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# Massachusetts Attorney's Oath: History That Should Not Be Repeated

Jared A. Picchi

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## **Massachusetts Attorney's Oath: History That Should Not Be Repeated**

Jared A. Picchi

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### **ABSTRACT**

Massachusetts proudly boasts that it has one of the oldest versions of the Attorney's Oath in the United States. However, the Oath contains phrases that reflect both gender and religious biases. The use of the masculine form within the text, as well as the reference to God, reflect the nation's history of intolerance and ignorance. These phrases exclude a large portion of the legal community and act as a distraction from the true purpose of an attorney's oath, which is to remind incoming lawyers of their ethical obligations. This Article focuses primarily on the need for Massachusetts to adopt a newer version of the Attorney's Oath. Additionally, this Article proposes a new Oath to adopt, reflecting modern society's ethical beliefs by utilizing language that is progressive and inclusive of all attorneys.

### **AUTHOR NOTE**

B.A., Bryant University; J.D., University of Massachusetts School of Law. Thanks to Professor Jeremiah Ho and Professor Margaret Drew for their patience and guidance on this article, as well as to the UMass Law Review staff for their thoughtful work on this and all articles. A special thanks to my family and friends, as well as to my wonderful wife, Kelsey, for their encouragement and support throughout the article writing process and law school.

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## I. INTRODUCTION

After three long years filled with study sessions, cram sessions, intense classroom debates, midterms, hair-losing finals, and a little bit of golf and ping pong to ease the stress, law students finally get to graduate.<sup>1</sup> Their reward: roughly eight hundred hours of studying crammed into ten weeks in order to adequately prepare for the bar exam.<sup>2</sup> The two-day experience of taking the bar exam is said to be one of the most stressful and difficult tests one will ever take.<sup>3</sup> If law students are lucky enough to pass the bar in Massachusetts, it means they are able to participate in a historical swearing-in ceremony right in the heart of Boston's historic Faneuil Hall.<sup>4</sup> In Massachusetts, the swearing-in ceremony is "an actual session of the Court, presided over by a Justice of the Supreme Judicial Court and currently conducted by Supreme Judicial Court Clerk Maura S. Doyle."<sup>5</sup> Clerk Doyle takes command of a sea of future attorneys and recites the Massachusetts Attorney's Oath (hereinafter "Oath").<sup>6</sup> After listening to the Oath, all of the participants, in unison, proclaim: "I do."<sup>7</sup> At that moment they officially become practicing attorneys within the Commonwealth of Massachusetts. The Oath is, thus, one of the most important and powerful parts of the swearing-in ceremony, as it marks

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<sup>1</sup> See Charlie Hatton, *The Swearing of the Lawyers*, WHERE THE HELL WAS I? (Dec. 15, 2008), [http://www.wherethehellwasi.com/categories/married-and-a-moron/the\\_swearing\\_of\\_the\\_lawyers.html](http://www.wherethehellwasi.com/categories/married-and-a-moron/the_swearing_of_the_lawyers.html) [https://perma.cc/H7FM-LET9]. The author described his observations of his wife's struggles while attending law school, referencing the four years his wife went through law school, rather than the normal three years, because she was a part-time night student. *See id.*

<sup>2</sup> See *Studying for the Bar Exam Timeline: How to Get Organized*, PIEPER B. REV. (Jan. 14, 2016) <https://news.pieperbar.com/studying-for-the-bar-exam-timeline-how-to-get-organized> [http://perma.cc/WA2Y26SF] (discussing the mental and physical exhaustion and the demand for studying to prepare).

<sup>3</sup> *See id.*

<sup>4</sup> *Formal Admission to the Massachusetts Bar*, MASS.GOV, <https://www.mass.gov/service-details/formal-admission-to-the-massachusetts-bar> (last visited Feb. 23, 2018) [https://perma.cc/P4KP-RNLH] (describing the attorney swearing-in ceremony in Massachusetts).

<sup>5</sup> *See id.*

<sup>6</sup> See drbking, *2013 Massachusetts Bar Swearing-in Ceremony*, YOUTUBE (Nov. 23, 2013), <https://www.youtube.com/watch?v=rFRq5Jahp7s> (displaying the portion of the swearing-in ceremony when the Oath is administered to incoming attorneys).

<sup>7</sup> *See id.*

the point where students become lawyers and begin developing their professional identities.<sup>8</sup> Massachusetts proudly claims to have one of the oldest oaths in the nation, but why take such pride in an oath that excludes a majority of its citizens?<sup>9</sup> By using phrases such as “delay no man,” or “[s]o help me God,”<sup>10</sup> the Oath serves as a reminder of the United States’ checkered past, which has been filled with religious and gender-based persecution. Although the nation is still struggling to rectify these issues, great progress has been made by brave and powerful individuals and that progress should be reflected in the Oath.<sup>11</sup> Holding onto the traditional language of the Oath diminishes the true meaning and message that an oath ought to convey.<sup>12</sup> Attorneys’ oaths have been used, and are still used, to uphold the laws of one’s country or jurisdiction and to remind oath-takers of the ethical obligations that they are required to uphold as members of the legal profession.<sup>13</sup> Carol Andrews said it best when she stated that, “tradition should not be valued over lawyers’ appreciation of the ethical obligations by which they swear to abide. The duties of the oath can and should be stated in a manner that is meaningful—in both terminology and substance—to the lawyer who takes the vows.”<sup>14</sup>

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<sup>8</sup> See generally Matthew Spalding, *Support and Defend: Understanding the Oath of Office*, THE HERITAGE FOUND. (Jan. 3, 2011), <http://www.heritage.org/research/reports/2011/01/support-and-defend-understanding-the-oath-of-office> [<https://perma.cc/2VB3-F8WG>].

<sup>9</sup> See Hatton, *supra* note 1.

<sup>10</sup> See MASS. GEN. LAWS ch. 221, § 38 (2017).

<sup>11</sup> See *FACT SHEET: Promoting Gender Equality and Women’s Empowerment*, THE WHITE HOUSE (Sept. 27, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/27/fact-sheet-promoting-gender-equality-and-womens-empowerment> [<https://perma.cc/WB3E-BB4G>] (describing the efforts made in the Obama administration to improve gender equality); see also *Timeline of Legal History of Women in the United States*, NAT’L WOMEN’S HIST. PROJECT, <http://www.nwhp.org/resources/womens-rights-movement/detailed-timeline/> (last visited Feb. 23, 2018) [<https://perma.cc/8BTJ-FKKR>] (describing milestones in gender equality advancement in the United States); see generally Jeffrey Imm, *America as a Haven for Religious Freedom*, RESPONSIBLE FOR EQUAL. & LIBERTY (Aug. 16, 2010), <http://www.realcourage.org/2010/08/america-and-religious-freedom/> [<https://perma.cc/D28C-PQDB>] (identifying why religious freedom in America was important during the country’s foundation).

<sup>12</sup> See Carol Rice Andrews, *The Lawyer’s Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3, 62 (2009).

<sup>13</sup> *Id.* at 60.

<sup>14</sup> *Id.*

Massachusetts should improve the effectiveness of its Oath by utilizing language that is applicable to everyone, irrespective of their gender or their religious beliefs. This Article focuses on the importance of oaths in the legal profession and, by examining different historical contexts, emphasizes why a change to the Oath is needed, given the significant societal shifts that have occurred within the last century in the United States. Part II first sets forth the general history of oaths and their connection to religious beliefs. It will then focus specifically on the history of the Oath in Massachusetts, specifically on the historical influence of religion on oath-taking. Part III dissects the elements of the Oath to illustrate how its words and phrases are archaic, offensive, irrelevant, and exclude a majority of Massachusetts' oath-takers and citizens. The textual breakdown of the Oath will be followed by a brief exploration of the act of oath-taking in Massachusetts. Part IV consists of a proposal to adopt a new state Oath, as well as a proposal to adopt a new method for administering the Oath. The new Oath will be comprised of key phrases found in other state oaths, focusing on a lawyer's legal and ethical obligations, regardless of one's gender or religious beliefs.<sup>15</sup> It effectively resolves the issues that this Article raises with respect to the current Oath. Part V concludes the Article by reemphasizing why a new oath needs to be adopted.

