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## As God as my witness: a contemporary analysis of theology's presence in the courtroom as it relates to the "oath or affirmation" requirement within the Florida rules of evidence

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AS GOD AS MY WITNESS:  
A CONTEMPORARY ANALYSIS OF THEOLOGY'S PRESENCE IN THE  
COURTROOM AS IT RELATES TO THE "OATH OR AFFIRMATION"  
REQUIREMENT WITHIN THE FLORIDA RULES OF EVIDENCE

by

NICHOLAS SCOTT GURNEY

A thesis submitted in partial fulfillment of the requirements  
for the Honors in the Major Program in Legal Studies  
in the College of Health and Public Affairs  
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at the University of Central Florida  
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Thesis Chair: Dr. Margarita Koblasz

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## **ABSTRACT**

The existence of the oath in the courtroom can be traced back thousands of years throughout history, but the use, meaning, and effect of the oath in law has changed dramatically. The oath as we know it was once a powerful truth-telling instrument that our ancestors used to call upon a higher power. It was the belief of many that the oath itself was not sworn to man or state, but rather directly to a deity.

The oath has since then evolved as a result of ever changing beliefs, fueled by increasing tolerance, shaping the oath into more of a tradition, and less of an edict. For centuries, theorists have attempted to determine whether an oath in court is actually effective at accomplishing its goal.

The intent of this thesis is to examine the origin of the oath all the way up to the present day. It will be through a comprehensive study of federal law, state law, case law, articles, and publications that we will better understand the oath as a truth-telling instrument that in recent times has lost its effect.

From there, it will be possible to better form a solution to a problem that plagues our courtrooms: perjury, or the act of lying under oath. This thesis will seek to establish the best way for our community to actively work towards ensuring the integrity and effectiveness of our judicial system.

## **DEDICATION**

To my family, who has supported me,  
unwavering, throughout my life,  
in everything I did,  
all of the time.

To my Parents, Stephen and Deborah,  
who couldn't be described in  
ten-thousand pages of writing,  
so I won't even try.  
You know what you've done.  
Thank you for it all.

To my Sisters, Jennifer and Jessica,  
who have never ceased to amaze me  
and who never once let me down.

To the best little man in the world,  
Sebastian Teran, my nephew,  
who lights up my life, and  
has helped me smile  
in some tough times.

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To the inventor of RedBull, thank you for all you have done for humanity. If it wasn't for your visionary taurine-induced creativity, I would never have finished this thesis. "What I hope most of all is that you understand what I mean when I tell you that, even though I do not know you, and even though I may never meet you, laugh with you, cry with you, or kiss you; I love you. With all my heart, I love you." - V for Vendetta.

## TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION .....	1
Topic Review.....	1
Issue Overview.....	3
CHAPTER TWO: ANCIENT HISTORY .....	4
Origin of the Oath .....	4
Babylonian.....	4
Mesopotamian .....	7
Grecian .....	9
Roman .....	11
Anglo-Saxon .....	12
Origin of Perjury .....	14
Perjury as a Crime .....	16
CHAPTER THREE: MODERN HISTORY .....	18
American Colonial Law.....	18
Writings.....	18
United States Constitution.....	19
Amendments to the Constitution .....	19
Case Law.....	21
American Statutory Law .....	24
Federal Statutes.....	24
Florida Statutes.....	25
Verbiage of Oaths .....	25
Florida's Oath .....	25
North Dakota's Oath .....	26
Delaware's Oath .....	26
Pennsylvania's Oath .....	27
CHAPTER FOUR: ISSUE .....	28
Question.....	28
Scope.....	28
CHAPTER FIVE: EXAMINATION.....	29
Perjury Today .....	30
Hypothetical.....	32
Paradox of the Oath .....	34
Florida's Current Jury Instruction .....	34
CHAPTER SIX: RECOMMENDATION.....	37

## CHAPTER ONE: INTRODUCTION

“It would seem, therefore, that this constitutional safeguard may no longer serve its original purpose, especially when, as we learned last year, some acts of perjury may now be acceptable - in this world, at least, if not the next.”

James L. Buckley<sup>1</sup>

The manner in which perjury is treated, as shown in this James L. Buckley quote, underscores the issue that this study will attempt to address: truthfulness in judicial proceedings.

### Topic Review

Forcing a witness to testify truthfully in court can be a difficult endeavor and knowing whether or not a witness is lying may be impossible to determine as there is little evidence to suggest that the courts could ever know with certainty whether testimony is true or not.<sup>2</sup> Therefore, this examination shall deal solely with what can be known in relation to the oath in the courtroom.

It shall be the goal of this paper, in part, to determine whether the blending of religious principles with the establishment of the American Common Law system has had a discernible effect on the level to which truth is elicited. More specifically, the question is whether the oath or affirmation requirement, in light of its known theological

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<sup>1</sup> Author: James L. Buckley is a retired judge for the United States Court of Appeals for the District of Columbia. The constitutional safeguard he speaks of here is the oath in court.

<sup>2</sup> George Fisher, *The Jury's Rise as Lie Detector* 579 (Yale Law Journal The Yale Law Journal Company, Inc. 1997) (1997).



history<sup>3</sup>, has proven to be effective. This could be considered the “oath experiment” and in those terms, this study shall conclude that the experiment is a near total failure today.

