they are found in the Qur'an and Sunna but as they have been interpreted and elaborated in *fiqh* to be acted upon in everyday life. Therefore these terms are often used interchangeably.”

<sup>225</sup> SAEED, *supra* note 183, at 43.

<sup>226</sup> *Id.* at 43, 45.

The role of *shariah* in the modern Islamic state is problematic. On the one hand, *shariah* is a guide for Muslims in all aspects of their life, private and public.<sup>227</sup> On the other hand, *shariah* is not an essentially political or legal body of authority, and its validity extends only to Muslims. Accordingly, fitting *shariah* into the systems of a modern non-Muslim state presents profound theoretical difficulties, especially when one considers how *shariah* can, might, or should co-exist with a highly developed and secular legal system, such as is found in the United States. For the purposes of this Article, therefore, *shariah* will be examined not in its relevance to political and legal systems, but only insofar as it is a general moral guide for Muslims.<sup>228</sup>

### C. Teachings on Truth, Lying, and Giving Witness in Islam

A fundamental moral imperative of the Quran is that Muslims must be truthful. The Quran expressly warns Muslims that God is “well aware” if they “conceal *the truth* or evade it.”<sup>229</sup> Moreover, it instructs Muslims to “say the straightforward word”<sup>230</sup> and to “[b]e *always* just”<sup>231</sup> because God

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<sup>227</sup> *Id.* at 45 (“[*Shari’ah*] is a religious notion of law, one in which law is an integral aspect of religion. In fact religion to a Muslim *is* essentially the Divine Law which includes not only universal moral principles but details of how man should conduct his life and deal with his neighbor and with God; how he should eat, procreate, and sleep; how he should buy and sell at the market place; how he should pray and perform other acts of worship”); see also Khaled Abou El Fadl, *Muslim Minorities and Self-Restraint in Liberal Democracies*, 29 LOY. L.A. L. REV. 1525, 1526 (1996) (emphasizing the importance of *shariah* by quoting Muslim jurist, Muhammad Ibn Qayyim: “Every good in this life is derived from [*shariah*] and achieved through it . . . [it] is the pillar of existence and key to success in this world and the Hereafter.”).

<sup>228</sup> It must be remembered, however, that for Muslims *shariah* is more than merely a body of moral or religious instructions that can peacefully co-exist with a developed political and legal system. In its fullest sense, *shariah* represents an ideal to which the “Muslim state” must aspire.

<sup>229</sup> QURAN 4:135. All quotes from the Quran are from THE HOLY QUR’AN (Islam Int’l Publ’ns Ltd., 1988) [five volume series]. Each chapter of the Quran, except the *Bara’at*, begins with the verse, “In the name of [God], the Gracious, the Merciful.” THE HOLY QUR’AN series translation considers the aforesaid verse as the first verse of each chapter. Most translations of the Quran do not denote this as the first verse. This results in a discrepancy between the numbering of verses; e.g., verse 136 in THE HOLY QUR’AN series translation would be verse 135 in most other translations. Although this Article will use the translation of THE HOLY QUR’AN series, the citations to verse numbers will follow that of the majority of other translations of the Quran.

<sup>230</sup> *Id.* at 33:70. The commentary on this passage from 4 THE HOLY QUR’AN, *supra* note 229, at 2137, indicates that this particular *Surah* pertains to among the most important laws for Muslims to follow, calling them to be always “scrupulously straightforward in dealings with other people.”

“guides not one who exceeds the bounds *and is* a great liar.”<sup>232</sup> Those who tell lies and bear false witness are categorized with unbelievers and hypocrites as *li'an* (cursed), who are to be deprived of God’s blessings.<sup>233</sup>

Although the Quran instructs Muslims to be truthful, there are two elements from Islamic tradition which suggest that Muslims might be permitted to lie in limited circumstances. The first pertains to an understanding of the scope of Islamic sovereignty. While some Islamic scholars hold that the world is one abode under Islamic jurisprudence and contemporary international law, others recognize a basic division into zones of peace and belligerency.<sup>234</sup> For them, the world is comprised of two spheres: *dar al-Islam* (“house of Islam” or “house of peace”), which contains all lands under Muslim rule, and *dar al-Harb* (“house of war”), which contains all lands outside Muslim rule.<sup>235</sup> Consistent with this belief, it might be argued that Muslims residing in *dar al-Islam* live in a state of constant conflict<sup>236</sup> with the citizens of *dar al-Harb*, and thus the rules that govern relations among Muslims do not necessarily apply to interactions between Muslims and others in *dar al-Harb*.<sup>237</sup> Hence, it has been reported that Muslim theologian Abū Bakr al-Bāqillānī contends that a Muslim would be permitted to lie if he feared for his safety while in *dar al-Harb*.<sup>238</sup>

According to progressive Muslim scholarship, however, the fundamental distinction between *dar al-Islam* and *dar al-Harb*, when it is defined politically and used to justify militant *jihadi* aggression, is contrary to the principles of Islam.<sup>239</sup> A Muslim thus would not be permitted to rely on this

<sup>231</sup> QURAN 5:8.

<sup>232</sup> *Id.* at 40:28.

<sup>233</sup> In Islam, *li'an* is the most derogatory word. ALLAMA SYED SULAIMAN NADWI, SIRATUN NABI: ETHICS IN ISLAM 359 (Rizwan Uddin Ahmad & Haji Muhammad Aslam trans., 1999).

<sup>234</sup> Sheikh Wahbeh al-Zuhili, *Islam and International Law*, 87 INT’L REV. OF THE RED CROSS 258, 278, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-858-p269/\\$File/irrc\\_858\\_Zuhili.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-858-p269/$File/irrc_858_Zuhili.pdf).

<sup>235</sup> MAJID KHADDURI, THE ISLAMIC CONCEPTION OF JUSTICE 162–63 (1984). This distinction does not appear in the Quran or *sunnah*, but it was posited by early Muslim scholars and theologians.

<sup>236</sup> Although this “state of conflict could” entail physical warfare, it also embraces other Islamic principles, such as spreading the Muslim religion. *See id.* at 164–65.

<sup>237</sup> A branch of Muslim law, *Siyar*, developed to govern relations between *dar al-Islam* and *dar al-Harb*. *See id.* at 164.

<sup>238</sup> *Id.* at 163.

<sup>239</sup> MUHAMMAD SA’ID AL-‘ASHMAWY, AGAINST ISLAMIC EXTREMISM 111–12 (Carolyn Fluehr-Lobban ed., 1998) (“militants believe wrongly that Muhammad’s path and message have abrogated any other paths . . . maintain[ing] that jihād means to impose



belief in order to justify departing from the fundamental moral tenets of Islam. Moreover, even under the most traditional understanding of the division between *dar al-Islam* and *dar al-Harb*, a Muslim's general duties toward God would remain constant.<sup>240</sup> Accordingly, the narrow set of circumstances in which a Muslim might be permitted to lie based on this rationale almost certainly does not pertain to the Muslim living in the United States today.

The second element in Islamic tradition stems from a *hadith* in which Muhammad condoned lying in three circumstances:

Humaid b. 'Abd al-Rahman b. 'Auf reported that his mother Umm Kulthum daughter of 'Uqba b. Abu Mu'ait, and she was one amongst the first emigrants who pledged allegiance to Allah's Apostle (may peace be upon him), as saying that she heard Allah's Messenger (may peace be upon him) as saying: A liar is not one who tries to bring reconciliation amongst people and speaks good (in order to avert dispute), or he conveys good. Ibn Shihab said he did not hear that exemption was granted in anything what the people speak as lie but in three cases: in battle, for bringing reconciliation amongst persons and the narration of the words of the husband to his wife, and the narration of the words of a wife to her husband (in a twisted form in order to bring reconciliation between them).<sup>241</sup>

The three narrow circumstances in which lying might be permissible for Muslims are themselves further circumscribed.<sup>242</sup> Concerning lying in battle, “[a]ccording to the renowned Shafi'i jurist, an-Nawawi . . . there is a

Islam on the infidels at any time and anywhere, to convert them to the right path and true faith. . . . [this] is not jihād but aggression, forbidden by the verses and the very spirit of the Qur'ān. . . . The one-sided stress placed on holy wars and fighting is a historical distortion of the real concept of jihād and is due to political interests.”); see also MALISE RUTHVEN, *ISLAM: A VERY SHORT INTRODUCTION* 145 (1997) (“With globalization eroding the classic distinction between *dar al-islam* [sic] and *dar al-harb* [sic] the coming decades are likely to see a retreat from direct political action and a renewed emphasis on the personal and private aspects of faith.”).