## II. THE HISTORY OF OATHS

Many different types of oaths have been used throughout history.<sup>16</sup> This Article will focus on two specific types of oaths: the promissory oath, which includes both the oath of office and the juror's oath, and the testamentary oath, which includes the witness's oath.<sup>17</sup> People who take promissory oaths are swearing to fulfill their duties honestly and faithfully, whereas people who take testamentary oaths are

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<sup>15</sup> See generally MASS. R. OF PROF'L CONDUCT (2017) (outlining the rules of ethics by which all lawyers in Massachusetts must abide).

<sup>16</sup> Frederick B. Jonassen, "So Help Me?": *Religious Expression and Artifacts in the Oath of Office and the Courtroom Oath*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 303, 310 n.45 (2014) ("[Black's Law Dictionary] for example, provides definitions for the following categories of oath: assertatory oath, corporal oath, decisory oath, extrajudicial oath, false oath, judicial oath, loyalty oath or oath of allegiance, oath of office, official oath, poor debtor's oath, promissory oath, purgatory oath, solemn oath, supplementary oath, and voluntary oaths." (citing BLACK'S LAW DICTIONARY (6th ed. 1990)).

<sup>17</sup> *Id.* at 310-11.

guaranteeing that their testimonies are truthful.<sup>18</sup> Aside from their functional differences, these two oath types share the same core purpose of recognizing duties of honesty and truthfulness.<sup>19</sup> People taking oaths today fear that if they break their oaths, they may incur punishment from a higher authority, such as the court system or an oversight board; however, that has not always been the case.<sup>20</sup>

#### a. Connection Between Religion and Oaths

Oaths are presumed to have existed even before the advent of recorded history.<sup>21</sup> Although there is no physical evidence to support it, the presumption endures because the act of oath-taking was well-established throughout many nations by the time of the earliest known history records.<sup>22</sup> The word “oath” itself has significant religious connections, which is understandable given where the first recorded oaths were discovered.<sup>23</sup> For example, one of the earliest recordings of an oath exists within the Holy Bible in the book of *Genesis*.<sup>24</sup> In *Genesis*, Abraham was asked by Ablimelech to swear upon the Lord’s name in order to prove his trustworthiness: “[n]ow swear to me here before God that you will not deal falsely with me or my children or my descendants’ . . . . Abraham said, ‘I swear it.’”<sup>25</sup> When individuals took oaths like this, they recognized three things.<sup>26</sup> Firstly, they acknowledged that God was omnipresent, omnipotent, and knew if the oath-taker had broken his or her oath.<sup>27</sup> Secondly, they recognized that God was impartial and would judge everyone equally, no matter what

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Andrews, *supra* note 12, at 7-8.

<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

<sup>23</sup> See Jonathan Belcher, *Religion-Plus-Speech: The Constitutionality of Juror Oaths and Affirmations Under the First Amendment*, 34 WM. & MARY L. REV. 287, 291 (1992) (describing how an oath was historically a solemn appeal to a deity, or some revered person or thing, to witness one’s determination to speak the truth or keep a promise).

<sup>24</sup> *Id.* The book of *Genesis* is the first of twenty-four books of the Hebrew Bible, and is the basis for the Christian Old Testament.

<sup>25</sup> See *Genesis* 21:23-24 (New Int’l Version).

<sup>26</sup> Byron Snapp, *Oaths and Religion*, CHALCEDON (Jul. 1, 1999), <https://chalcedon.edu/magazine/oaths-and-religion> [<https://perma.cc/2EM2-QGAZ>].

<sup>27</sup> *Id.*

their earthly status was.<sup>28</sup> Lastly, they acknowledged that God set the standard for what truth was, and that it was up to the oath-taker to live up to that standard.<sup>29</sup> People then trusted the oath-taker after he or she swore an oath on God's name because of the Third Commandment of the book of *Exodus*, which states, "You shall not take the name of the Lord your God in vain, for the Lord will not hold him guiltless who takes His name in vain."<sup>30</sup> This Commandment expressed the idea that God would punish those who betrayed their oaths.<sup>31</sup> Many deeply religious civilizations strongly believed that God would oversee the oath-takers and punish them if they did not uphold the standard of truth that God had set for them.<sup>32</sup>

Oaths were not just used in conjunction with Christianity and Judaism, however.<sup>33</sup> Many citizens of early civilizations such as the Egyptians, Carthaginians, Greeks, Persians, and Romans used similarly styled oaths in order to earn the trust of other citizens.<sup>34</sup> For example, evidence from the fourth century B.C. demonstrates that ancient Egyptians would often swear on their lives in order to promise that they would remain truthful.<sup>35</sup> In the fourteenth century B.C., the Hittite Empire made agreements between states by calling upon various oath gods, such as Indra and Mithra.<sup>36</sup> In Ancient Greece, oaths were used throughout judicial proceedings to manifest in oath-takers a feeling of duty to the gods in order to ensure that their testimony would be truthful.<sup>37</sup> Some Hindus in India would hold water from the holy river Ganges while swearing an oath, believing the act to signify an oath to a divine power.<sup>38</sup> Muslims would make a *qasam*<sup>39</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (citing *Exodus* 20:7).

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Oath*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/oath-religious-and-secular-promise> (last visited Feb. 23, 2018) [<https://perma.cc/LJV3-4DXL>].

<sup>34</sup> Belcher, *supra* note 23, at 291.

<sup>35</sup> ENCYCLOPEDIA BRITANNICA, *supra* note 33.

<sup>36</sup> *Id.* Mithra, an Iranian god, was one of the deities of the Hellenistic mystery religion and was believed to be the god of contracts. *Id.*

<sup>37</sup> *See* Belcher, *supra* note 23, at 291.

<sup>38</sup> ENCYCLOPEDIA BRITANNICA, *supra* note 33.

<sup>39</sup> *Id.* (Islamic word for "oath").



upon their life, soul, honor, and faith.<sup>40</sup> Native American tribes swore oaths upon their unique deities by placing one hand over their hearts and raising the other as an appeal to the sun.<sup>41</sup> All of these civilizations utilized the act of calling upon a source of divine power as a means to ensure that the oath-taker would remain truthful because they feared that if they broke the oath, their god or gods would punish them.<sup>42</sup>

Modern civilizations also believed in divine intervention.<sup>43</sup> For example, English citizens believed that God would hold oath-takers accountable for their promises.<sup>44</sup> During trials in the sixteenth and seventeenth century English court system, witnesses and jurors were required to swear an oath to the Christian God.<sup>45</sup> Courts would require jurors to use the phrase “So help me God and the Saints” when taking the juror’s oath.<sup>46</sup> The indisputable predominance of Christianity during the time when the English common law developed ensured that such religious ideals and language would permeate its foundation.<sup>47</sup> Thus, the juror’s oath essentially presumed that all oath-takers were adherents to Christianity.<sup>48</sup> However, not everyone in England believed in a god.<sup>49</sup> In order to resolve this issue, under the Old English common law, only Christians were allowed to be witnesses and jurors.<sup>50</sup> In *Omychund v. Barker*,<sup>51</sup> the English court confirmed this rule when it stated that only those who believed in God were competent enough to serve as witnesses and jurors.<sup>52</sup> The concept of divine punishment was the rationale behind this decision.<sup>53</sup> Chief Justice Willes stated that only those who believed in a deity that could punish or reward them could be bound by the oath.<sup>54</sup> Since atheists did

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<sup>40</sup> *Id.*

<sup>41</sup> See Belcher, *supra* note 23, at 291.

<sup>42</sup> See generally *id.*

<sup>43</sup> *Id.* at 292.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See *Omychund v. Barker* (1744) 26 Eng. Rep. 15 (K.B.).

<sup>52</sup> *Id.* at 31.

<sup>53</sup> See Belcher, *supra* note 23, at 292.

<sup>54</sup> See *Omychund*, 26 Eng. Rep. at 31.

not believe in any god, they could not be bound by the oath because they did not believe in anything that could punish them if they did not tell the truth.<sup>55</sup> It was not until the reign of Queen Victoria in the Nineteenth Century that atheists first received the opportunity to take part in judicial proceedings.<sup>56</sup> During that time, the British Parliament authorized the use of a declaration, and subsequently an affirmation, in place of a godly oath.<sup>57</sup> However, this decision came too late to counter the pervasive influence that the English common law had on early American judicial policies.<sup>58</sup>

The Founding Fathers of the United States believed in, and put greater emphasis on, the connection between oaths and religion.<sup>59</sup> In fact, Eugene R. Milhizer credits the English judicial system and its common law traditions as having the greatest effects on American oath practices.<sup>60</sup> The use of *Omychund* within the American court system to prohibit atheists from becoming jurors or testifying as witnesses demonstrated this effect.<sup>61</sup> The founders strongly believed that an oath was a religious act and a solemn vow between individuals and their Creator.<sup>62</sup> *Commonwealth v. Wolf*,<sup>63</sup> an early American case, reflects the influence of religion on oaths in the American judicial system.<sup>64</sup> There, Justice Yeates of the Pennsylvania Supreme Court explained that:

*Laws cannot be administered in any civilized society unless the people are taught to revere the sanctity of an oath, and look to a future state of rewards or punishments for the deed of this*

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<sup>55</sup> *See id.*

<sup>56</sup> Belcher, *supra* note 23, at 293.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 292-93.