It is the desire of this study to propose a solution that can work alongside the procedures already in place in the Florida Rules of Evidence, so as to ensure a more accurate system of evaluating testimony for truthfulness. In doing so, this study will first seek to understand the theological and ancient history of the oath, the secular direction the oath has taken, and the ultimate effectiveness of today’s oath.

It is first necessary to examine the history of swearing under oath, as a thorough understanding of where the oath has come from coupled with an examination of its evolution, will serve to set our foundation. Special attention shall be given to the theological roots of the oath.

Next, a modern day analysis of the oath in American Courts shall be endeavored. Specifically, this paper will look at the oath as it appears in the Florida Rules of Evidence, and it will also look into the role of juries as fact finders. It has been stated that the jury is the only true and reliable “lie detector”<sup>4</sup> and this “lie detector” theory will be challenged with respect to what types of instructions the average Florida jury members have at their disposal when it comes to witness testimony.

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<sup>3</sup> By and through the use of the phrase “theological history”, this author intends to draw attention to the fear of divine retribution as encouragement to tell the truth under oath.

<sup>4</sup> *Id.* at 577.

## Issue Overview

At this point, the issue becomes clear: “Is the ‘oath or affirmation’ requirement in the Florida Rules of Evidence an effective means of ensuring that only the most reliable and truthful testimony is elicited in court?” The issue hinges on a particular assessment of what is considered effective, reliable and truthful.

Truthful testimony, based on theological and religious belief systems, will serve to set the stage for this examination. Judeo-Christian beliefs in particular, will be examined since they provide the fundamental theological basis for the Florida Rules of Evidence.<sup>5</sup> This becomes important in determining what our courts and legislatures say about the role of religion at trial. It becomes vital here to look at alternative means of eliciting truth, regardless of ethical compromise or public controversy.

It will be this exhaustive approach that will yield the recommendation this study seeks. It is necessary to establish a tightly worded, powerful and effective jury instruction that will impress in the mind of jurors that testimony in court is properly consigned to their discretion, based upon their collective knowledge, individual knowledge, and common sense and not theological or religious preference.

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<sup>5</sup> Sir W. Churchill, *The Island Race*, Corgi, London, 1964, 219 as reprinted in Rev. Prof. Dr. F.N. Lee, *King Alfred The Great and Our Common Law* (Dept. of Church History, Queensland Presbyterian Theological Seminary, Brisbane, Australia 2005) (2000).

## CHAPTER TWO: ANCIENT HISTORY

Any historical analysis of the oath or perjury in legal proceedings is going to be fragmented. The consensus appears to be that the oath (as society knows it today) is the product of many centuries of evolution.<sup>6</sup> In fact, it wasn't until the mid-16<sup>th</sup> century that any type of criminal violation for lying under oath can even be reliably traced.<sup>7</sup> However, throughout history, the oath in court appears a number of times carrying with it a considerable amount of reverence and importance.

### Origin of the Oath

"It is not the oath that makes us believe the man, but the man the oath."

Aeschylus<sup>8</sup>

The oath in legal proceedings extends back thousands of years and will prove to be impactful, even on our current oath. The study of the traceable oath begins around 2,000 B.C.

### ***Babylonian***

This study can begin nowhere else than with the Code of Hammurabi. This groundbreaking listing of ancient Babylonian laws survives as the one of the oldest deciphered writings of significant length in the world.<sup>9</sup>

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<sup>6</sup> Michael D. Gordon, *The Perjury Statute of 1563: A Case History of Confusion* 440 (Proceedings of the American Philosophical Society 1980) (1980).

<sup>7</sup> Michael D. Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts* (The American Journal of Legal History 1980) (1980).

<sup>8</sup> Greek writer commonly credited with being The Father of the Greek Tragedy.

<sup>9</sup> J. Dyneley Prince, *The Code of Hammurabi* 601 (The American Journal of Theology, The University of Chicago Press 1904) (1904).

Written under the rule of the sixth King of Babylon, Hammurabi, the Code of Hammurabi outlines legal principles that governed Babylon during (and after) the time that Hammurabi ruled. Its significance extends to how matters of false accusation, false witness, and immoral acts were dealt with almost 4,000 years ago.<sup>10</sup>

The Code levies serious punishment upon those who accuse persons falsely. It enumerates that, “[t]o bring another into danger of death by false accusation” was a crime itself punishable by death.<sup>11</sup> “To cause loss of liberty or property by false witness was punished by the penalty the perjurer sought to bring upon another.”<sup>12</sup> Here the equal distribution of the law in Babylon is clear: if you cost another person his hand by false witness, you will lose your hand, if you cost another person his life by false witness, you will lose your life. This very ancient “eye-for-an-eye” style of legal application, also referred to as “lex talionis”<sup>13</sup>, was a hallmark of the era. So too was it a means to a very operative end: solemn and effective oaths.