<sup>240</sup> VIKØR, *supra* note 179, at 280–81 n.1.

<sup>241</sup> SAHIH MUSLIM 32:6303 (Abdul Hamid Siddiqui trans.), available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muslim/032.smt.html> (last visited Oct. 2, 2007). For a complete collection of the SAHIH MUSLIM, see University of Southern California Compendium of Muslim Texts, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muslim/>.

<sup>242</sup> *But cf.* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 45, at ¶¶ 2475–87 (prohibiting lying under all circumstances, but indicating that there must be an intention to deceive or lead another person into error). See generally PAUL J. GRIFFITHS, *LYING: AN AUGUSTINIAN THEOLOGY OF DUPLICITY* (2004) (providing a broad historical discussion of lying); 10 THE CATHOLIC ENCYCLOPEDIA 195–96 (1913) (containing a discussion of the concept of mental reservation).

consensus among Islamic scholars that allows for tricks in war against unbelievers, unless they have been given a promise or guarantee.”<sup>243</sup> Thus, an oath or promise limits this possibility during time of war because an oath is never to be violated.<sup>244</sup> Concerning the last two circumstances, lying for the sake of reconciliation between persons or spouses may only be done when there is a legitimate need for reconciliation.<sup>245</sup> For Muhammad, one’s intention is the foundation of whether an action is moral or immoral.<sup>246</sup> Therefore, lying is permissible only in these exceptional situations, provided one intends to bring about the necessary reconciliation of persons and not simply to lie.

The few situations in which lying is permitted, however, should not overshadow the fundamental requirement that Muslims must be truthful in their words and actions. When Muhammad was asked what would lead people to paradise, he replied:

Telling of truth is a virtue and virtue leads to Paradise and the servant who endeavours to tell the truth is recorded as truthful, and lie is obscenity and obscenity leads to Hell-Fire, and the servant who endeavours to tell a lie is recorded as a liar. Ibn Abu Shaiba reported this from Allah's Apostle (may peace be upon him).<sup>247</sup>

Further, when Muhammad was questioned about major sins, he identified *shirk* (polytheism)<sup>248</sup> and disobeying parents. He then quickly added “false evidence” or “false speech,” and he repeated it so many times that his companions wanted him to stop saying it.<sup>249</sup> According to Muhammad’s companions (*Sahabah*), “nothing was more hateful to the Prophet than a lie. If a person had lied while being in [the] presence of the Prophet, he would have suffered its pain until his repentance.”<sup>250</sup> This

<sup>243</sup> Karima Bennoune, Note, *As-Salamu ‘Alaykum? Humanitarian Law in Islamic Jurisprudence*, 15 MICH. J. INT’L L. 605, 625 (1994).

<sup>244</sup> *Id.*; see also QURAN 16:91.

<sup>245</sup> Sami Zaatari, *Examining the Issue of the Prophet Muhammad Allowing Muslims to Lie*, available at [http://muslim-responses.com/Islam\\_on\\_Lying/Islam\\_on\\_Lying\\_](http://muslim-responses.com/Islam_on_Lying/Islam_on_Lying_); see also Uthmaan Dhumayriyyah’, *Truthfulness*, <http://www.alminbar.com/khutbaheng/293.htm>.

<sup>246</sup> NADWI, *supra* note 233, at 50.

<sup>247</sup> SAHIH MUSLIM 32:6308, *supra* note 241, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muslim/032.smt.html>.

<sup>248</sup> See *infra* notes 265–68, and accompanying text.

<sup>249</sup> NADWI, *supra* note 233, at 364.

<sup>250</sup> MAULANA ABDUS SALAM NADVI, *THE WAYS OF THE SAHABAH (COMPANIONS OF THE PROPHET)* 236 (Muhammad Younus Qureshi trans., 2000).

disapproval of lying was not limited to Muhammad alone; his followers held lying in such contempt that if someone charged one of them with lying, the accused liar would mourn because the accusation itself reflected he had a bad moral character.<sup>251</sup>

Thus, in *shariah*, one must not have a character of falsehood, or he will be considered a hypocrite and will be without the blessings of God.<sup>252</sup> According to Muhammad, “[t]he signs of a hypocrite are three: 1) Whenever he speaks, he tells a lie. 2) Whenever he promises, he always breaks it (his promise). 3) If you trust him, he proves to be dishonest (if you keep something as a trust with him, he will not return it).”<sup>253</sup> This character of falsehood or hypocrisy leads to infidelity, which closes the door to salvation for Muslims.<sup>254</sup>

Besides addressing truth and lying, *shariah* also teaches specifically about giving witness and taking oaths. In the Quran, Muslims are told to “plead not on behalf of those who are dishonest to themselves”<sup>255</sup> and to “be strict in observing justice, and be witnesses for [God], even though it be against yourselves or against parents and kindred.”<sup>256</sup> Only those who “bear not false witness”<sup>257</sup> are considered a true servant of God.<sup>258</sup> Refraining from bearing false witness<sup>259</sup> has been interpreted to apply to two areas: 1) Muslims are instructed not to give evidence in a court of law “in regard to a false thing in order to prove it right, when in fact it is a falsehood, or at best a doubtful thing”; and 2) they must “have no intention to witness any thing

<sup>251</sup> *Id.*

<sup>252</sup> NADWI, *supra* note 233, at 359.

<sup>253</sup> SAHIH AL-BUKHARI 1:2:32 (Muhammad Muhsin Khan trans.), available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/002.sbt.html#001.002.032> (last visited Oct. 3, 2007). For a complete collection of the SAHIH AL-BUKHARI, see University of Southern California Compendium of Muslim Texts, <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/>.

<sup>254</sup> “No believer has been accused for any action except falsehood.” NADWI, *supra* note 233, at 359.

<sup>255</sup> QURAN 4:107.

<sup>256</sup> *Id.* at 4:135; see also 2 THE HOLY QUR’AN, *supra* note 228, at 571 n.600 (commenting that this verse instructs that “one should give true evidence in all cases, even against the members of one’s own community or one’s near relations or even when one’s own honour or property is at stake.”).

<sup>257</sup> QURAN 25:72.

<sup>258</sup> *Id.* at 25:63.

<sup>259</sup> In Islam, a lie which is detrimental to the rights and honor of others is distinguished from a common falsehood because it is considered the worst kind of lie. It is referred to as *zur* (to stray from the straight path). Although the meaning of *zur* includes “falsehood and calumny, it does appear from hadiths that it particularly means false evidence.” NADWI, *supra* note 233, at 363–64.

which is false, evil or wicked as spectators. In this sense, every sin and every indecency, every sham and counterfeit act is a falsehood. A true servant of [God] recognizes it as false and shuns it . . . .”<sup>260</sup> *Shariah* also permits women to give testimony where such testimony will “establish the truth.”<sup>261</sup>

Moreover, faithful Muslims are instructed that they should “make not your oaths a means of deceit between you; or your foot will slip after it has been firmly established, and you will taste evil because you turned *people* away from the path of [God], and you will have a severe punishment.”<sup>262</sup> The solemnity in taking an oath is reflected by the requirement that oaths only be taken in the name of God.<sup>263</sup> It is not permissible for a Muslim to take an oath swearing by Muhammad or anyone else.<sup>264</sup> In fact, if anyone swears by other than God, he has committed an act of *shirk*.<sup>265</sup> *Shirk* is the gravest of sins and is considered unpardonable.<sup>266</sup> *Shirk* is committed anytime one implies that there are partners or equals to God, or ascribes “divine attributes to others besides [God] and believing that the source of power, harm and blessings comes from another besides [God].”<sup>267</sup> Muhammad also equated giving false witness with the sin of *shirk*.<sup>268</sup>

Although the above-quoted verses from the Quran and instructions from various *hadith* indicate that Muslims should observe their oaths and not bear false witness, there exist other, seemingly contradictory verses. For instance, the Quran instructs:

<sup>260</sup> S. ABUL A‘LĀ MAUDŪDĪ, 8 THE MEANING OF THE QUR’AN 206 (‘Abdul ‘Azīz Kamāl trans., 1991).

<sup>261</sup> MOHAMMAD HASHIM KAMALI, FREEDOM, EQUALITY AND JUSTICE IN ISLAM 68 (2002).