<sup>59</sup> *Oaths: Religion in Our Legal System*, ROAD TO CONCORD, <https://theroadtoconcord.com/americas-christian-foundation/oaths-religion-in-our-legal-system/> (last visited Mar. 2, 2018) [<http://permacc/2EME-BWB4>].

<sup>60</sup> Eugene R. Milhizer, *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*, 70 OHIO ST. L. J. 1, 19 (2009).

<sup>61</sup> Belcher, *supra* note 23, at 292-93.

<sup>62</sup> *Oaths: Religion in Our Legal System*, *supra* note 59.

<sup>63</sup> *Commonwealth v. Wolf*, 3 Serg. & Rawle 48 (1817).

<sup>64</sup> *See generally id.*

*life. It is of the utmost moment, therefore, that they should be reminded of their religious duties.*<sup>65</sup>

Yeates's sentiments emphasize just how much the early American court system valued the sanctity of an oath and its connection to a person's religious beliefs.<sup>66</sup> This interrelationship between oaths and religion was widely supported throughout the American judicial system until the Eighteenth Century.<sup>67</sup>

Beyond the judicial context, in some states, religious belief was also used to determine who was eligible for public office.<sup>68</sup> For example, one Connecticut statute from 1784 denied public office to anyone who "believed 'there are more Gods than one,' or who denied 'the Being of God,' that 'any One of the Persons in the Holy Trinity to be God,' or that 'the Holy Scriptures of the Old and New Testament to be of Divine Authority.'"<sup>69</sup> Furthermore, the Massachusetts Constitution of 1780 contained a clause that required oath-takers to repeat the phrase, "I . . . do declare that I believe in the Christian religion, and have a firm persuasion of its truth."<sup>70</sup> The American judiciary supported these restrictive practices in spite of the fact that withholding office from non-Christians directly violated the Religious Test restriction found in Article VI of the federal Constitution.<sup>71</sup>

As time went on, the connection between religion and oaths only strengthened.<sup>72</sup> Individuals who did not harbor the "proper" beliefs were continually persecuted and their participation within the early American judicial system was very limited.<sup>73</sup> As diversity of religions and cultures has grown in the United States, only recently have people become more tolerant and respectful of religious beliefs that differ from their own.<sup>74</sup>

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<sup>65</sup> *Id.* Interestingly, this case was about a Jewish man who was punished for working on a Sunday, which is the Holy Sabbath Day in Judaism. He was fined \$4, or what would be roughly \$75 today with inflation. *See generally id.*

<sup>66</sup> *Oaths: Religion in Our Legal System, supra* note 59.

<sup>67</sup> Milhizer, *supra* note 60, at 19.

<sup>68</sup> *See* Jonassen, *supra* note 16, at 327.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 327-28.

<sup>71</sup> U.S. CONST. art. VI, cl. 3; *see infra* note 135 and accompanying text.

<sup>72</sup> *See generally* Andrews, *supra* note 12, at 7.

<sup>73</sup> *See generally* Jonassen, *supra* note 16, at 327-28.

<sup>74</sup> *See generally* Milhizer, *supra* note 60 (exploring how America has evolved into a more religiously diverse society).

### b. History of the Massachusetts Attorney's Oath

In the modern era, attorney's oaths conform to three different versions. The first version was the "do no falsehood" oath, which was originally adopted in England in 1402.<sup>75</sup> In 1729, England developed the second version, named "the simple oath," in an attempt to improve the regulation of attorneys and solicitors.<sup>76</sup> The third version was the Swiss Oath, which was an oath that recognized the "just causes duty."<sup>77</sup> All of the states have adopted one of these three versions of oaths, with some modifications.<sup>78</sup>

Massachusetts maintains one of the oldest attorney's oaths in the Western Hemisphere.<sup>79</sup> In 1701, Massachusetts formally mandated the "do no falsehood" version of the Oath.<sup>80</sup> The only modification made to the traditional English "do no falsehood" oath was that Massachusetts left out the reference to attorney's fees, and this was most likely due to the fact that American colonies had already been regulating attorney fees.<sup>81</sup> Massachusetts held onto this form of the Oath until 1785 when the state adopted a similar version with updated

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<sup>75</sup> Andrews, *supra* note 12, at 12-13 (acknowledging that although the "do no falsehood" oath was adopted in the 1402 Act, it had been well developed and used prior to that time and most likely originated as early as 1246 A.D.). *Id.* at 13 n.45. An approximation of the original oath read: "You shall doe noe Falsehood nor consent to anie to be done in the Office of Pleas of this Courte wherein you are admitted an Attorney. And if you shall knowe of anie to be done you shall give Knowledge thereof to the Lorde Chiefe Baron or other his Brethren that it may be reformed you shall Delay noe Man for Lucre Gainie or Malice; you shall increase noe Fee but you shall be contented with the old Fee accustomed. And further you shall use yourselfe in the Office of Attorney in the said office of Pleas in this Courte according to your best Learninge and Discrecion. So helpe you God." *Id.* at 13.

<sup>76</sup> *Id.* at 14. This shortened oath read: "that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability." *Id.* The shortened version was likely to put a greater emphasis on the professional standards that an attorney must maintain. *Id.*

<sup>77</sup> *See id.* at 17-19. The Swiss Oath was developed from the French Oath that focused on "just causes," but since the 1908 ABA Model Oath was based off of the Swiss Oath, many people credit the "just cause" oath to Switzerland. *Id.*

<sup>78</sup> *See id.* at 19.

<sup>79</sup> *See* Hatton, *supra* note 1.

<sup>80</sup> *See* Andrews, *supra* note 12, at 20. Although formally mandated in 1701, it was adopted as early as 1686. *See also id.* at n.77.

<sup>81</sup> *Id.*

language, while still focusing on the same general content.<sup>82</sup> In 1836, Massachusetts attempted to adopt the simple oath, but by 1860, the original modified version of the “do no falsehood” Oath was reinstated and is still being used today.<sup>83</sup>

The current Oath is codified in the General Laws of Massachusetts chapter 221, section 38, and reads:

*Whoever is admitted as an attorney shall in open court take and subscribe the oaths to support the constitution of the United States and of the commonwealth; and the following oath of office shall be administered to and subscribed by him:*

*I (repeat the name) solemnly swear that I will do no falsehood, nor consent to the doing of any in court; I will not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same; I will delay no man for lucre or malice; but I will conduct myself in the office of an attorney within the courts according to the best of my knowledge and discretion, and with all good fidelity as well to the courts as my clients. So help me God.*<sup>84</sup>

This Oath embodies the long history of oath-taking globally and also represents the unique history of the Commonwealth. However, it does so at a price.<sup>85</sup> Although firmly rooted in the history of the world, the connection between religion and oaths has also become a distraction from its modern purpose: to uphold the ethical obligations of the legal profession.<sup>86</sup> The United States is filled with believers and non-believers alike, and all of them are required to adhere to this Oath in order to become attorneys in Massachusetts.<sup>87</sup> The belief that a Supreme Being will hold attorneys accountable for their falsehoods is

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

<sup>83</sup> *Id.* at 20-21. The Massachusetts version of the simple oath read: “You solemnly swear, that you will conduct yourself, in the office of an attorney, according to the best of your knowledge and discretion, and with all good fidelity, as well to the courts as to your clients.” *Id.* at 21.

<sup>84</sup> MASS. GEN. LAWS ch. 221, § 38 (2017).

<sup>85</sup> Specifically, the price paid is the offense it causes, as well as the exclusions it creates with its gender-biased and religious-biased language.

<sup>86</sup> *See generally* MASS. R. OF PROF’L CONDUCT (2017).