Lex talionis placed considerable emphasis on the necessity of truth telling, especially in matters of life, liberty and property. These rights appear more recently and exactly in the Constitution of the United States.<sup>14</sup> Even in ancient times, these rights were viewed as being so sacred that if deprived by a false witness, they were just as

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<sup>10</sup> Claude Hermann Walter Johns, *Babylonian Law – The Code of Hammurabi*, 11 Encyclopedia Britannica (1910) available at <http://avalon.law.yale.edu/ancient/hammpre.asp>.

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> [http://www.newworldencyclopedia.org/entry/Lex\\_talionis](http://www.newworldencyclopedia.org/entry/Lex_talionis) (follow: no hyperlink). (“Latin for “law of retaliation”, Lex Talionis is the principle of retributive justice expressed in the phrase “an eye for an eye,” (Hebrew: עין תחת עין) from Exodus 21:23–27. The basis of this form of law is the principle of proportionate punishment, often expressed under the motto “[l]et the punishment fit the crime.’”).

<sup>14</sup> U.S. Const. amend. V, § 1.

swiftly taken from the offender.<sup>15</sup> Here, punishment sought to serve as motivation for truthful testimony.

The Code goes on to establish the foundation for the oath, “[p]arties and witnesses were put on oath. The penalty for false witness was usually that which would have been awarded the convicted criminal.”<sup>16</sup> Here the identifiable violation of perjury is replaced with act of bearing “false witness”, something that will resurface in Biblical times. However, it will later become clear that not until the Perjury Statute of 1563 is an identifiable<sup>17</sup> crime of perjury in existence.<sup>18</sup> The Code of Hammurabi lays considerable foundation, in the form of tradition, to this end.<sup>19</sup>

In what appears to be a stark inconsistency with this very real punishment for lying, the Code enlists a “higher” form of punishment, in what appears to be a catchall way of impressing the seriousness of lying under oath upon all those who testify against another. This impression of a higher power comes, in part, from the depiction of a god giving Hammurabi the Code atop the steel on which it is written. The Code calls upon that higher power in the following way: “[f]inally, it may be noted that many immoral acts, such as the use of false weights, lying, &c. [sic.], which could not be brought into court, are severely denounced in the Omen Tablets as likely to bring the offender into ‘the hand of God’ as opposed to ‘the hand of the king’.”<sup>20</sup>

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<sup>15</sup> Johns, *supra*, at 5.

<sup>16</sup> *Id.* at 6.

<sup>17</sup> Author: read as “codified”.

<sup>18</sup> Michael D. Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts*, (The American Journal of Legal History 1980) (1980).

<sup>19</sup> The “end” mentioned here is the author referring to the establishment of oaths in judicial proceedings.

<sup>20</sup> Johns, *supra*, at 6 (author’s note).

It appears that the threat of death coupled with the threat of retribution was the two prong punishment that the Babylonians relied upon in minimizing false statements in matters of law. All accounts tend to show that witnesses were aware of this. While no concrete evidence seems to exist in support of the effectiveness of this approach, this spirit of dual punishment would survive for several centuries to come.<sup>21</sup>

### ***Mesopotamian***

Moving forward nearly one thousand years, a Biblical approach to truth telling can be found. Of the eighty-seven times the word “false” appears in the Bible, few have inspired such rich use than that which appears in the sixth chapter of Proverbs.<sup>22</sup> What has been identified as the “Seven Deadly Sins” by some, lists the offense of lying *twice*: “[t]hese six things doth the LORD hate: yea, seven are an abomination unto him: a proud look, *a lying tongue*, and hands that shed innocent blood, an heart that deviseth wicked imaginations, feet that be swift in running to mischief, *A false witness that speaketh lies*, and he that soweth discord among brethren.”<sup>23</sup>

Deuteronomy goes on to provide a legally reminiscent form of seeking truth. It states, “[t]hou dost not take up the Name of Jehovah thy God for a vain thing, for Jehovah doth not acquit him who taketh up His Name for a vain thing.”<sup>24</sup> It is by this binding admonition that the Bible establishes the eternal sin that is false swearing. Not

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<sup>21</sup> Michael D. Gordon, *The Perjury Statute of 1563: A Case History of Confusion*, 438 (Proceedings of the American Philosophical Society 1980) (1980).

<sup>22</sup> *Proverbs* 6:19 (King James).

<sup>23</sup> *Proverbs* 6:16-19 (King James) (emphasis added).

<sup>24</sup> *Deuteronomy* 5:11 (Young’s Literal Translation).

only does one who swears wrongfully endure the possible pain of physical punishment, so too might this person suffer eternal punishment.

Cross over between religious belief and legal truth telling is further established in Deuteronomy: “Thou shalt fear the LORD thy God, and serve him, and shalt swear by his name.”<sup>25</sup> Swearing by the name of God helps to blend physical testimony with that which is held most sacred to many: the name of the Lord. The book of Jeremiah goes on to further develop this crossover: “And thou shalt swear, The LORD liveth, in truth, in judgment, and in righteousness; and the nations shall bless themselves in him, and in him shall they glory.”<sup>26</sup> Here, the Bible establishes not only that the Lord oversees the truth of a witness, but also that the Lord himself lives in truth and in judgment.