<sup>262</sup> QURAN 16:95. It is interesting to note that the commentary in 3 THE HOLY QUR’AN, *supra* note 229, at 1379, indicates that not only are dishonest motives unrighteous, but Muslims in particular should refrain from dishonest conduct, “even though it be in political affairs” because it “will make men turn away from Islam.” See also 6 MAUDŪDĪ, *supra* note 260, at 97.

<sup>263</sup> SAHIH AL-BUKHARI 8:78:641, *supra* note 253, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/078.sbt.html>. Oaths must be observed since God is invoked as a guarantor of the oath-taker. QURAN 16:92.

<sup>264</sup> SAHIH AL-BUKHARI 8:78:641–43, *supra* note 253, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/078.sbt.html>.

<sup>265</sup> 6 AL-MUSNAD, ISLAMIC VERDICTS, *supra* note 214, at 367.

<sup>266</sup> IGNAZ GOLDHIZER, INTRODUCTION TO ISLAMIC THEOLOGY AND LAW 42 (Andras Hamori & Ruth Hamori trans., 1981).

<sup>267</sup> MUHAMMAD TAQĪ-UD-DĪN AL-HILĀLĪ, MUHAMMAD MUHSIN KHĀN, INTERPRETATION OF THE MEANINGS OF THE NOBLE QUR’AN IN THE ENGLISH LANGUAGE (4th ed. 1994).

<sup>268</sup> 3 SUNAN ABU DAWUD 1022, 28:3592 (Ahmad Hasan trans., 1984).

And make not [God] a target for your oaths that you may thereby abstain from doing good and acting righteously and making peace between men. . . [God] will not call you to account for such of your oaths as are vain, but He will call you to account for what your hearts have earned.<sup>269</sup>

Here, however, the Quran is referring to men who become angry with their wives and swear oaths that they will not treat them well.<sup>270</sup> Muslims are elsewhere instructed to refrain from doing anything that is vain or purposeless,<sup>271</sup> and the oaths referenced in this verse have been sworn by men purely out of habit, because of anger, or in a careless manner without reflection.<sup>272</sup> Such “oaths” lack adequate thought and thus do not have legal effect,<sup>273</sup> and Muhammad would often overlook oaths that were made casually or purely out of habit.<sup>274</sup>

On the other hand, deliberate oaths—that is, oaths with a proper intention<sup>275</sup> in one’s heart and awareness—must be observed.<sup>276</sup> Indeed, some Muslim scholars and jurists teach that simulating an oath by deliberately making a false oath for material gain or to appease someone is too grave a sin for atonement.<sup>277</sup> The notion of atonement or expiation for breaking an oath is found in the following verse:

God will not call you to account for such of your oaths as are vain, but He will call you to account for the oaths which you take in earnest. Its expiation, then, is the feeding of ten poor persons with such average food as you feed your families with, or the clothing of them or the freeing of a neck. But whoso finds not the means shall fast for three days. That is the

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<sup>269</sup> QURAN 2:224–25.

<sup>270</sup> 2 THE HOLY QUR’AN, *supra* note 229, at 294.

<sup>271</sup> QURAN 23:3.

<sup>272</sup> 2 THE HOLY QUR’AN, *supra* note 229, at 294.

<sup>273</sup> *Id.*; see also 1 MAUDŪDĪ, *supra* note 260, at 163 (“[I]f anyone takes a thoughtless oath to do or not to do a thing and afterwards realizes that fairness demands its abrogation, he should abrogate it and expiate for it.”).

<sup>274</sup> SAYYID QUTH, 1 IN THE SHADE OF THE QURAN 275 (M.A. Salahi & A.A. Shamis eds. & trans., 1999).

<sup>275</sup> Muhammad judged an action as good or evil based on the intention of the actor. NADWI, *supra* note 233, at 50. In *shariah*, because one’s intention is the foundation of the morality of an action, one must be aware of what he is doing in order for the oath to be binding; thus, only a “deliberate” oath is an oath in a strict sense.

<sup>276</sup> QURAN 16:91.

<sup>277</sup> 1 QUTH, *supra* note 274, at 275.

expiation of your oaths when you have sworn them. And do keep your oaths.<sup>278</sup>

The instruction to expiate for oaths is not explicit permission to break oaths with impunity and then make atonement for them afterward.<sup>279</sup> The oaths referred to in this verse involve designating certain lawful foods to be unlawful for the oath takers.<sup>280</sup> Such an oath is considered sinful for Muslims, and therefore ought to be broken because Muslims cannot make unlawful food which God made lawful.<sup>281</sup> Thus, if a Muslim without deliberation made an oath such as this, he is not bound to observe it. On the other hand, if a Muslim deliberately takes such an oath, he ought to expiate for breaking it, even though the oath was sinful, because of his original intention and deliberate taking of an oath.<sup>282</sup> Deliberation and awareness imply three requirements: (1) Muslims should not make oaths for worthless or sinful purposes; (2) if a Muslim takes an oath, he has an obligation to remember it; and (3) if a Muslim deliberately takes a valid oath that is not sinful in itself, he must fulfill it.<sup>283</sup> The deliberateness of an oath and emphasis of its gravity can be manifested in several ways: (1) by the wording of the oath, such as including names of God, which calls to mind in the oath-taker the punishment for contradicting the oath; (2) by the time when the oath is taken, such as after prayer; (3) by the place in which the oath is taken; (4) by the position the person is in when taking the oath, such as standing; and (5) by the consequences connected with breaking it.<sup>284</sup>

Another easily misunderstood verse from the Quran concerns dissolving oaths: “[God] has indeed allowed to you dissolution of your oaths, and [God] is your Friend; and He is All-Knowing, Wise.”<sup>285</sup> In this verse, Muhammad had made an oath to refrain from using certain lawful amenities<sup>286</sup> because of his wives’ insistent demands that he procure them.<sup>287</sup> Similar to verse 5:90, this passage indicates that not even Muhammad had the power to make

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<sup>278</sup> QURAN 5:90.

<sup>279</sup> 2 THE HOLY QUR’AN, *supra* note 229, at 649.

<sup>280</sup> 3 MAUDŪDĪ, *supra* note 260, at 70.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> 6 AL-MUSNAD, ISLAMIC VERDICTS, *supra* note 214, at 365–66.

<sup>285</sup> QURAN 66:2.

<sup>286</sup> It is speculated that Muhammad had made an oath not to eat honey. See 14 MAUDŪDĪ, *supra* note 260, at 379.

<sup>287</sup> 5 THE HOLY QUR’AN, *supra* note 229, at 2649.

unlawful those things which God had made lawful.<sup>288</sup> Muhammad did not regard this oath as forbidding something “as a matter of faith nor legally.”<sup>289</sup>

Hence, telling the truth, giving truthful testimony in court, and fulfilling deliberate oaths are moral imperatives for the faithful Muslim.<sup>290</sup> Failure to be honest in one’s private and public affairs bears the likely consequence of eternal condemnation. Moreover, although *shariah* properly belongs to an Islamic state, faithful Muslims in America consider themselves equally bound by its moral imperatives, at least insofar as they are compatible with America’s secular legal traditions.<sup>291</sup> Accordingly, with respect to truth-telling and giving testimony, faithful Muslims living in the United States are constrained by the religious instructions contained in *shariah* just as their brethren living in Muslim countries are bound by them.<sup>292</sup>

#### D. Muslims and Oath-Taking: Political and Legal Contexts

Perhaps as a result of the increasing democratization of Middle Eastern countries,<sup>293</sup> oaths in these nations are used in many of the same ways as in the West. In several Muslim states, for example, government officials take an oath prior to assuming office;<sup>294</sup> cadets take an oath upon graduation from

<sup>288</sup> 14 MAUDŪDĪ, *supra* note 260, at 376.

<sup>289</sup> *Id.*

<sup>290</sup> The inviolability and reverence that Muslims have for an oath, particularly in court, is shown by a study of courts in Islamic Morocco, where “it was found that lying litigants would frequently ‘maintain their testimony right up to the moment of oath-taking and then to stop, refuse the oath, and surrender the case.’” Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 FLA. J. INT.’L L. 1, 83 (2006).

<sup>291</sup> KAMALI, *supra* note 261, at 4 (“For the common practicing Muslim [in North America], the essentials of the faith remain the most important issues in their religious life.”).