<sup>87</sup> *See* ch. 221, § 38.

both archaic and irrelevant in practice today.<sup>88</sup> The prevailing purpose of modern oaths is to remind fledgling attorneys of the ethical obligations to which they commit when they enter the profession.<sup>89</sup> The current Oath detracts from that message because it uses offensively gendered and belief-biased language.<sup>90</sup> The Oath should be changed in order to better reflect its intended purpose of binding attorneys to their significant ethical obligations, and to allow all lawyers to connect with its message.<sup>91</sup>

### III. ANALYSIS OF ISSUES WITHIN THE CURRENT OATH

Throughout the nation, states have adopted new attorney's oaths in order to reflect the progress made in the United States.<sup>92</sup> However, Massachusetts adheres to its current divisive Oath primarily for reasons of pride relating to tradition and longevity.<sup>93</sup> In fact, during the swearing-in ceremony, Clerk Doyle proudly proclaims that the Oath is the oldest of its kind in the entire Western Hemisphere.<sup>94</sup> By observing the ceremony, it is apparent that history and tradition are the focal points.<sup>95</sup> This source of pride, however, is misplaced. Although there is great value in preserving one's history and continuing some traditions, the Oath needs an upgrade to rectify some negative historical aspects that are preserved within it. The current Oath acts as a constant reminder that women were not always considered legally equal to

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<sup>88</sup> See Milhizer, *supra* note 60, at 58-59.

<sup>89</sup> See *id.*

<sup>90</sup> See *infra* Section III.a (analysis of current oath and its issues).

<sup>91</sup> See Andrews, *supra* note 12, at 60.

<sup>92</sup> See Angela Morris, *Practicing Lawyers Invited to Take New Oath with New Lawyers*, TEX. LAW., Nov. 13, 2015, at LNSDUID-ALM-TXLAWR-1202742430575 (LEXIS) (providing a recent example of a state legislature purposefully removing gender-specific pronouns from its swearing-in oath).

<sup>93</sup> See Hatton, *supra* note 1.

<sup>94</sup> See *id.* Although the author refers to the person who said this as "the woman," it is presumed by the description that Clerk Doyle is the speaker given that she has performed the swearing-in ceremony since she obtained her position over twenty years ago. See *Formal Admission to the Massachusetts Bar*, *supra* note 4; see also Christopher P. Sullivan, *Massachusetts Attorney's Oath of Office*, MASS. B. ASS'N LAW. J. (2017), <https://www.massbar.org/publications/lawyers-journal/lawyers-journal-article/lawyers-journal-2017-november-december/massachusetts-attorney-s-oath-of-office> [https://perma.cc/DW53-L63X].

<sup>95</sup> See *id.*; see also drbking, *supra* note 6.

men, and were barred from voting, working in most occupations, or even signing a contract on their own behalf for most of modern history.<sup>96</sup> The Oath also recalls a time when the nation's religious minorities faced constant persecution.<sup>97</sup> Even though there are still many issues regarding religious and gender-based discrimination in the United States today, substantial social progress has been made in this country and the Oath needs to be changed in order to reflect that progress. As society progresses, so too must the law.

#### a. Textual Analysis of the Current Oath

Violations of the Oath, which is codified, can be addressed in disciplinary proceedings.<sup>98</sup> Including phrases such as, “delay no man for lucre or malice,” “subscribed by him,” or “[s]o help me God”<sup>99</sup> within the statute demonstrate a biased viewpoint in the law that should not endure. If an attorney were to delay a woman for lucre or malice, would they actually be violating the Oath? There are many issues that arise from the current version of the Oath that must be resolved. The language of the Oath is both archaic and irrelevant, which can lead to oath-takers feeling disconnected from the Oath. If more progressive language were adopted, the Oath would be more inclusive and allow every lawyer to connect with its true purpose: to remind new attorneys of their ethical obligations.<sup>100</sup>

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<sup>96</sup> See generally Cynthia G. Bowman, *Women in the Legal Profession from the 1920s to 1970s: What Can We Learn from Their Experience About Law and Social Change*, 61 ME. L. REV. (2009); see also *Bradwell v. State*, 83 U.S. 130, 141 (1872). *But see* U.S. CONST. amend. XIX (women's suffrage).

<sup>97</sup> See generally Erik Wong, *The History of Religious Conflicts in the U.S.: Revolution to Sept. 11th*, STANFORD (Dec. 6, 2002), <https://web.stanford.edu/class/e297a/The%20History%20of%20Religious%20Conflict.htm> [<https://perma.cc/5M2P-7R47>].

<sup>98</sup> See Dean R. Dietrich, *Ethics: Conduct Outside the Law Office*, ST. B. OF WIS. (Feb. 1, 2004), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=77&Issue=2&ArticleID=669> [<https://perma.cc/MS74-EZR9>] (explaining that in Wisconsin, an attorney who does not act in accordance with the commitments contained in the attorney oath may be subject to discipline).

<sup>99</sup> See MASS. GEN. LAWS ANN. ch. 221, § 38 (2017); see *infra* Sections III.a.iii, III.a.iv.

<sup>100</sup> See generally Andrews, *supra* note 12. Andrews notes further that, “The modern oath does not live up to its potential. Relatively modest refinements would enhance the role of the oath so that it can better inspire lawyers to the ethical ideals of their profession.” *Id.* at 5.

i. Use of Active Voice in a Statute

Why should a statute be written in active voice? The answer is simple:

*Active voice makes our writing more exciting and energetic. It snags a reader quickly and encourages [them] to continue reading. Active voice sentences are also easier to read, so using active voice broadens your audience. Finally, passive sentences are usually wordy. Active voice provides us with succinct and precise writing.*<sup>101</sup>

This statement clearly shows that a passage written in the active voice captures the reader's attention more than one written in the passive voice.<sup>102</sup> However, the introduction of the current Oath is written in the passive voice, which takes away from the Oath's ability to empower individuals.<sup>103</sup> Instead of using the active voice throughout the initial section, the Oath uses the phrase, "[T]he following oath of office shall be administered to and subscribed by him."<sup>104</sup> Even on its face, this phrase does not empower an individual because the oath-taker is positioned as the object of the Oath, rather than the actor subscribing to it. Further, the statement should make the oath-takers feel that they personally must administer the oath to themselves.<sup>105</sup> On

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<sup>101</sup> See Kimberly Joki, *Empowering Your Writing: Transform the Passive Voice*, GRAMMARLY BLOG (Nov. 7, 2014); see also *Voice*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/voice-grammar> (last visited Dec. 30, 2016) [<https://perma.cc/N7KT-LXTY>] (discussing how the use of passive voice is often an important feature of certain styles of writing where it is used to express relationships and events in an impersonal way). The proposed Oath should not use an impersonal style of writing, however, because it is less individually empowering and people cannot connect with the writing, so the language in the Oath would be more effective if it were written in the active voice. See generally Mary Dash, *Mary Dash's Writing Tips: Active and Passive Voice*, PLAIN LANGUAGE, <http://www.plainlanguage.gov/howto/quickreference/dash/dashactive.cfm> (last visited Dec. 30, 2016) [<https://perma.cc/X9KJ-8CPV>] (discussing how using active voice shows responsibility and gives credit for an action, as opposed to using passive voice, which avoids showing any responsibility).

<sup>102</sup> See Joki, *supra* note 101.

<sup>103</sup> See *id.*; see also MASS. GEN. LAWS ch. 221, § 38 (2017).

<sup>104</sup> See § 38. We will touch upon the offensive gender-biased language later in the article. See *infra* Section III.a.iv.

<sup>105</sup> I am arguing for the oath-taker to feel empowered by the Oath, but I am speaking in general terms since this Article argues that this Oath should be



a foundational and textual level, empowering each individual oath-taker will provide a greater emphasis on the vital importance and ethical obligations of the Oath. Thus, by eliminating the initial passive voice utilized within the current Oath, the reworked attorney's Oath will empower each individual oath-taker in a more meaningful way.

ii. Archaic and Irrelevant Phrasing

The Massachusetts Attorney's Oath was originally adopted over three hundred years ago.<sup>106</sup> Over time, popular usages of language in American society evolved and the use of certain words, such as "lucre" or "malice," declined dramatically.<sup>107</sup> While the Oath is perhaps not as outdated as the current Kentucky Attorney's Oath, which mandates that the oath-taker swear they have not taken part in, nor challenged anybody, in a "duel of deadly weapons,"<sup>108</sup> it is still in a form to which most oath-takers feel disconnected.<sup>109</sup> Similarly, most readers are unable to connect with the Massachusetts Oath in its current form.<sup>110</sup> In 1998, many judges in Michigan also felt that their oath used archaic language and did not convey the ideas that it should, so they sought to change their state attorney's oath into plain English.<sup>111</sup> They reasoned

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changed anyways. This is merely a breakdown and analysis of the issues with the current Oath.