This basis, once understood, sheds considerable light on where truth telling comes to a head: “[f]or men verily swear by the greater: and an oath for confirmation is to them an end of all strife. Wherein God, willing more abundantly to shew unto the heirs of promise the immutability of his counsel, confirmed it by an oath...”<sup>27</sup> In an ancient text on the Third Commandment, its anonymous author examines this same verse from Hebrews. Of it he says, “... because [God] could Swear by no greater, [H]e Swore by [H]imself.”<sup>28</sup> Here God makes a promise *by Himself*, and in doing so, He cements His promise to man.

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<sup>25</sup> Deuteronomy 6:13 (King James).

<sup>26</sup> Jeremiah 4:2 (King James).

<sup>27</sup> Hebrews 6:16,17 (King James).

<sup>28</sup> Anon, *The Third Commandment; an essay tending to prove that perjury deserves not only the pillory but a much severer punishment, occasioned by a reflection on the heinous [sic] sin and extream [sic] mischiefs of perjury and the great confusion into which this kingdom and Church of England have lately been brought by false oathes [sic].* 7 (London: Printed for Joseph Hindmarsh 1685) (1685) (author’s note).

## **Grecian**

Close in time to these writings, the case against Leocrates helps to showcase how the Greek's viewed the role of testimony. In this case, famed orator Lycurgus gave an opening statement. In this role, he sought to impress upon the witnesses and the jury the importance of truthful testimony. He states, "[a]sk the witnesses therefore to come up without hesitation and not to put offered favors before your interests and the state. Ask them to pay their country the debt of truth and justice which they owe and not to follow the example of Leocrates by failing in this duty. Otherwise let them swear the oath of disclaimer with their hands on the sacrifice."<sup>29</sup> Here Lycurgus equates the responsibility to tell the truth to a debt owed to the state.

At this point in Lycurgus' statement, it seems that the traditional calling to "truth for the Lord's sake"<sup>30</sup> is set aside for a form of compelling state interest. Lycurgus speaks to the citizen in his jury. Ignoring the obvious religious undertones that traditionally might have been called upon in a case of truthfulness; he spoke of a debt to truth and justice before succumbing to the calling of a higher power.

He continues, "[t]he power which keeps our democracy together is the oath. For there are three things of which the state is built up: the archon, the juryman and the private citizen. Each of these gives this oath as a pledge, and rightly so. For human beings have often been deceived. Many criminals evade them, escaping the dangers of the moment, yes, and even remaining unpunished for these crimes for the remainder of their lives. But the gods no one who broke his oath would deceive. No one would

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<sup>29</sup> J.O. Burt & Kenneth John Maidment, *Minor Attic orators* (Cambridge: Harvard University Press 1941) (1982).

<sup>30</sup> Author's quotations.



escape their vengeance. If the perjurer does not suffer himself, at least his children and all his family are overtaken by dire misfortunes.”<sup>31</sup>

Here Lycurgus gives up to the “gods” the ability to punish those who perjure themselves. To those who wish to bear false witness, he threatens the fate of their children and their family. This familial style of punishment resurfaces in additional Greco-Roman writings.

Greek tradition goes on to highlight the gravity of the oath in “The Story of the Child of Oath”.<sup>32</sup> This story serves to put into perspective how seriously oath taking was once regarded. Additionally, it shows that there was not only an obligation to God and State, but also to family. A historical review reveals that “... oaths played an important function in sanctioning and preserving agreements between private individuals, between the individual and the city, and between cities.”<sup>33</sup>

Based on this belief, it becomes evident that, “[t]he swearing of an oath ... involved the gods as witnesses, and made the parties to an oath liable to punishment by the gods if the oath were broken.”<sup>34</sup> In addition, oaths were seen as binding obligations “...protected by the gods...” in the same writings.<sup>35</sup>

The Story of the Child of Oath goes on to explain that “[t]he worst punishment a man could face was considered to be the loss of family, children, and descendants. A man who died without children would not be remembered in family cult; his family ...

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

<sup>32</sup> Michael Grant & Rachel Kitzinger, *Civilizations of the Ancient Mediterranean* 891 (Grant & Kitzinger ed., New York: Scribner's 1988) (1980).

<sup>33</sup> *Id.* at 891.

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

<sup>35</sup> *Id.*

and his ancestral gods would die with him... [f]urther, he would have failed his duty as a citizen because in the city's eyes the purpose of having children was to preserve and to protect the fatherland and the altars of the gods."<sup>36</sup>

This punishment was grave once its extent was described: "the punishment for those who do not remain true to oaths sworn; they would be pursued by the unnamed child of Oath, a monster with no hands and no feet, who would destroy the family and the whole family line."<sup>37</sup> Imagine the seriousness with which oaths would have been viewed during a period where this sort of story might have been told at bed time.

## ***Roman***

A principal element of Roman law was developed and displayed around the year 449 B.C. in the form of the Twelve Tables. Erected in the town center for all to see, these fundamental rules of law served to not only provide citizens with notice of their crimes, but also with their potential punishments. One such punishment resulted from bearing false witness, "[a] person who had been found guilty of giving false witness shall be hurled down from the Tarpeian Rock."<sup>38</sup> This author was hard-pressed to find a more direct crime-and-punishment system that has ever existed. Under Roman rule, a person would quite literally be thrown from a huge cliff if found to have testified falsely.

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<sup>36</sup> *Id.* at 891.