<sup>292</sup> Fadl, *supra* note 227, at 1529.

<sup>293</sup> For perspectives on the character, development and processes of democracy in Middle Eastern countries, see generally DEMOCRATIZATION IN THE MIDDLE EAST: EXPERIENCES, STRUGGLES, CHALLENGES (Amin Saikal & Albrecht Schnabel, eds., 2003).

<sup>294</sup> Examples of constitutions that require taking an oath prior to assuming office are: Iran (*see* QANUNI ASSASSI JUMHIRI’I ISLA’MAI IRAN [Constitution] art. 121 1358); Iraq (*see* AL-DUSTURAL-‘IR-AQ-I [Constitution] arts. 48, 68, 76); Jordan (*see* CONST. OF THE HASHEMITE KINGDOM OF JORDAN art. 29); Kuwait (*see* CONST. KUWAIT art. 60); Qatar (*see* QATAR CONST. arts. 10, 13, 74, 92, 116, 119); Syria (*see* CONST. OF THE SYRIAN ARAB REPUBLIC art. 7); United Arab Emirates (*see* DASTŪR DAWLAT AL-‘IMARĀT AL-‘ARABĪYA AL-MUTTALIDA [Constitution] arts. 52, 57, 73, 98); Yemen (*see* YEMEN CONST. arts. 75, 108, 111, 132, 159).

military academies;<sup>295</sup> and healthcare professionals, viewed as “instruments of God’s mercy on earth,”<sup>296</sup> take an oath affirming the sacredness of their duty to serve mankind.<sup>297</sup>

In the Islamic law of evidence, the oath is more than a procedural guarantor of testimony; it is also a substantive, evidentiary tool that can fortify or detract from a litigant’s case. Accordingly, if a plaintiff has insufficient evidence to support his claim, he may request that the defendant take an oath declaring his innocence. If the defendant refuses to take the oath, that refusal can be used as evidence to support a verdict for the plaintiff;<sup>298</sup> if he takes the oath, it may be used as evidence to render judgment for the defendant.<sup>299</sup> Although Muslims are not required to take such oaths on the Quran, many do, presumably to buttress the strength of their testimony.<sup>300</sup> Telling the truth under oath, regardless of whether the Quran is used, is a grave moral imperative.<sup>301</sup>

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<sup>295</sup> See, e.g., *Leader Attends Graduation and Oath-Taking Ceremony at Imam Ali Military Academy*, THE ISLAMIC REVOLUTION CULTURAL-RESEARCH INSTITUTE FOR PRESERVING AND PUBLISHING WORKS BY AYATOLLAH SEYYED ALI KHAMENIE, Dec. 24, 2006, available at [http://www.khamenei.ir//index.php?option=com\\_content&task=view&id=352&Itemid=2](http://www.khamenei.ir//index.php?option=com_content&task=view&id=352&Itemid=2).

<sup>296</sup> FARHAT MOAZAM, *BIOETHICS AND ORGAN TRANSPLANTATION IN A MUSLIM SOCIETY: A STUDY IN CULTURE, ETHNOGRAPHY, AND RELIGION* 218 (2006).

<sup>297</sup> *Id.* at 240–41 n.7.

<sup>298</sup> HUSSAIN, *supra* note 195, at 165.

<sup>299</sup> *Id.* at 166 (Referring to a March 1996 article in the Malaysian Law News, Hussain reports of a case in Malaysia in which a man, accused of rape, took an oath in the presence of the Imam of the mosque, the judge, the prosecutor, the solicitor, and the victim’s mother. He was acquitted on the grounds that his oath raised a reasonable doubt as to his guilt.). See *supra* note 27, and accompanying text, concerning decisory oaths, of which this is an example.

<sup>300</sup> HUSSAIN, *supra* note 195, at 165–66.

<sup>301</sup> A comprehensive, comparative study of oath taking as it bears on the Muslim’s relation to the State is beyond the scope of this Article. A few examples are instructive, however. In Turkey, a secular democratic State, oaths in criminal trials are administered not on sacred artifacts (such as the Quran or the Bible), but on one’s honor. See Ergun Özsunay, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Turkey*, 19 EMORY INT’L L. REV. 1087, 1118 (2005). In Greece, Muslims must take oaths on the Quran when required by law, during military service, or when elected as deputies. See Secretary-General, *Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, § 1 (Greece), *Report prepared pursuant to Commission on Human Rights resolution 1993/24*, U.N. Doc. E/CN.4/1994/72 (1993). The Algerian Constitution mandates that when taking the oath of office, “the President must swear by Allah to respect and glorify the Islamic religion.” Joëlle Entelis, *International Human Rights: Islam’s Friend or Foe?*, 20 FORDHAM INT’L L.J. 1251, 1274 (1997).



Further, many Muslim-Americans freely participate in American state and societal institutions in which the oath is an integral part. For example, it is estimated that ten thousand Muslims serve in the various branches of the United States military,<sup>302</sup> enlistment in which requires taking an oath to “support and defend the Constitution of the United States against all enemies.”<sup>303</sup> In addition, in United States courts, as discussed above,<sup>304</sup> witnesses must take an oath or affirmation prior to giving testimony, and Muslims generally have freely participated in this requirement. Recently, the Attorney General required certain nonimmigrant aliens, mostly from Muslim countries, to report to Immigration and Naturalization Service to be photographed, fingerprinted, and interviewed under oath regarding why they were in the United States,<sup>305</sup> and presumably most Muslims complied with these requirements. These examples illustrate that the oath is regarded by Muslim-Americans in essentially the same way that non-Muslim Americans regard it: as a mode of publicly guaranteeing the truthfulness of one’s testimony.

In summary, telling the truth is an important, universal moral principle of Islam. When sealed by an oath, particularly on the Quran, the importance of telling the truth attains a heightened significance, for such an oath sworn on the Quran gives witness to the declarant’s willingness to stake his eternal destination on the truthfulness of his testimony.<sup>306</sup> Accordingly, taking an oath generally, and in particular securing an oath by the Quran, rises to at least the same level of significance for a Muslim-American as taking an oath

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<sup>302</sup> Many Muslims have honorably performed their military duties in campaigns against Middle Eastern countries. See NIMER, *supra* note 194, at 15. Nimer notes that although some Muslim servicemen have claimed conscientious objection, such as boxer Muhammad Ali during the Vietnam war, many participated in the 1990–91 Gulf War against Iraq.

<sup>303</sup> 10 U.S.C. § 502 (2000) (“Each person enlisting in an armed force shall take the following oath: ‘I, \_\_\_\_\_, 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; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.’”).

<sup>304</sup> See *supra* Part III.

<sup>305</sup> See Registration of Certain Nonimmigrant Aliens from Designated Countries, Att’y Gen. Order No. 2643-2003, 68 Fed. Reg. 2363 (Jan. 16, 2003).

<sup>306</sup> The gravity of making a deliberately false oath while swearing on the Quran is of the most serious kind. If one swears to a lie while using the Quran and knows it, “this is a great sin for which he must turn in repentance to Allah. Indeed, some of the scholars say that this is a false oath, which submerges the perpetrator into itself, and then he will be submerged in the Fire.” Al-Musnad, ISLAMIC VERDICTS, *supra* note 214, at 405.

on the Bible does for a Christian-American, or making an affirmation does for one who does not wish to guarantee his oath on a holy artifact.

## V. THE BIBLE, QURAN, AND RELIGIOUS ARTIFACTS IN AMERICAN COURTS

In light of the religious pluralism present within the United States today, it is appropriate to consider the content of oaths and oath ceremonies in contemporary American courts, and in particular whether religious artifacts such as the Bible and Quran should be permitted. This evaluation requires an analysis of four issues: (1) What is the purpose and significance of oaths in modern American society?; (2) Is it acceptable to use the Bible, the Quran, and other religious artifacts in oath taking in light of the relevant common law and statutory provisions?; (3) Is it necessary for Christians to use the Bible, for Muslims to use the Quran, and for adherents of other religious traditions to use sacred artifacts in oath taking?; and (4) What are the relative advantages and disadvantages of allowing the use of such artifacts for this purpose?