<sup>106</sup> See Andrews, *supra* note 12, at 20.

<sup>107</sup> See *id.* at 59.

<sup>108</sup> KY. CONST. § 228. The Kentucky Attorney's Oath reads: "I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of this Commonwealth, and be faithful and true to the Commonwealth of Kentucky so long as I continue a citizen thereof, and that I will faithfully execute, to the best of my ability, the office of \_\_\_\_\_ according to law; and I do further solemnly swear (or affirm) that since the adoption of the present Constitution, I, being a citizen of this State, have not fought a duel with deadly weapons within this State nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge, nor aided or assisted any person thus offending, so help me God." *Id.*

<sup>109</sup> See Hatton, *supra* note 1 (referencing Clerk Doyle's announcement to the audience at the swearing-in ceremony that they may be confused by some of the language used in the oath due to its antiquated origins). See *id.*; see also *Formal Admission to the Massachusetts Bar*, *supra* note 4; see also Sullivan, *supra* note 94.

<sup>110</sup> This is due to the numerous issues presented within this Article, stemming from the Oath's outdated language.

<sup>111</sup> See George H. Hathaway, *A Plain English Lawyer's Oath*, MICH. B. J. 434, 434 (May 1998)

that changing the oath to plain English would lead to a greater public understanding of, and respect for, the judicial system and the legal profession.<sup>112</sup> Adjustments should be made to the current Oath as well to create a greater understanding of, and respect for, the legal profession within Massachusetts. The current language detracts from its substantive message.<sup>113</sup>

iii. “So Help Me God”

In ancient times, oaths were used to declare a promise of truthfulness.<sup>114</sup> A crucial part of many ancient oath-taking traditions was to invite a Supreme Being to witness the recited statements, which were bolstered by the belief that God would punish those who betrayed their oaths.<sup>115</sup> Nowadays, oath-takers are more concerned with the legal repercussions they may face if they violate an oath, rather than nebulous punishments from a Supreme Being.<sup>116</sup> Although the majority of the Founding Fathers were Christians and of European descent, modern society reflects a much broader diversity of cultural backgrounds and religious beliefs.<sup>117</sup> In particular, there has been an influx of culturally and religiously diverse individuals entering the legal profession.<sup>118</sup> Because of these new realities, old traditions such as using religious artifacts or calling upon a Supreme Being during an oath-taking ceremony have been changed.<sup>119</sup> The term “so help me God” no longer holds the original power it did when the Oath was first

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[https://www.michbar.org/file/generalinfo/plainenglish/pdfs/98\\_may.pdf](https://www.michbar.org/file/generalinfo/plainenglish/pdfs/98_may.pdf)  
[<https://perma.cc/25AL-7ZTS>].

<sup>112</sup> See *id.* at 435. Hathaway further rationalized that the judges could support these goals by requiring lawyers and judges to write legal documents in plain English. Specifically, he argued that, “since law students are taught plain English in law school, the best way to begin their practice of law is with a plain English oath.” *Id.*

<sup>113</sup> See generally *Writing Across the Curriculum: Tips for Using Inclusive, Gender Neutral Language*, MARQ. U., <http://www.marquette.edu/wac/neutral/NeutralInclusiveLanguage.shtml> (last visited Dec. 30, 2016) [<https://perma.cc/6YUN-XERV>] (explaining that gender-neutral language is more inclusive).

<sup>114</sup> See Milhizer, *supra* note 60, at 6.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 58-59.

<sup>117</sup> *Id.* at 30-31.

<sup>118</sup> See *id.* at 40.

<sup>119</sup> See generally *id.*

adopted, thus, leaving it in the Oath merely distracts and potentially prevents oath-takers from fully appreciating the gravity of their ethical obligations.<sup>120</sup>

One reason why it is unwise to retain traditional Christian language in oaths for an increasingly diversified legal profession is because the extent and influence of Christianity within the United States is in decline, while other faiths and unaffiliated belief systems have grown.<sup>121</sup> In 1966, 98% of Americans believed in some form of a God, however, by 2014, that number had decreased to roughly 86%.<sup>122</sup> Even from 2007 to 2014, the number of Christians has fallen roughly seven percent, from 78% to 71%.<sup>123</sup> The number of people who are unaffiliated with any organized religion, such as atheists and agnostics, has risen from 16% to 23%.<sup>124</sup> The remaining roughly 6% of the population is made up of non-Christian faiths, including the Jewish, Muslim, Buddhist, and Hindu faiths.<sup>125</sup> This is a dramatic difference from the 91% of Americans in 1948 that identified as Christians.<sup>126</sup> Although some people may not classify this as “progress,” it does show that there are rapidly changing viewpoints regarding religion, supporting the fact that the phrase, “so help me God,” has become an empty phrase for a substantial and growing portion of the population.<sup>127</sup> Thus, relying on Christian religious language in an Oath that applies to attorneys of all or no faiths is becoming increasingly unrepresentative of those reciting the words themselves.

The removal of religious references in witness and juror oaths has slowly begun. Although thirty-three states continue to use language in their oaths that reference “God,” twenty-five states allow oath-takers to affirm to an oath, rather than to swear, using language such as

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<sup>120</sup> See generally *id.*; see generally MASS. R. OF PROF'L CONDUCT (2017).

<sup>121</sup> See *America's Changing Religious Landscape*, PEW RES. CTR. (May 12, 2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> [<https://perma.cc/ZGD3-BUB8>]; see also Antonia Blumberg, *American Religion Has Never Looked Quite Like It Does Today*, HUFFINGTON POST (Apr. 15, 2016), [http://www.huffingtonpost.com/entry/american-religion-trends\\_us\\_570c21cee4b0836057a235ad](http://www.huffingtonpost.com/entry/american-religion-trends_us_570c21cee4b0836057a235ad) [<https://perma.cc/U2BU-4QPU>].

<sup>122</sup> Blumberg, *supra* note 121.

<sup>123</sup> *America's Changing Religious Landscape*, *supra* note 121.

<sup>124</sup> *Id.*

<sup>125</sup> See *id.*

<sup>126</sup> Blumberg, *supra* note 121.

<sup>127</sup> See generally *id.*

“under the pains and penalties of perjury.”<sup>128</sup> Recently, a movement led by believers and non-believers alike has emerged to challenge the constitutionality of the witness and juror oaths.<sup>129</sup> The challengers believe that the witness and juror oaths violate the Free Exercise Clause in the Constitution.<sup>130</sup> In *Society of Separationists, Inc. v. Herman*,<sup>131</sup> the Court held that the trial court judge violated the Free Exercise Clause when he attempted to coerce the appellant, who was an atheist, to take an oath or make an affirmation in order to qualify for jury duty.<sup>132</sup> Although *Herman* pertains to oaths in relation to jurors and witnesses, it is also relevant to attorney’s oaths, as both types of oaths are required by judicial proceedings.<sup>133</sup> Many people have begun to fight against the use of religiously biased language within oaths, and that fight will only grow stronger as the country becomes more diversified.<sup>134</sup>

The phrase “So help me God” should be removed from the current Oath to make it more inclusive of people of all faiths and no faith.<sup>135</sup>

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<sup>128</sup> See discussion *infra* Section III.a.iii; see, e.g., VT. R. B. ADMISSION, R. 12.

<sup>129</sup> See Belcher, *supra* note 23, at 294.

<sup>130</sup> *Id.*; see also U.S. CONST. Amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

<sup>131</sup> *Soc’y of Separationists, Inc. v. Herman*, 939 F.2d 1207 (5th Cir. 1991).

<sup>132</sup> *Id.* at 1215. Appellant atheist was jailed for contempt after refusing to take an oath or make an affirmation as a qualification for jury duty based on her belief that an affirmation was a religious statement. *Id.* at 1209. The Free Exercise Clause protected even an unreasonable belief that an affirmation was religious, so long as the belief was not so bizarre, or so clearly nonreligious in motivation. *Id.* at 1215-16. Additionally, the court reinstated appellant Separationist Society as a plaintiff to the action, affirmed the dismissal of the action against appellee county officials under absolute immunity, held that the offending judge was absolutely or qualifiedly immune from liability, and granted declaratory relief should judges ever be confronted with a similar situation. *Id.* at 1217-20.