<sup>37</sup> *Id.* at 891.

<sup>38</sup> Paul Halsall, *The Library of Original Sources: The Twelve Tables, c. 450 BCE* (Oliver J. Thatcher ed., Milwaukee: University Research Extension Co., 1998) (1901), available at <http://www.fordham.edu/Halsall/ancient/12tables.asp>.

## **Anglo-Saxon**

Moving forward to the tenth century, the origins of what is now known as Common Law began to take shape. Compiled under King Alfred the Great, the Doom Book is a collection of state laws from three different Christian Saxon kingdoms: Kent, Mercia and Wessex.<sup>39</sup> Coupled with these state laws were the principles of Mosaic Law, Celto-Brythonic Law, and Christian and Germanic customs. The end result was a legal structure that eventually became the underpinnings of modern American Law: the Common Law System.<sup>40</sup>

The section of the Doom Book that speaks of those giving false witness originated from the Laws of Alfred, Guthrum and Edward the Elder. It states, “[i]f witches or diviners, perjurers or morth-workers... be found anywhere within the land; let them be driven from the country, and the people cleansed, or let them totally perish within the country...”<sup>41</sup> A very clear point is made: those who lie under oath are in the same category as witches, diviners and morth-workers<sup>42</sup>. Being included in the same law speaks volumes as to how perjurers were classified at the time.

The Doom Book was unique in relation to other historic texts that discuss the oath, in that; it provides one of the earliest scripts for taking an oath. For the accused, the script provided: “The other's oath that he is guiltless[:] By the Lord, I am guiltless, both in deed and counsel, and of the charge of which [the accuser's name] accuses

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<sup>39</sup> Rev. Prof. Dr. F.N. Lee, *King Alfred The Great and Our Common Law 1* (Rev. Prof. Dr. F.N. Lee ed., Dept. of Church History, Queensland Presbyterian Theological Seminary, Brisbane, Australia 2005) (2000).

<sup>40</sup> *Id.* at 1.

<sup>41</sup> Paul Halsall, *The Library of Original Sources: The Anglo-Saxon Doms, 560 – 975* (Oliver J. Thatcher ed., Milwaukee: University Research Extension Co., 1998) (1901), available at <http://www.fordham.edu/Halsall/source/560-975doms.asp>.

<sup>42</sup> He who causes death; a murderer.

me.”<sup>43</sup> This script allowed the oath-taker to swear to his accuser that what he was about to testify to was, indeed, the truth.

For he who was similarly charged, the script outlined: “His companion's oath who stands with him[:] [b]y the Lord, the oath is clean and unperjured which [the accused] has sworn.”<sup>44</sup> This oath allowed companions (likely the rough equivalent of “co-defendants”) to apparently swear by each other’s testimony.

In an analysis of the Doms, author Sir Frederick Pollock states, “... in Alfred’s laws there is mention of a solemn kind of promise called ‘god-borh’; if a suit is brought upon it, the plaintiff must make his fore-oath in four churches, and when that has been done, the defendant must clear himself in twelve, so that falsehood on either side would involve manifold perjury and contempt of the church and the saints.”<sup>45</sup> This idea of manifold perjury is an attempt to impress upon potential witnesses, the seriousness of perjury. Much like the oath attempts to do, swearing in twelve churches seems to compound the issue of bearing false witness. Conversely, because the accuser only had to swear in four churches, the weight of the accusations fell on the accused to swear innocence three times over.

Later additions to the Doms included those written by the Grandson of King Alfred, King Athelstan of England, who ruled from 924 A.D. to 939 A.D. These provided a punishment that was less eternal, while still effecting its purpose: “[a]nd he who shall swear a false oath, and it be made clear against him; that he never be oath-worthy, nor

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<sup>43</sup> *Id* (author’s note).

<sup>44</sup> *Id* (author’s note).

<sup>45</sup> Sir Frederick Pollock & Frederic William Maitland, *The History of English Law before the Time of Edward I: Vol. 1*, (Indianapolis: Liberty Fund, 2010) (1898).

let him lie within a hallowed burial-place, though he die...”<sup>46</sup> A change in oath-taking appears in this Doom wherein King Athelstan decrees that anyone who lies under oath shall not be oath-worthy again. This punishment signals the slow progression that will culminate with perjury eventually becoming a common law crime.

Keeping it all in the family, King Edmund, the half-brother of King Athelstan, contributed to the Doom Book as well. He oversaw the addition of what appears to be an early “exception” under the law. “Those who swear falsely... let them forever be cast out of all communion with God, unless they turn to right repentance.”<sup>47</sup> The exception here is “right repentance”. What King Edmund I meant by “right repentance”, specifically, is unclear. However, here it seems that the prior rule of King Athelstan (where a false witness may never again be oath-worthy) comes in direct conflict with this idea of repentance under the law. The law is unclear as to what would happen to those who did not come to “right repentance” with God.

### **Origin of Perjury**

As previously alluded to, the modern idea of perjury as a criminal offense did not exist until the mid-sixteenth century. In a pair of articles outlining the advent of Perjury as a true Common Law Crime, author Michael D. Gordon explains that the accepted thought is *5 Elizabeth c. 9* was the first statute to officially make perjury a crime punishable at common law.<sup>48</sup>

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<sup>46</sup> Halsall, *supra*.