### A. *The Purpose and Significance of Oaths in Modern American Society*

Cultures change, and American society is no exception. Human nature is transcendent, however, and an important aspect of the human person is a desire to know the truth.<sup>307</sup> While a yearning and inclination for the truth and knowledge endures, no society has successfully cultivated the virtue of truthfulness in all its citizens, a reality which is attributable to the human condition. Accordingly, the historical purpose of an oath as a guarantor of truth to promote justice remains relevant in present-day America. As one court recently put it, the continued “purpose of the oath requirement is to impress upon the affiant the solemnity of the occasion and the need to tell the truth.”<sup>308</sup>

Of course, the use of oaths and affirmations in modern American courts is not directed at promoting the virtue of truthfulness for the sake of perfecting a witness’ character. Rather, an oath or affirmation is meant “to bind the conscience of the speaker at a time when what he says will deeply affect the rights of an individual.”<sup>309</sup> In other words, the witness oath or affirmation has a fundamental civic purpose of helping to achieve right order

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<sup>307</sup> See Milhizer, *supra* note 11, at 59–63.

<sup>308</sup> State v. Robinson, 518 S.E.2d 269, 275 (S.C. Ct. App. 1999).

<sup>309</sup> Brummer v. Stokebrand, 601 N.W.2d 619, 623 (S.D. 1999).

and justice within society by promoting truth so that no one is stigmatized or deprived of legitimate rights or liberty based on false testimony. The oath has thus retained its status as “an essential component of . . . legal proceedings.”<sup>310</sup>

Although the basic reasons and relevance of oaths in our legal system have remained constant, their foundational premise has changed over time as a consequence of a cultural transformation in America from Christian homogeneity to religious diversity. Notwithstanding the contention that American society has become more irreligious, the American people have retained a sense that they are bound to follow their consciences, which for most of us is linked to God in some manner.<sup>311</sup> And so, for the oath taker, the modern understanding of an oath’s potency resides in its capacity to awaken one’s conscience and reinforce one’s duty to be truthful through a divine invocation, rather than its ability to summon supernatural intervention or even divine retribution should one lie. Moreover, even those who still hold interventionist beliefs would join in the contemporary consensus that an oath awakens the taker’s conscience and reinforces his duty to tell the truth. This is the substance of the modern oath.

Given the religious diversity in contemporary America, an effective oath must account for a variety of beliefs about the identity and nature of God, consistent with present-day attitudes. It must permit subjective and divergent understandings of God’s relationship to an oath and an oath taker. It must accommodate religious diversity, both as publicly expressed in the oath ceremony and as privately held by individual oath takers. Finally, it must retain its substantive meaning while demonstrating procedural agility. These are the needs and challenges of the modern oath.<sup>312</sup>

In addition, oaths and oath ceremonies have continued significance for persons besides oath takers. For fact-finders and the broader public, witness oaths are important because they can “remedy . . . a defect, namely, some man’s lack of belief in another man.”<sup>313</sup> An invocation of “God” as part of an oath helps satisfy others that the oath taker’s conscience has at least presumptively been awakened to the duty to tell the truth. This assurance rests on a common understanding that one who believes in God would not lie

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<sup>310</sup> *State v. Tye*, 636 N.W.2d 473, 478 (Wis. 2001).

<sup>311</sup> A Gallup poll in 1988 revealed that eight in ten Americans thought they would be called before God on Judgment Day to give an account of their sins; a 1994 Harris poll indicated that 95% of Americans believe in God. Thomas C. Reeves, *Not So Christian America*, 66 *FIRST THINGS* 16 (1996).

<sup>312</sup> Federal Rule 603 provides that no particular form of oath is required. *See* FED. R. EVID. 603 Advisory Committee Notes. Accordingly, the Federal Rule allows for the adoption of appropriate oaths without specifying any specific oath.

<sup>313</sup> AQUINAS, *supra* note 9, II-II, Q. 89, Art. 5.

when invoking God, especially in a formal setting and about significant matters. The objective value of the oath for society complements its subjective value for oath takers. Because oaths continue to serve both functions effectively—in fact, because they most powerfully serve these functions for most people—they have retained their relevance and potency in modern American society.

### *B. The Acceptability of Using the Bible, Quran, and Other Religious Artifacts in Courtroom Oaths*

Although a non-specific invocation of God in an oath has continuing importance, it remains to consider whether the use of religious artifacts during oath ceremonies is still acceptable in contemporary courtrooms. Consistent with the relevant common law and statutory law principles, it seems entirely permissible to allow Christians to use the Bible, Muslims to use the Quran, and believers from other faith traditions to use various artifacts and objects when taking a witness oath in American courts.

Over two centuries ago, *Omychund v. Barker* established that an oath taker should be permitted to swear an oath using a form that he finds binding on his conscience.<sup>314</sup> Consistent with this reasoning, if an oath taker believes that a religious artifact is necessary or helpful in this way, its use would be deemed beneficial for this limited purpose. Accordingly, American courts have historically permitted a variety of religious artifacts and other objects to be employed while taking an oath, including chickens, burning sticks, and tribal icons.<sup>315</sup> As one court instructed:

And if our form of oath is not binding upon persons of other religious beliefs, the form which is recognized as binding can be administered. A Jew may be sworn on the Pentateuch or Old Testament, with his head covered; a Mohammedan on the Koran; a Gentoo, touching with his hand the foot of a Brahmin or priest of his religion; a Chinese, by breaking a china saucer.<sup>316</sup>

Consistent with this approach, sacred texts from all faith traditions should be equally welcomed.

This historic tolerance of alternative oath practices seems to have been preserved in most contemporary statutory provisions. As noted earlier, there

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<sup>314</sup> *Omychund v. Barker*, (1744) 26 Eng. Rep. 15, 31 (K.B.) (opinion of Lord Chief Justice Willes); *id.* at 33 (opinion of the Lord Chancellor Hardwicke).

<sup>315</sup> See *supra* notes 68–72.

<sup>316</sup> *United States v. Miller*, 236 F. 798, 799–800 (W.D.Wa. 1916); see also *United States v. Mallard*, 40 F. 151, 151 (D.C.S.C. 1889) (holding that “[t]he oath may be administered on the Book, or with uplifted hand, or in any mode peculiar to the religious belief of the person sworn, or in any form binding on his conscience”).

is presently no required constitutional or federal statutory form for witness oaths.<sup>317</sup> The overriding concern in the federal system is that the oath binds the witness in conscience and raises the witness' awareness of his duty to tell the truth.<sup>318</sup> Many state statutory provisions likewise accommodate the use of various religious articles, presumably to help accomplish these same goals.<sup>319</sup> Such provisions would seem to allow a witness to take oaths using any artifact he considers sacred, and, perhaps, they would even tolerate the use of any object that the witness finds to have religious significance.

The special status of the Bible for Christians and the Quran for Muslims make these texts especially suitable for oath ceremonies. Christians believe the Bible is the inspired word of God, worthy of the most solemn veneration; they believe it teaches the truth by revealing divine realities, and it offers strength and guidance for daily life.<sup>320</sup> Analogously, for Muslims the Quran is the paramount authority, which teaches how one should live every aspect of his life.<sup>321</sup> The Quran is understood by Muslims to be the word of God and to symbolize the demands of *shariah*: that one must be truthful, must not bear false witness, must refrain from taking a false oath, and must keep oaths.<sup>322</sup> Given the unique role of the Bible and the Quran in their respective religious traditions, it seems likely that most contemporary statutes could be applied in such a way as to allow believers to use these artifacts when taking a witness oath.

Other faith traditions have their own inspired texts and esteemed artifacts, and thus they could also be used during oath ceremonies consistent with the same controlling principles of promoting truthful testimony and binding the conscience of oath takers. For Hindus, swearing on the Bhagavad Gita<sup>323</sup> could enhance oaths. Various Buddhist traditions recognize different

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<sup>317</sup> See *supra* notes 135–40 and accompanying text (demonstrating the absence of any comprehensive and mandatory oath form); see also *United States v. Ward*, 989 F.2d 1015, 1018–20 (9th Cir. 1992).

<sup>318</sup> FED. R. EVID. 603; *United States v. Armijo*, 5 F.3d 1229, 1235 (9th Cir. 1993).

<sup>319</sup> See *supra* notes 141–42 and accompanying text.

<sup>320</sup> CATECHISM OF THE CATHOLIC CHURCH, *supra* note 45, ¶¶ 101–05, 107, 141; TIMOTHY F. LULL, ON BEING LUTHERAN: REFLECTIONS ON CHURCH, THEOLOGY AND FAITH 11–15 (2006); NEIL S. WILSON & BRUCE B. BARTON, THE HANDBOOK OF BIBLE APPLICATION 165 (1992); BILL J. LEONARD, BAPTISTS IN AMERICA 132 (2005).