<sup>133</sup> See *Formal Admission to the Massachusetts Bar*, *supra* note 4 (describing how the oath actually occurs during a live court session, which shows that taking an attorney’s oath is part of judicial proceedings).

<sup>134</sup> See sources cited *supra* note 121 and accompanying text.

<sup>135</sup> Further analysis could be done to determine if this Oath conflicts with the Oath or Affirmation Clause of Article VI of the U.S. Constitution. That clause states, “The Senators and Representatives before mentioned, and the Members of the several State Legislators, and all executive and *judicial Officers*, both of the United States and of the several States, shall be bound by *Oath or Affirmation*, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. CONST. art. VI, cl. 3. (emphasis added). Since the Massachusetts Oath is spoken

Further, in order to conform to the Oath or Affirmation Clause, there must be a possibility for non-believers to affirm by other means than to swear upon an oath.<sup>136</sup> The reworked Oath that this Article proposes will allow oath-takers to acknowledge their ethical obligations by declaration, rather than by swearing or affirming.<sup>137</sup>

#### iv. Uses of Clearly Gender-Biased Phrases

“We hold these truths to be self-evident, that all *men* are created equal . . . .”<sup>138</sup> Inequality between genders in the United States has existed since the country’s formation and remains a contentious issue.<sup>139</sup> The use of masculine language as a default has been a constant source of controversy due to its obvious gender-biased nature.<sup>140</sup> One example of this controversy occurred in 2011, when

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by the clerk, it gives no opportunity for any non-believers to affirm rather than to swear on the oath. *See generally* MASS. GEN. LAWS ch. 221, § 38 (2017). Further, the Oath does not provide the oath-taker of any way to affirm, rather than to swear on the oath. *Id.* Since attorneys are officers of the court, if they are forced to acknowledge these words, it could be viewed as a religious test and would violate the Oath or Affirmation Clause. It is not as apparent a violation as the older Massachusetts Oath found in the original state Constitution which stated, “Any person chosen governor, lieutenant-governor, councilor, senator, or representative, and accepting the trust, shall, before he proceed to execute the duties of his place or office, make and subscribe the following declaration: ‘I . . . do declare that I believe the Christian religion, and have a firm persuasion of its truth; and that I am seized and possessed, in my own right, of the property required by the constitution, as one qualification for the office or place to which I am elected.’” *Religious Tests and Oaths in State Constitutions in the Revolutionary Period, 1776-1784*, CTR. FOR STUDY OF AM. CONST., [https://archive.csac.history.wisc.edu/Religious\\_test\\_in\\_state\\_const.pdf](https://archive.csac.history.wisc.edu/Religious_test_in_state_const.pdf) (last visited Dec. 30, 2016) [<https://perma.cc/KQ7M-UZHJ>].

<sup>136</sup> *See* Belcher, *supra* note 23, at 294.

<sup>137</sup> *See infra* Part IV (discussing the newly proposed oath); *see generally* *Soc’y of Separationists*, 939 F.2d. at 1215-16 (establishing that even having the option to affirm rather than to take an oath was insufficient to conform to the Free Exercise Clause of the First Amendment); *see also* Belcher, *supra* note 23, at 296-97. (distinguishing the phrases “oath” and “affirmation” as used in the Constitution to show that the phrase “oath” was supposed to hold a religious connection, and that an affirmation did not have religious connections to it). *Id.* His analysis showed that oaths and affirmations are constitutional so long as the oath-taker has the option to choose. *Id.* at 296-97, 327-28. This is different from Massachusetts, which mandates that only an oath may be taken and does not provide the ability for the oath-taker to affirm. *See* ch. 221, § 38.

<sup>138</sup> DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

<sup>139</sup> *See* sources cited *supra* note 11 and accompanying text.

<sup>140</sup> *See Writing Across the Curriculum*, *supra* note 113.

Justice Scalia was asked about the Equal Protection Clause of the Fourteenth Amendment and its protection against gender discrimination and sexual orientation.<sup>141</sup> He remarked that the Fourteenth Amendment was never meant to be applied to gender discrimination, and courts have erred in allowing this protection.<sup>142</sup> Justice Scalia's statement was founded on his belief that the masculine term, "male," had been purposefully used in the Fourteenth Amendment, as that was the first time gender-biased language appeared anywhere in the U.S. Constitution.<sup>143</sup> For Scalia, the inclusion of gender-biased language could not have been accidental as each constitutional amendment was carefully thought out before being ratified.<sup>144</sup>

Justice Scalia was not the first person to have this opinion. In his 1872 concurrence in *Bradwell v. State*,<sup>145</sup> Justice Bradley stated that women have no right or protection under the Fourteenth Amendment to pursue lawful employment in any and every profession or occupation.<sup>146</sup> The plaintiff, Mrs. Myra Bradwell, was denied a license to practice law in Illinois even though she had satisfied all requisites to obtaining a license and the licensing board determined her to be of good moral character.<sup>147</sup> His rationale was:

*[A] married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.*<sup>148</sup>

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<sup>141</sup> See *Legally Speaking: The Originalist*, CAL. LAW. (Jan. 2011), [http://podcast.uctv.tv/webdocuments/legally-speaking/11\\_01LegallySpeaking\\_Scalia.pdf](http://podcast.uctv.tv/webdocuments/legally-speaking/11_01LegallySpeaking_Scalia.pdf) [https://perma.cc/WJ2F-UDBM] (excerpting an interview conducted with Justice Antonin Scalia).

<sup>142</sup> See *id.*

<sup>143</sup> See *id.*

<sup>144</sup> See generally *id.*

<sup>145</sup> *Bradwell v. State*, 83 U.S. 130 (1872).

<sup>146</sup> *Id.* at 140-41. (Bradley, J., concurring). This case was brought by a married woman seeking to obtain her license to practice law in Illinois. *Id.* at 130.

<sup>147</sup> *Id.* at 136.

<sup>148</sup> *Id.* at 141. (Bradley, J., concurring).

The sentiment clearly illustrates how the court system viewed women in the past and how they were prevented from obtaining employment or having the power to sign a contract because of their gender. This is just one of countless examples of how women have been greatly restrained by the use of masculine pronouns in legislative language, and by courts enforcing those provisions literally. Thus, by retaining its masculine language, the Oath serves as a reminder of a time when courts did not recognize women as having equal rights, potentially preventing women from connecting with its message.<sup>149</sup>

Before the Civil Rights Act of 1964<sup>150</sup> (hereinafter “CRA”), it was very difficult, if not impossible, for women to be permitted to practice law.<sup>151</sup> Because of this restriction, the use of gender-neutral language within an attorney’s oath was unnecessary as only men were taking the oath at that time. However, because of the CRA, employers could no longer discriminate against women based on their gender, which in turn allowed women to enter the legal profession with slightly less pushback.<sup>152</sup> Due to the increase in gender diversity among the population of incoming lawyers, states began to change their state attorney’s oaths.<sup>153</sup> In 2015, Texas affirmatively changed its attorney’s oath to include gender-neutral language.<sup>154</sup> Out of the fifty states, only four still use the phrase “delay no man,” while the rest have replaced this phrase with phrases such as, “delay no person” or “delay no cause.”<sup>155</sup> This overwhelming acceptance of the use of gender-neutral

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<sup>149</sup> *See id.*

<sup>150</sup> Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of sex, color, race, religion, or national origin. 42 U.S.C. § 20000e et seq.

<sup>151</sup> *See, e.g., Bradwell*, 83 U.S. at 133.

<sup>152</sup> *See generally* Phillips v. Martin Marietta, 400 U.S. 542 (1971) (holding that employers cannot refuse to hire women with young children while hiring men in the same or similar situation); *see also generally* Hishon v. King & Spalding, 467 U.S. (1984) (holding that women must be considered for partnership in law firms); *see generally* Johnson v. Transp. Agency, 480 U.S. 616 (1987) (holding that sex can be taken into account as a factor for hiring, so long as it is done as an affirmative action meant to remedy the underrepresentation of women in male dominated fields).

<sup>153</sup> Morris, *supra* note 92.