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

<sup>48</sup> Michael D. Gordon, *The Perjury Statute of 1563: A Case History of Confusion* 439 (Proceedings of the American Philosophical Society 1980) (1980).

In an attempt to understand why this was the case, the author quotes S.F. Milsom, “perjury by witnesses ... could not be a common law offence [sic] because witnesses had no formal existence.”<sup>49</sup> Mr. Gordon explains the phenomenon as a “slow evolution of the jury from functioning as witness to functioning as judge...”<sup>50</sup> So it appears that many forces were at play when the common law crime of perjury was created.

Of the prevalence of perjury during the era, the author quotes Frederick W. Maitland, “our ancestors perjured themselves with impunity.”<sup>51</sup> This quasi-modern view of the crime of perjury shows the necessity for some controls in the courtroom as the jury began to gain judicial power. Up until this point it seems that judges were almost exclusively the finders of fact and a perjury statute was not seen as necessary because the judges saw themselves as fit to determine which testimony to believe. This, in their eyes, seemed to be enough of a reason not to enact a formal perjury statute. Once the idea of the modern jury was established, a perjury statute was viewed as necessary to fill the gap in expertise between jurors and judges.

Within the same article are two definitions of perjury from the era, each with a distinct difference. The first is an Anglo-American criminal definition, “perjury is the willful assertion made by a witness in a judicial proceeding upon oath and known to

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<sup>49</sup> Milsom, *Historical Foundation*, p.366 as reprinted in Michael D. Gordon, *The Perjury Statute of 1563: A Case History of Confusion* 440 (Proceedings of the American Philosophical Society 1980) (1980) (author’s note).

<sup>50</sup> Michael D. Gordon, *The Perjury Statute of 1563: A Case History of Confusion* 439 (Proceedings of the American Philosophical Society 1980) (1980).

<sup>51</sup> Sir Frederick Pollock & Frederic William Maitland, *The History of English Law before the Time of Edward I*, Vol. 2, 542 (Indianapolis: Liberty Fund 2010) (1898).

such witness to be false.”<sup>52</sup> This definition will become more familiar during this author’s discussion of modern perjury statutes.

The second definition, deemed as being much older, is said to have existed before the advent of perjury as a common law crime: “periuria est mendacium cum iuramento”<sup>53</sup> or rather, “perjury is a lie with an oath.” The distinction here is that the thought of lying under oath was always seen as heinous, whereas the crime was a totally new concept.

### ***Perjury as a Crime***

The evolution of perjury as a common law crime continues into Elizabethan Courts where it was given unique treatment. In his analysis, author Michael Gordon goes on to describe the punishment, “...when the pillory was abolished as a punishment [for crimes generally] in 1816, an exception was made for perjury. This exceptional treatment ... persisted until 1837.”<sup>54</sup> This treatment eventually subsided as a result of a particular view. Criminalizing perjury had changed perceptions: “the courts were concerned that widespread prosecutions for perjury would make men reluctant to testify.”<sup>55</sup>

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<sup>52</sup> Michael D. Gordon, *The Perjury Statute of 1563: A Case History of Confusion* 440 (Proceedings of the American Philosophical Society 1980) (1980).

<sup>53</sup> *Id.* at 441.

<sup>54</sup> Michael D. Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts* 151 (The American Journal of Legal History 1980) (1980) (author’s note).

<sup>55</sup> *Id.* at 152.

This opinion was so pervasive at the time that it has leached into our judicial system even today. As evidenced by a case in 1606<sup>56</sup> where a man was found guilty of a number of offenses including perjury, the court declined to try the perjury charge because “men are so [slow] to give ... for the kinge [sic] and this woulde [sic] [hinder] them much more.”<sup>57</sup>

As a result, it comes as no surprise that the crime of perjury today is underpursued and overly difficult to prove. This is because essentially all of the elements of perjury today were developed under the purview of Elizabethan Courts.<sup>58</sup>

As the crime of perjury evolved, so did the judicial handling of it. Over time, only Common Law Courts were eligible to handle cases of perjury. Specifically precluded from handling perjury was the Ecclesiastical Court, or Christian Court.<sup>59</sup> This signals yet another secularization of the crime of perjury as it moves into the jurisdiction of oaths made to man and state, and not to God. A similarly noticeable transition towards state sponsored secularization occluded during the founding of the United States.

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<sup>56</sup> *Attorney-General v. Miles*, J. Hawarde, Les Reportes del Cases in Camera Stellata 301 (W. P. Baildon ed. 1894) (1606) as reprinted in Michael D. Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts* 152 (The American Journal of Legal History 1980) (1980).

<sup>57</sup> *Id.* (author's note).

<sup>58</sup> Michael D. Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts* 145, 153 (The American Journal of Legal History 1980) (1980).

<sup>59</sup> *Id.* at 154.



## CHAPTER THREE: MODERN HISTORY

As this study shifts from the ancient background of the oath to a more recent history, it becomes increasingly necessary to identify the evolution of the oath in American law. Specifically, this study shall seek to reveal what past cases can tell us about the oath and perjury.