<sup>321</sup> See *supra* notes 208–15 and accompanying text.

<sup>322</sup> See *supra* Part IV.

<sup>323</sup> The Bhagavad Gita is revered as a sacred text of Hindu philosophy. CATHERINE A. ROBINSON, INTERPRETATIONS OF THE BHAGAVAD-GITA AND IMAGES OF THE HINDU TRADITION: THE SONG OF THE LORD 5 (2006).

sacred texts.<sup>324</sup> While the list of religions and their corresponding sacred verses and artifacts is long and complicated,<sup>325</sup> many of these would seem to occupy a similar status to the Bible and the Quran for their respective believers, and, therefore, could enjoy a similar recognition in American courtrooms.

### *C. Using the Bible, Quran, and Other Religious Artifacts to Take an Oath Is Unnecessary in Modern American Society*

Although the underlying principle in both statutory and common law is to allow forms of oaths which bind the consciences of oath takers and raise their awareness of the duty to tell the truth, not every oath variation that serves these purposes must be permitted. It is sufficient that the oath binds the conscience of the oath taker to tell the truth;<sup>326</sup> it is not, however, necessary that the oath and its accompanying ceremony bind an oath taker's conscience in the strongest conceivable manner. Thus, the imperative of the court system to discover and preserve truth and administer justice is met if the form and manner of the oath or affirmation raises *sufficient awareness* in the mind of the oath taker of his truth-telling obligations.

For Christians, an oath is sufficient if it invokes God and thereby raises the awareness of the oath taker to the presence of a divine witness to his commitment to tell the truth.<sup>327</sup> Although an explicit reference to God is necessary for an attestation to be considered an oath, the use of the Bible is not required.<sup>328</sup> In fact, the Bible is explicitly permitted in courtroom oath ceremonies in only a handful of states.<sup>329</sup> Most state statutes addressing courtroom oaths make no reference to sacred artifacts. They instead allow oath takers to invoke God, make an affirmation that they will tell the truth, or

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<sup>324</sup> See TODD ALBERTSON, *THE GODS OF BUSINESS: THE INTERSECTION OF FAITH AND THE MARKETPLACE* 46–47 (2007) (describing the various texts considered sacred by certain groups of Buddhists, including the *Tripitaka* and the *Dhammapada*).

<sup>325</sup> See, e.g., *id.* at 30 (explaining the importance of the *Kojiki* and the *Nihongi* in Shintoism); see also HUSTON SMITH, *THE WORLD'S GREAT RELIGIONS: OUR GREAT WISDOM TRADITIONS* 76 (1991) (describing the reverence given to the *Guru Granth Sahib* in Sikhism).

<sup>326</sup> See *State v. Healy*, 521 N.W.2d 47, 50 (Minn. Ct. App. 1994) (emphasizing that the particular form of oath or affirmation used is not important provided that the oath taker consciously affirms to tell the truth); *State v. Sands*, 467 A.2d 202, 224 (N.H. 1983) (recognizing that a form of oath used that causes the oath taker to consciously recognize the obligation to tell the truth is acceptable even if it is not according to a customary form).

<sup>327</sup> See, e.g., *CATECHISM OF THE CATHOLIC CHURCH*, *supra* note 45, ¶ 2150.

<sup>328</sup> *Cox v. State*, 79 S.E. 909, 909 (Ga. Ct. App. 1913).

<sup>329</sup> See *supra* notes 144–50 and accompanying text.

permit some other type of accommodation.<sup>330</sup> Thus, while it is permissible and perhaps even desirable in certain instances to allow Christians to use the Bible in taking an oath, it is not necessary for the purposes of binding a Christian in conscience to tell the truth in court because of the general moral requirement that a Christian refrain from lying and giving false testimony.<sup>331</sup>

Like Christians, Muslims do not consider swearing on a religious artifact, including the Quran, to be essential for a valid oath.<sup>332</sup> Muslims have a pre-existing obligation from *shariah* to speak the truth, making it unnecessary for Muslim witnesses to use the Quran in oath ceremonies. Indeed, the Quran is not universally used for oath taking even in predominantly Muslim countries.<sup>333</sup> Swearing an oath with reference to God, without the Quran, would be fully binding upon a Muslim witness, as would an affirmation to testify truthfully.<sup>334</sup> Either form, with or without the Quran, would be wholly sufficient to provide the necessary subjective and objective assurances for oath takers and others.

The same conclusions can be confidently drawn about other faith traditions and belief systems. The literature discloses no case where a witness claimed to be disabled from telling the truth because he was denied the use of an artifact or object during an oath ceremony. Moreover, any person who expressed such an initial reservation could likely have his concerns alleviated by appropriate explanations and instructions from the trial judge. For all these reasons, it is clear that the use of religious artifacts, while permissible and in some cases even helpful, are not required for meaningful and effective oaths and affirmations.

#### D. *Advantages and Disadvantages of Allowing Religious Artifacts in Courtroom Oaths*

Given the continued relevancy and power of oaths in modern American society, and the inessentiality of using religious artifacts in taking oaths, it is finally necessary to balance the advantages and disadvantages of their use in courtroom oaths. While there are certain benefits in permitting the use of

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<sup>330</sup> See *supra* note 152.

<sup>331</sup> *Exodus* 20:12; CATECHISM OF THE CATHOLIC CHURCH, *supra* note 45, ¶¶ 2482–87.

<sup>332</sup> HUSSAIN, *supra* note 195, at 166.

<sup>333</sup> See *supra* note 301.

<sup>334</sup> Muslims have on occasion chosen to make an affirmation instead of availing themselves of the opportunity of swearing on the Quran. See, e.g., *United States v. Kalaydjian*, 784 F.2d 53, 55 (2d Cir. 1986). From the viewpoint of the court, there is no distinction between an oath or affirmation that commits the witness to testify truthfully. *Hong Sai Chee v. Long Island R.R. Co.*, 328 F.2d 711, 713 (2d Cir. 1964).

religious artifacts on such occasions, they are outweighed by the countervailing burdens of such an accommodation.

### 1. *Advantages of Allowing Religious Artifacts*

The first potential advantage of allowing religious artifacts in oath ceremonies is that they can enhance an oath's substantive effectiveness. As described earlier, the contemporary justification for a witness oath or affirmation is to bind the taker's conscience and emphasize his duty to tell the truth. Although the use of artifacts was never universally treated as essential for these purposes, they have been employed throughout history because they are considered beneficial in achieving these ends.<sup>335</sup> Thus, insofar as an artifact has meaning to the oath taker, it can help remind and encourage him to fulfill his truth-telling duty. Further, because an artifact may enhance the solemnity of the oath for the taker and observers, it can strengthen the confidence of the fact-finder and others that a witness has testified truthfully. The use of religious artifacts, therefore, can help promote the efficacy of an oath, thereby assisting the search for truth and the administration of justice.

It would be an overstatement, however, to claim that without religious artifacts oath takers would neither recognize their duty to tell the truth nor consider themselves bound in conscience to testify truthfully. When a witness swears an oath in an American court, he is making a public expression in a formal ceremony that he will speak the truth regardless of whether artifacts are used in conjunction with this commitment. The formal and public expression, alone, has sufficient power to emphasize one's duty and bind one's conscience. Even if additional ritual is deemed useful, this can be satisfied by requiring a witness to stand, raise his right hand, and repeat the oath.

A second possible advantage of permitting witnesses to use religious artifacts is that such an accommodation is solicitous of diverse and even individualized religious expression, which is beneficial to society in general and the legal system in particular. Such permissive procedures would demonstrate, in an important and tangible way, the public's respect for or at least tolerance of the full spectrum of religious belief and expression. One might argue that such an approach is necessary because religious freedom is truly honored only if no belief is disrespected or unduly encumbered.