<sup>154</sup> *Id.*

<sup>155</sup> *See* Judge Margaret Robb, *Oaths of Admission for All 50 States*, CT. APP. ARMED FORCES, <http://www.armfor.uscourts.gov/newcaaf/ConfHandout/2016ConfHandout/2016>

language in state oaths must not go unnoticed. Using terms such as “subscribed to by him” and “delay no man” shows a clear gender bias that should not endure in modern society.<sup>156</sup> The time is long overdue for Massachusetts to follow the lead of these states and change the Oath to reflect the progress made in gender equality.<sup>157</sup>

The use of obvious gender-biased, as well as belief-biased, language detracts from the actual purpose of the Oath and makes it difficult for all oath-takers to feel included.<sup>158</sup> Textually speaking, the language used in the current Oath is archaic, exclusionary, and irrelevant.<sup>159</sup> The true purpose of an oath is to remind all oath-takers that they must respect and adhere to the ethical obligations that are imposed upon them by that oath.<sup>160</sup> However, the current Oath reflects the religion-based and gender-based oppression that has occurred throughout this nation’s history, as well as throughout the history of the world.<sup>161</sup> Many people have dedicated their lives to combating these issues in an effort to allow society to progress.<sup>162</sup> Failing to update the Oath to reflect the Nation’s progress arguably belittles the efforts of those who have fought to eradicate gender and religious discrimination. To honor these efforts, as well as to reflect the true purpose of the Oath, a change is required.

#### **b. The Act of Oath-Taking in Massachusetts**

The act of oath-taking is a powerful experience for those who participate in it, as well as for those who witness it. During a President’s Inaugural Address, the future president of the United States observes a vast sea of people and recites the Presidential Oath of Office: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.”<sup>163</sup> The completion of this thirty-five word oath marks the

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MargretRobbOathsOfAdmissionForAll50States.pdf (last visited Dec. 30, 2016) [<http://perma.cc/8H33-YQW8>].

<sup>156</sup> See Morris, *supra* note 92.

<sup>157</sup> *Id.*; see generally Andrews, *supra* note 12.

<sup>158</sup> Andrews, *supra* note 12, at 60.

<sup>159</sup> See discussion *supra* Section III.a.

<sup>160</sup> See Andrews, *supra* note 12, at 60.

<sup>161</sup> See generally Bowman, *supra* note 96; see also Wong, *supra* note 97.

<sup>162</sup> See Andrews, *supra* note 12; see also Bowman, *supra* note 96.

<sup>163</sup> U.S. CONST. art. II, § 1.



moment when the former president's term is finished and the new president officially takes office.<sup>164</sup> The power and beauty of this moment is insurmountable.<sup>165</sup> Fledgling attorneys in Massachusetts, on the cusp of realizing their goals after three long years of hard work in law school, are potentially denied similar symbolic power and beauty because of the oath-taking ceremony's restrictive language and procedures.<sup>166</sup> Because the Oath is recited to prospective attorneys in Massachusetts and their only participation is uttering "I do" at its conclusion, the oath-takers are deprived of the opportunity to more personally connect with its profound meaning.<sup>167</sup> These judicial officers who swear upon the same oath, and vow to live by the obligations embodied in it, deserve the right to speak these words clearly and proudly. When individuals are empowered to speak the words, and promise to live up to their oath, it is more than just a subscription to the oath, but a vow to honor it and live by the ethical obligations it reflects.

#### IV. PROPOSAL FOR A NEW OATH

While this Article argues that history and tradition should not be clung to at all costs, it simultaneously recognizes the importance of maintaining certain aspects of the original Oath. The reworked Oath preserves some parts of the historical Oath, while eliminating the exclusionary and archaic language, and also places a greater emphasis

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<sup>164</sup> See *The Campaign Trail*, NAT. MUSEUM OF AM. HIST., <http://americanhistory.si.edu/presidency/1b2.html> (last visited Dec. 30, 2016) [<http://perma.cc/D88W-MZDS>].

<sup>165</sup> The significance of this moment is that a person is freely relinquishing the most powerful position in the country. This peaceful transfer of power was inspired by George Washington's selfless decision to voluntarily transfer power as president after two terms. See Bruce Kauffmann, *Bruce's History Lesson: George Washington Gives Up Power*, LEBANON DAILY NEWS (Dec. 19, 2016), <http://www.ldnews.com/story/opinion/columnists/2016/12/19/bruces-history-lesson-george-washington-gives-up-power/95619584/> [<http://perma.cc/5TJT-MW57>] (describing how George Washington turned down the ability to become King of America because he did not want to leave one monarchy in order to create another one).

<sup>166</sup> See drbking, *supra* note 6. In the video, SJC Clerk Doyle recites the oath. *Id.* However, during a Presidential Inaugural Address the incoming president is granted the honor of reciting the President's Oath of Office. See *The Campaign Trail*, *supra* note 164.

<sup>167</sup> See drbking, *supra* note 6.

on the ethical obligations promoted by the profession. The new Oath reads:

Whoever is admitted as an attorney shall in open court take and subscribe to the following oath<sup>168</sup>:

*I (repeat name), do solemnly and sincerely declare that<sup>169</sup>: I will support the Constitution of the United States and the Constitution of the Commonwealth of Massachusetts;<sup>170</sup> I will do no falsehood, nor consent to the doing of any in court;<sup>171</sup> I will not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same;<sup>172</sup> I will not reject, from any consideration personal to myself, the cause of the defenseless or the oppressed, or delay any cause for monetary gain or spite;<sup>173</sup> and I will in all other respects conduct myself personally and professionally in conformity with the high standards of conduct imposed upon members of the bar as conditions for the privilege to practice law in this State.<sup>174</sup>*

Each piece of this Oath is inspired by other state oaths that reflect the ideals that an attorney's oath ought to contain. However, this new Oath remains as a "do no falsehood" version of an oath, which is what Massachusetts has utilized throughout most of its history.<sup>175</sup> Although the adoption of a new oath will take away the state's record for having the oldest oath in the Western Hemisphere, it will prove to the nation that societal progress is more important than historical pedigree.

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<sup>168</sup> This language paraphrases that of the current Massachusetts Attorney's Oath. See MASS. GEN. LAWS ch. 221, § 38 (2017).

<sup>169</sup> CONN. GEN. STAT. § 1-25 (2012). This oath inspired the use of the word "solemnly."

<sup>170</sup> This language is identical to the Washington state attorney's oath, but with the appropriate state name substituted. See WASH. REV. CODE § 2.48.210 (2013).

<sup>171</sup> See ch. 221, § 38.

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

<sup>173</sup> I changed the terms "lucre" and "malice" to "monetary gain" and "spite" respectively, in order not to deter from the true meaning of the oath and to allow for lawyers and the general public to understand it better. See MICH. R. ST. B. 15 § 3(1).

<sup>174</sup> See *id.*

<sup>175</sup> Andrews, *supra* note 12, at 20.

The proposed Oath should be adopted because it resolves all the issues presented in this Article. Firstly, this proposed Oath does not use any gender-biased language.<sup>176</sup> This was accomplished, in part, by eliminating passive voice from the introduction of the Oath, making the opening more empowering to all individuals who recite it.<sup>177</sup> Also, the phrase, “delay no man,” was changed to “delay any cause,” in order to promote gender-neutral language and broaden the scope of the Oath to recognize the significance of all legal and equitable causes.<sup>178</sup> The use of gender-neutral language allows for all genders to be able to connect with the Oath because of its inclusiveness. The language no longer detracts from the Oath’s true purpose, which is to remind all incoming lawyers of the ethical obligations owed to the community, as well as to the profession. The current Oath only acts as a sad reminder of a time when women did not have a voice and could not partake in the legal profession. Decades of progress and social movements have culminated in a society that is more diverse and tolerant than ever before and such progress must be reflected in the Oath. The proposed Oath achieves this purpose.

Secondly, the proposed Oath does not contain any of the archaic language found in the original Oath. The use of the phrase “delay any cause for monetary gain or spite” solves another problem that was discussed earlier within this section. The terms “lucre” and “malice”

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<sup>176</sup> See Adam Tamburin, *Colleges Trend Toward Gender-Neutral Pronoun*, USA TODAY (Sept. 5, 2015), <http://www.usatoday.com/story/news/nation/2015/09/05/colleges-trend-toward-gender-neutral-pronouns/71780214/> [<http://perma.cc/93DS-GT75>]. Schools have begun moving towards gender-neutral phrases in their student handbooks, using gender-neutral pronouns such as “ze” and “xyr” in order to accommodate all forms, including those who do not identify themselves as strictly male or female. This demonstrates that schools are recognizing the need for gender-neutral language in order for more students to feel like they are being represented. *Id.*

<sup>177</sup> See sources cited *supra* note 101 and accompanying text.