### American Colonial Law

#### *Writings*

The writings of Noah Webster held a unique view of the oath requirement in early American Colonial Law. Mr. Webster is best known for his work, “An American Dictionary of the English Language”, which would eventually become the Merriam-Webster Dictionary.<sup>60</sup>

Mr. Webster, in examining the oath, states, “[a]n oath created no new obligation. A witness, who swears to tell the whole truth, is under no new obligation to tell the whole truth. An oath reminds him of his duty; he swears to do as he ought to do that is, he adds an express promise to an implied one. A moral obligation is not capable of addition or diminution.”<sup>61</sup>

The idea that the oath is actually a reminder of one’s duty to tell the truth is a far cry from what the Greeks, Romans, and Anglo-Saxons believed the oath to be. Further complicating the position of Mr. Webster is the practicality of what he seems to be

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<sup>60</sup> Noah Webster History, *available at* <http://noahwebsterhouse.org/discover/noah-webster-history.htm>.

<sup>61</sup> Noah Webster, *A Collection of Essays and Fugitiv Writings on Moral, Historical, Political and Literary Subjects* (Reprint: Delmar, N.Y.: Scholars' Facsimiles & Reprints 1977) (1790).

saying. To believe that a witness's testimony can be benefitted<sup>62</sup> by a simple reminder of his or her duty, helps to undermine the purpose of having a perjury statute altogether.

The stance that a moral obligation is not capable of addition or diminution, on the other hand, is extremely helpful in understanding how early Americans might have viewed the theological associations that the oath held.

### ***United States Constitution***

During the time of the drafting of the United States Constitution, the Nation's founders saw fit to establish a number of provisions that worked to remedy issues they had with English rule. Interestingly enough, this two-hundred and thirty-five year old document was written with the foresight to include an "Oath *or Affirmation*" requirement.<sup>63</sup> This affirmation ability was certainly unorthodox in a period of time that was so entrenched with theological underpinnings. Even today, many countries around the world retain oath requirements that espouse religious undertones.

### ***Amendments to the Constitution***

The Nation's founders took the handling of religion in the Constitution a step further. In the First Amendment to the U.S. Constitution, the Establishment Clause prohibits any law respecting the establishment of religion.<sup>64</sup> The Nation's founder's foresight is highlighted here in relation to religious preference.

Why then, does this firm stance against governmental support of one religion seem to falter when one enters the courtroom? Why, for hundreds of years, did oaths

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<sup>62</sup> Author: "benefit" in this context refers to anything that tends to make a witnesses testimony more truthful.

<sup>63</sup> U.S. Const. art. I, § 3 (emphasis added).

<sup>64</sup> U.S. Const. amend. I, § 1.

around the nation contain religious elements despite the edict to separate church and state?

These questions are not easily answered. The most likely reason is that the role of a witness was such a solemn position that it transcended religious blockades. It is possible that the fear of rampant false testimony was enough to defy this secularization for decades.

The Free Exercise Clause supports this position because it was enacted to limit the government's ability to restrict the free exercise of religion.<sup>65</sup> It is the position of this author that the religious foundations within the oath survived as a product of "conscionable elements" furthered by the Supreme Court of the United States.<sup>66</sup>

In the original text of the Constitution of the United States itself, the nation's founders saw it necessary to prevent religious tests from precluding individuals from public service. Here they wrote, "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, 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."<sup>67</sup> The no religious test element in the Constitution bears directly on our topic by further explaining the Nation's founder's views on religion's place in the law.

Another oath appears in the Fourth Amendment to the United States Constitution. When outlining searches and seizures, this amendment proscribes that all

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<sup>65</sup> U.S. Const. amend. I, § 1.

<sup>66</sup> *Planned Parenthood of SE Penn., et al. v. Casey*, 505 U.S. 833 (1992).

<sup>67</sup> U.S. Const. art. VI, § 3.

warrants be sworn to before being signed. It states, "...no warrants shall issue, but upon probable cause, supported by Oath or affirmation..."<sup>68</sup> This shows an allowance for "affirmation" while still attempting to hold individuals responsible for their statements. The value of truth is not deemed to be lost by simply choosing to affirm one's statements rather than swear to an oath.

Finally, an additional lasting impression of the oath in the Fourteenth Amendment can be seen, "[n]o person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof..."<sup>69</sup> Here, the Nation's founders show where the oath fits into the Constitutional scheme of things. It becomes clear that someone who commits wrongs against the state, even if put under oath, is no longer to be trusted.

### ***Case Law***

Whenever American Legal History is evaluated, Supreme Court decisions are inevitably a large part of the discussion. Providing the backbone for legal doctrine, the Supreme Court makes decisions that affect our daily lives. For the purposes of this

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<sup>68</sup> U.S. Const. amend. IV, § 1.

<sup>69</sup> U.S. Const. amend. XIV, § 3.

study, such decisions can provide the foundation and framework for a clear idea of where the oath has been and where it is going.

In the seminal case *U.S. v. Dunnigan*, the Court established the parameters of the Federal Perjury Statute, “[a] witness testifying under oath or affirmation violates 18 U.S.C. § 1621 if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.”<sup>70</sup> This precedent builds upon the Federal Perjury Statute.