Of course, the absolutist position in this regard is silly and, ultimately, untenable. Expression of all types, including religious expression, has traditionally been limited within the courtroom context, where certain

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<sup>335</sup> See *supra* Part II.



standards of dignity, decorum, and solemnity must be maintained.<sup>336</sup> Thus, activities or items which detract from the proper courtroom environment, and thus hinder the administration of justice, are disallowed or restricted regardless of their religious content. For example, a reasonable judge would prohibit a defendant from distractingly praying in the courtroom during the cross-examination of a witness, or a juror standing and publicly expressing his belief in Jesus Christ while a prosecuting attorney made an opening statement. Because the state has legitimate reasons for exercising control in the courtroom and placing limits on the religious expression of people present therein, it has the ability to restrict the manner in which oaths can be sworn. This legitimate authority extends to the use of religious artifacts during oath ceremonies. Accordingly, the advantages of allowing religious artifacts in oath ceremonies, while genuine, are minimal and subject to competing policy considerations.

## 2. *Disadvantages of Allowing Religious Artifacts*

Although there are certain advantages to incorporating religious artifacts into courtroom oaths, there are substantial, countervailing disadvantages associated with their use. As one begins down the road of permitting such objects, he is immediately confronted with two troubling and burdensome options: (a) accede to an oath taker's request to use any artifact which he considers symbolic of his religious beliefs, or (b) restrict the use of artifacts only to those that are deemed acceptable. Either choice leads to a multitude of undesirable consequences.

Any consideration of the first option must appreciate the enormous breadth of its logical extension. If no distinctions are to be drawn on substantive religious bases, then the range of permitted "religious" artifacts would be virtually unlimited. The only valid criterion for excluding an

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<sup>336</sup> The notion that there is a certain dignity, decorum, and solemnity that must be maintained in a court is evidenced by a judge's authority to impose various restrictions and prohibitions within the courtroom. *See, e.g.,* Jensen v. Superior Court, 201 Cal. Rptr. 275, 280 (Cal. Ct. App. 1984) (stating that there is a standard for appropriate attire for an attorney, which is whether it interferes with courtroom decorum disrupting justice, and the judge has the authority to require attorneys to dress accordingly); Christo Lassiter, *An Annotated Descriptive Summary of State Statutes, Judicial Codes, Canons, and Court Rules Relating to Admissibility and Governance of Cameras in the Courtroom*, 86 J. CRIM. L. & CRIMINOLOGY 1019, 1025 (1996) (underscoring that certain states allow the judge to decide whether to permit cameras in the courtroom based in part on whether it detracts from the solemnity, decorum, and dignity of the court); Gerald G. Ashdown & Michael A. Menzel, *The Convenience of the Guillotine?: Video Proceedings in Federal Prosecutions*, 80 DENV. U. L. REV. 63, 67, 106 (2002) (noting concerns about video proceedings in federal court in part because "proceedings conducted by video may not reflect the solemnity and decorum befitting a proceeding in federal court").

artifact would be on the basis that the reasons offered by an oath taker in support of its use did not conform to the oath's underlying purposes. Exclusion would thus turn solely upon the subjective and professed rationale for the object's use, and not upon the objective nature or legitimacy of the object itself. Moreover, as affirmation is recognized as an alternative to oaths, presumably "non-religious" objects should likewise be allowed if an affirmer contends that they would enhance the efficacy of his affirmation. In other words, any distinction between religious artifacts and secular objects would evaporate; courts could be obligated to permit, for example, a philosophical text or a picture of Elvis for affirmers in the same way they would allow the Bible or the Quran for oath takers.

Even if courts sought to impose different rules pertaining to artifacts for oath and affirmation ceremonies, they would still be faced with the dilemma of what to do about seemingly secular objects. Any attempt to specify a comprehensive standard for distinguishing between religion and secular belief systems would be difficult, complex, and fraught with broader implications.<sup>337</sup> For instance, such an approach could require a court to

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<sup>337</sup> Attempts to determine what does and does not constitute a religion have been marked with contradictions and varying standards. For an overview of these varying standards and approaches, see Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123 (2007). Courts have sometimes concluded that no attempt should be made to distinguish between religious belief and secular belief. *See, e.g., Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) ("It is no business of courts to say that what is a religious practice or activity for one group is not religion. . . ."); *State ex rel. Tate v. Cabbage*, 210 A.2d 555, 562 (Del. Super. Ct. 1965) ("this court cannot—or should not—undertake to define or rule on what is or what is not a religion"). The Internal Revenue Service likewise observed that:

It is logically impossible to define 'religion'. It appears that the two religious clauses of the First Amendment define 'religious freedom' but do not establish a definition of 'religion' within recognized parameters. An attempt to define religion, even for purposes of statutory construction, violates the 'establishment' clause since it necessarily delineates and, therefore, limits what can and cannot be a religion. The judicial system has struggled with this philosophic problem throughout the years in a variety of contexts.

Gen. Couns. Mem. 36,993 (Feb. 3, 1977). *See id.*, however, for a historical treatment of attempts to determine what constituted a "church" for tax exempt purposes.

Even the purposeful adoption of broad definitions for religion, *see, e.g.,* 42 U.S.C. § 290kk(c)(6) (2000) (tautologically defining the term "religious organization" to mean a "nonprofit religious organization"), results in discord as to the meaning of words and whether other understandings are needed by the government in order to avoid religious entanglement. *See also* 42 C.F.R. § 54.2 (2003) (declining to adopt the tax code's more focused definition of "religious organization" or otherwise narrow its definition when implementing a new federal program to which funds will be given to religious

determine whether Scientology qualifies as a religion.<sup>338</sup> If it does, its artifacts may be used during oath ceremonies; if it does not, they cannot be used. What about New Age spirituality and secular humanism, or for that matter Satanism and witchcraft? The list seems inexhaustible. Indeed, if the definition of a “religion” does not include a requirement for a community of believers or a demonstrable historical basis, then any witness would be free to mint his own personal religion before testifying and insist upon using its unique and individually specified artifacts.<sup>339</sup>

Such a prospect is intolerable. Unusual or elaborate forms of oaths, and controversial and offensive artifacts, would be distracting or worse. They could undermine the solemnity and decorum that is necessary and expected in courts of law.<sup>340</sup> They could unduly detract from the credibility of a

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organizations for certain purposes). In implementing his faith-based initiative, President George W. Bush instituted more detailed guidance about what an organization is permitted to do with government funds: a faith-based organization “may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization[;]” it may use its facility “without removing or altering religious art, icons, scriptures, or other symbols from these facilities[;]” and it may “select its board members on a religious basis, and include religious references in its organization’s mission statements and other chartering or governing documents.” Exec. Order No. 13,279, 3 C.F.R. § 2(f) (2002) (Executive Order: Equal Protection of the Laws for Faith-Based and Community Organizations). Predictably, these restrictions have led to a multitude of debates and lawsuits. *See, e.g.,* Hein v. Freedom From Religion Found., 127 S. Ct. 2553 (2007). The Supreme Court’s own ambivalence as to what constitutes “secular” and “religious” has likely only added to the confusion surrounding religion in the public square, which in turn gives rise to lawsuits litigating the issues. *See* Mitchell v. Helms, 530 U.S. 793, 825–29 (2000) (plurality opinion) & 857–58 (O’Connor, J., concurring) (demonstrating that the Court’s “pervasively sectarian” doctrine—guiding how federal aid may be given to religious organizations without triggering a First Amendment violation—no longer enjoys majority approval on the Court).

<sup>338</sup> Courts have answered the question in contradictory ways. *Compare* Mo. Church of Scientology v. State Tax Comm’n, 560 S.W.2d 837, 842 (Mo. 1977) (disqualifying Scientology for a state tax exemption using a “Supreme Being” test), *with* Founding Church of Scientology of Washington, D.C. v. United States, 409 F.2d 1146, 1160 (D.C. Cir. 1969) (indicating that Scientology is a religion). *See generally* L. RON HUBBARD, WHAT IS SCIENTOLOGY? (1998) (providing a comprehensive overview of the organization, practices, and philosophy of Scientology). For a further discussion on whether Scientology should be considered a religion, see BRYAN R. WILSON, THE SOCIAL DIMENSIONS OF SECTARIANISM: SECTS AND NEW RELIGIOUS MOVEMENTS 267–70 (1992).

<sup>339</sup> *See supra* note 39 and accompanying text (discussing how such a permissive approach to artifacts proved unacceptable in ancient Greece and likely led to standardization and restrictions upon their use).

<sup>340</sup> *See supra* note 336 and accompanying text.

witness based on an expression of his religious beliefs when taking his oath.<sup>341</sup> And, they could offend many more people, including the parties at trial and the public generally, than would be offended if all artifacts were categorically prohibited.<sup>342</sup> Depending on the artifact used, the integrity and effectiveness of the justice system could be seriously compromised, thereby defeating the very purpose that oaths and affirmations were intended to serve.