<sup>178</sup> By identifying “causes” instead of using gender-biased language, the focus on the phrase becomes more about the reasoning behind causing a delay, i.e. for monetary gain or spite. Whereas, if left as is, the gender-biased language could deter people from focusing on the actual purpose of the phrase. Although most likely influenced by writing this Article, I now feel that when I come across language that is gender-biased, I start to wonder why the author chose to use such limiting terms. When legislatures pass a statute, each word or phrase is chosen carefully, so the use of gender-biased language makes one question whether the legislative intent was to exclude a specific gender.

were replaced with “monetary gain”<sup>179</sup> and “spite,”<sup>180</sup> respectively, thus eliminating distracting use of Latin terminology and ensuring that all oath-takers have a greater connection with the oath.<sup>181</sup> The current Oath uses obscure and esoteric language such as “lucre,” or “malice,” terms that have fallen out of conventional use. One goal of an effective lawyer is to communicate clearly and effectively, especially with those who are unfamiliar with the profession and the law.<sup>182</sup> The Oath should reflect this goal, containing instead coherent terminology, rather than terms comprehended only by those who have been exposed to Latin or to legal terms of art. The Oath is a codified<sup>183</sup> statute, accessible to all, so everyone who reads it should be capable of understanding it.<sup>184</sup> This proposed Oath, written with consideration for both lawyers and lay persons, ensures its broader clarity and, consequently, effect.

Thirdly, the proposed Oath uses the term “declare,” rather than “swear” or “affirm,” to ensure the removal of any religious connotation. As religious diversity expands, the laws that govern this nation must adapt to ensure equality amongst its population. Since an affirmation of an oath does not completely remove all religious context, the act of declaring<sup>185</sup> an oath, rather than swearing or affirming, resolves this problem.<sup>186</sup> The proposed Oath does not contain any phrases that could be aligned with certain religious beliefs, which allows for everybody to connect with it, no matter their

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<sup>179</sup> This is a more identifiable phrase that is synonymous with “lucre.”

<sup>180</sup> This a more identifiable term that is synonymous with “malice.”

<sup>181</sup> Although some students choose to learn the Latin language during part of their primary school class load, Latin has been widely referred to as a “dead language” and, therefore, it is irrational to use it in the oath. *See* BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* 185-87 (1991).

<sup>182</sup> *See* MODEL RULES OF PROF’L CONDUCT r. 1.4 (AM. BAR ASS’N, Discussion Draft 1983).

<sup>183</sup> *See* MASS. GEN. LAWS ch. 221, § 38 (2017); *see also* *Codification*, BLACK’S LAW DICTIONARY (10th ed. 2014). The term codification denotes the creation of codes, which are compilations of written statutes, rules, and regulations that inform the public of acceptable and unacceptable behavior.

<sup>184</sup> *See* GARNER, *supra* note 181.

<sup>185</sup> *Declaration*, BLACK’S LAW DICTIONARY (10th ed. 2014). A declaration is a formal or explicit statement or announcement. A declaration of an oath is the style that is least likely to have any religious connotations.

<sup>186</sup> *See, e.g.* CONN. GEN. STAT. §1-25 (2012).

religious views. This will ensure that all religious beliefs<sup>187</sup> are respected in Massachusetts.

Finally, the proposed Oath makes an explicit reference to an attorney's ethical obligations in the phrase, "I will in all other respects conduct myself personally and professionally in conformity with the high standards of conduct imposed upon members of the bar as conditions for the privilege to practice law in this State."<sup>188</sup> This phrase emphasizes the heightened standard of conduct and ethics imposed on members of the Massachusetts Bar, and is purposefully placed at the end of the Oath to enhance its significance and to echo as a final thought for oath-takers as they officially become licensed attorneys.<sup>189</sup> There must be an explicit reference to these ethical obligations. The emphasis on these obligations will also allow witnesses to comprehend the heightened ethical standards placed on members of the profession, which may serve to increase the respect and dignity of the profession in the eyes of the public.<sup>190</sup> It is time to adopt an oath that emphasizes ethical obligations rather than reflects the archaic belief that those who break an oath will be struck down by God.

Along with the substantive changes suggested by this Article, it is also recommended that the Oath be administered differently. To make sure that the proposed Oath has the most powerful impact, it should be recited by the oath-takers as a requirement for admission to the Massachusetts Bar. This idea is demonstrated in the Oath's introduction where the phrases "administered to" and "subscribed by" were removed because they connoted the current practice of reciting the Oath to the oath-takers and having them merely proclaim, "I do."<sup>191</sup> If allowed to recite the Oath, each incoming attorney would be more likely to recognize their ethical obligations while they affirmatively accept them.<sup>192</sup> This will lead to more individual

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<sup>187</sup> This includes non-believers, as well.

<sup>188</sup> See *supra* notes 167-73 and accompanying text (analyzing the newly reworked Oath).

<sup>189</sup> See generally Phillip K. Lyon, *20 Reasons Why People Don't Respect Lawyers the Way They Used To*, 54 PRAC. LAW. 19 (2008).

<sup>190</sup> *Id.* at 20-22.

<sup>191</sup> See drbking, *supra* note 6.

<sup>192</sup> See MINN. STAT. § 481.15 (2017); see also MONT. CODE ANN. § 37-61-301(2)(b) (2017). These statutes recognize the court's ability to use an oath as a source of discipline when violated.

empowerment because oath-takers will be actively participating in this recitation, rather than playing a passive role.

The proposal to adopt a new Oath may not be universally accepted initially. Some people may want to preserve the original Oath because of its uninterrupted history, which to some elevates it. However, even though the Oath distinguishes Massachusetts from other states, it does not necessarily follow that the Oath remains appropriate. After surveying every states' attorney's oath, it is clear that many states share the same viewpoint because they have adopted oaths that reflect the societal progress made in the areas of religious and gender equality in the United States. However, Massachusetts has yet to adapt its oath to the progress made. In order to show how important this progress is, consideration must be given to one of the most powerful documents ever written, the United States Constitution. The drafters of this document intended for it to adapt to changing conditions.<sup>193</sup> The Constitution was purposefully written to evolve as a living document<sup>194</sup> because as times change, people and viewpoints change, as well. The United States was founded on the belief that laws and policies must develop and adapt to reflect the evolving standards and beliefs of a changing society; oaths are no exception. Clinging to an exclusionary oath contradicts what this nation was founded upon and fails to reflect the progress that many generations have fought so hard to achieve.

## V. CONCLUSION

The only thing that is constant is change.<sup>195</sup> Many people fear change, but it is required for societies to survive and advance. This Article has proposed a change to the current Oath, which was adopted during a time when women were subjugated by the law and religious

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<sup>193</sup> Byron Williams, *Constitution Is Clearly a Living Document*, HUFFINGTON POST (June 16, 2012), [http://www.huffingtonpost.com/byron-williams/same-sex-marriage-constitution\\_b\\_1429064.html](http://www.huffingtonpost.com/byron-williams/same-sex-marriage-constitution_b_1429064.html) [<http://perma.cc/Z8ML-PMNW>].

<sup>194</sup> *Living Document*, DEFINITIONS, <https://www.definitions.net/definition/living%20document> (last visited Mar. 7, 2018) [<https://perma.cc/NP9V-TSQ3>]. A living document is a document that is continually able to be edited and updated, as opposed to a dead document that cannot.

<sup>195</sup> *Quotable Quotes*, GOODREADS, <https://www.goodreads.com/quotes/336994-the-only-thing-that-is-constant-is-change>— (last visited Mar. 7, 2018) [<https://perma.cc/XR5T-AGM9>]. This is a paraphrased quote from the Greek philosopher, Heraclitus, who was alive in 500 B.C.

persecution was commonly experienced. Society has changed and advanced, and it is time for the laws that govern this society to advance, as well. Many other states have recognized the need for this change and acted accordingly regarding their state attorney's oaths.<sup>196</sup> It is time for Massachusetts to modernize.

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<sup>196</sup> See *supra* Section III.a.iii (distinguishing between states that use religious references and ones that do not); see also *supra* Section III.a.iv (distinguishing between states that use gender-biased language and ones that do not).