Reasonable restrictions on oath forms and ceremonies, and the artifacts used with and in them, have long been permitted. For example, decisory oaths are disallowed in American courtrooms, regardless of whether the particular religious traditions of individuals involved recognize their use in resolving conflict.<sup>343</sup> Another imposition of proper limitations involves so-called loyalty oaths;<sup>344</sup> although the government may require such oaths in certain instances, the Supreme Court has instructed that some forms of loyalty oaths are legally objectionable.<sup>345</sup> These and other examples illustrate that the substance and procedures for oaths may be circumscribed and specified for legitimate reasons. In the courtroom context, such restrictions have traditionally been imposed to regulate the reception of substantive evidence and control courtroom practices. Consistent with these limitations,

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<sup>341</sup> One can only imagine the negative judgments that jurors might make about the credibility of witnesses who are self-proclaimed Satanists and witches or perhaps, regrettably, even Muslims in contemporary times. See FED. R. EVID. 610 (providing that “[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness’ credibility is impaired or enhanced”).

<sup>342</sup> Depending on the artifact used, disapproval or offense could blossom into outrage, such as if a neo-Nazi swore an oath on a copy of *Mein Kampf* or adherents of the vampire religion swore on the Vampire Bible. For information concerning the Vampire Bible and the vampire religion, see Temple of the Vampire, <http://www.vampiretemple.com> (last visited Feb. 2, 2009).

<sup>343</sup> Decisory oaths were prohibited in American secular courts even while a form of such oath, a supplementary oath, was simultaneously recognized in Canon Law tribunals in America and elsewhere. See THE 1917 OR PIO-BENEDICTINE CODE OF CANON LAW, Canon 1829, at 598 (Edward N. Peters, trans., Ignatius Press 2001) (“If there is available only semi-full proof and there is no other additional proof available, the judge can order or admit an oath to supplement the evidence, the other being called *supplementary*.”).

<sup>344</sup> A loyalty oath is an oath that the government may require individuals to take in certain circumstances (including prospective employment) to affirm “that they are not engaged in, or do not advocate sedition, subversive activities, or treason.” 70 AM. JUR. 2D *Sedition, Etc.*, § 1 (2008).

<sup>345</sup> *Wieman v. Updegraff*, 344 U.S. 183, 190 (1952) (striking down loyalty oaths that failed to distinguish between knowing and innocent membership in certain proscribed organizations and therefore could not be imposed upon prospective employees).

rule makers could claim the authority to distinguish between acceptable and unacceptable oath-related artifacts, and prescribe their use on that basis.

There are, however, considerable disadvantages associated with establishing rules for culling which artifacts are permitted for courtroom oaths. If some artifacts are allowed while others are excluded, this would necessitate the recognition and application of criteria for drawing such distinctions. These criteria necessarily would involve a substantive and normative evaluation about the legitimacy, or at a minimum the acceptability, of various religions and their artifacts. This implicates judgments about the genuineness and worthiness of faith traditions and their beliefs. Such decisions would involve imponderables and could be highly offensive. Further, there is no moral consensus for making such judgments. And, even if such a consensus existed, difficult questions would remain about the moral legitimacy, let alone its constitutionality, of acting upon such a consensus for these purposes.

There are also practical difficulties with such an approach. Neither legislators nor courts have any special competence in rendering judgments about the legitimacy of religions and religious beliefs.<sup>346</sup> Even if they did, it is doubtful that most people would entrust such decisions to these authorities. Moreover, the types of decisions encompassed by the wide-ranging undertaking of permitting and rejecting artifacts would be both breathtakingly sweeping and devilishly detailed. On some occasions, secular authorities would be called upon to make broad pronouncements about whether a belief system qualifies as a religion, and, if it does, whether it is a religion whose artifacts deserve special recognition in oath ceremonies. At other times, they would be asked to referee complicated internecine disputes, such as whether Catholics can select the Bible, a relic, or the Eucharistic to use when taking an oath, or to decide which version of the Bible is permitted for which Christian denominations. At the outer edges, such judgments could involve choosing sides about theological questions that have not even been fully settled within a particular religious tradition. To ensnare secular lawmakers or judges in these confounding matters would be more than wasteful: it could be highly inappropriate, disrespectful, and even sacrilegious.

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<sup>346</sup> Indeed, courts are generally quite circumspect when reviewing religious ideas and practices. *See* *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (“[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion. . .”); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713–14 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (“First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.”).

### 3. *The Solution: An Invocation of God Without the Use of Artifacts*

The most serious problems relating to religious endorsement can be avoided by allowing an explicit reference to an undifferentiated God while prohibiting the use of any artifacts. Such a public, generic reference to the divine would not intrude upon private conceptions of God, which can remain infinitely personal to the oath taker. Christians can comfortably swear an oath to God as God. So can Muslims.<sup>347</sup> So too, presumably, can adherents of most monotheistic religious traditions. If the witness cannot swear to God in this manner, or swear at all, or does not believe in any form of divinity, he can instead affirm.

Retaining the explicit reference to an undifferentiated God as part of an oath allows the legal system to preserve a venerable and still meaningful custom while adapting to the realities of today's religiously diverse American culture. Such an approach recognizes the possibility of a supernatural connection between the oath taker and his divine maker. It facilitates the expression of this most important spiritual relationship, for legitimate secular reasons, while simultaneously respecting all manner of subjective understandings of God and avoiding sectarian limitations.

Eliminating the use of artifacts, including the Bible, from oath ceremonies removes a legitimate but superfluous—and perhaps ultimately malignant—appendage to the substance of a witness oath while preserving its vitality in changing times. It allows more witnesses to take an oath to God rather than be forced instead to affirm because of objections to the Bible. It likewise avoids the problems associated with making the Bible optional, including the need to differentiate between Christian and non-Christian oath takers for controversial reasons that could raise First Amendment objections and cause sectarian-based offense. It is submitted that the approach proposed in this Article is the best, imperfect solution to a complicated and multi-faceted problem.<sup>348</sup>

## VI. CONCLUSION

Human nature seeks to know the truth. Yet in American society, as in all cultures, the virtue of truthfulness is not fully inculcated. Given this reality, oaths and affirmations remain relevant and necessary. The venerable common law and statutory principles still resonating within our legal system

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<sup>347</sup> See *supra* note 176 (explaining that Muslims can and do refer to “God” and “Allah” interchangeably).

<sup>348</sup> Although constitutional questions are beyond the scope of this Article, it likewise seems, at least preliminarily, that such an approach would be acceptable under the First Amendment.

are aimed at maximizing who can testify as a witness and otherwise participate in the legal process. This goal is best served by an oath or affirmation that at once binds the conscience of an oath taker and is free from unnecessary embellishments that may unduly limit who can swear an oath. Consistent with these goals, and given the longstanding religious character of American society and its growing diversity of religious beliefs, it is prudent to allow a divine invocation that avoids sectarian divisiveness.

Although religious artifacts, such as the Bible and the Quran, have long and often been used in oath taking, they are not essential to the validity or efficacy of oaths. And, while such artifacts may be acceptable within a courtroom environment, either permitting their wholesale use or attempting to distinguish between them based on their spiritual merits is problematic and unwise for a variety of important reasons, both abstract and practical. In the end, all of the benefits of oaths can be realized and their burdens avoided by an oath form that includes a public commitment by the affiant to testify truthfully, before God and the community, without sectarian identification or additional religious accouterments.

The purpose and content of oaths and oath ceremonies need to be fundamentally re-examined and re-considered. *ACLU of North Carolina* and Congressman Ellison are harbingers of the impact of growing religious diversity and an accompanying sense of equality and entitlement regarding religious expression in civic affairs.<sup>349</sup> The proposals regarding oaths made here, in conjunction with the option of affirmation, will help ensure that we remain one nation, mostly under God, but in any case one nation.

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<sup>349</sup> See, e.g., Dana Canedy, *Lifting Veil for Photo ID Goes Too Far, Driver Says*, N.Y. TIMES, June 27, 2002, at A16 (reporting on a Muslim woman who claims the state is violating her religious rights in demanding she remove her veil for a drivers license photo); Alan Cooperman, *For Gods and Country*, WASH. POST, Feb. 19, 2007, at C1 (reporting on an application to be the first Wiccan chaplain in the Army).