It is important to remember that the Court decides issues, including perjury, with an obligation to liberty and not its own moral code.<sup>71</sup> This avoidance of moral issues gives way to an apparent secularization of the Court as evidenced in two cases that dealt with witness testimony.

In *Houck v. Florida*, the Court established that an unsworn witness is incompetent to testify.<sup>72</sup> In citing Florida State Statutes, the Court held that “each witness shall declare that he will testify truthfully, by taking an oath or affirmation...”<sup>73</sup> Not only is unsworn testimony disallowed per *Houck*, but it also must not even be *considered* by the Court.<sup>74</sup>

In *Willis v. Romano*, the Court further outlined restrictions on unsworn witness testimony. When Appellant, Timothy Willis refused to swear under oath, he actually cited a belief in God as his reasoning. He said, “...I believe in the Bible. The Bible says

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<sup>70</sup> *U.S. v. Dunnigan*, 507 U.S. 87 (1993).

<sup>71</sup> See *Planned Parenthood of SE. Penn.* at 24.

<sup>72</sup> *Houck v. Florida*, 421 So.2d 1113 (Fla. 1st DCA).

<sup>73</sup> *Id.* at 1.

<sup>74</sup> *Id.* at 3.

don't swear by things on Heaven and Earth."<sup>75</sup> In response to his position the Court denied Mr. Willis the ability to testify and on appeal the decision was ultimately upheld.<sup>76</sup>

Both of these cases disallow the testimony of witnesses who refuse to take the oath in some form. The Court showed its leniency by allowing many variants of the oath to be taken, so long as the general goal was met: a mental impression of the need for truthful testimony.<sup>77</sup>

The aforementioned cases help to establish the Court's belief that the purpose of seeking truthful witness testimony is void of religious or theological undertones and is now purely the focus of equal justice under the law. This nearly complete abandonment of the once pervasive religious undertones that existed in the legal systems of centuries past helps put the recommendation of this study into perspective.

Further examination of the importance of truthful witness testimony (as stated by the Supreme Court), yields a case that restricts who can administer the oath. In *Crockett v. Cassels*, the Court limited the administration of the oath to individuals who can adequately impress upon the mind of the witness the importance of honest testimony.<sup>78</sup> Per *Crockett*, the Court only delineated which individuals may not administer an oath, and not who may.<sup>79</sup>

The Court seems to move further towards a system of secularization in *Torasco v. Watkins* by striking the provision of the Maryland Constitution that required a belief in

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<sup>75</sup> *Willis v. Romano*, 972 So.2d 294 (Fla. 5th DCA).

<sup>76</sup> *Id.*

<sup>77</sup> Fed. R. Evid. 603 (2010).

<sup>78</sup> *Crockett v. Cassels*, 95 Fla. 851 (1928).

<sup>79</sup> *Id.*

God.<sup>80</sup> The Court refused to uphold a prior ruling that disallowed an elected commissioner from serving unless he professed a belief in God by way of oath.<sup>81</sup> This decision helped to support the non-religious nature of the oath that is often seen today. Despite this fact, religious elements in oaths are still heard around the Country today.<sup>82</sup>

If found to be in violation of the oath, one might be subjected to punishment for the crime of perjury, as outlined in the case *Bronston v. United States*. In *Bronston*, the Court established the foundation of the modern perjury statute in the form of *specific restrictions*: statements that are true cannot be perjurious simply on the basis of them not responding directly to, or being misleading for the purpose of the question posed.<sup>83</sup> To this end, the Court actually held that “a jury should not be permitted to engage in conjecture whether an unresponsive answer... was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether [the witness] does believe his answer to be true.”<sup>84</sup> This will be expanded upon later in the perjury analysis section.

## **American Statutory Law**

### ***Federal Statutes***

The United States Code outlines the crime of perjury as being committed by anyone who, “having taken an oath before a competent tribunal, officer, or person, in

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<sup>80</sup> *Id.*

<sup>81</sup> *Torasco v. Watkins*, 367 U.S. 488 (1961).

<sup>82</sup> N.D.R.Ct. § 6.10 (1999).

<sup>83</sup> *Bronston v. U.S.*, 409 U.S. 352 (1973).

<sup>84</sup> *Id.* at 8 (author’s note).

any case in which a law of the United States authorizes an oath to be administered,”<sup>85</sup> does certify that “...he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or in any declaration, certificate, verification, or statement under penalty of perjury ... willfully subscribes as true any material matter which he does not believe to be true”<sup>86</sup> that he is guilty of perjury.<sup>87</sup>

### ***Florida Statutes***

In Florida, the statute on perjury defines it as the act of making “a false statement, which [the witness] does not believe to be true, under oath in an official proceeding in regard to any material matter...”<sup>88</sup> This statute utilizes the same elements as the Federal Perjury Statute, while simply listing them in a distinct way. The parallelism here is intentional.

### **Verbiage of Oaths**

#### ***Florida’s Oath***

The requirement to tell the truth is personified by the oath requirement in Florida. “Before testifying, each witness shall declare that he or she will testify truthfully, by taking an oath or affirmation in substantially the following form: ‘Do you swear or affirm that the evidence you are about to give will be the truth, the whole truth, and nothing but

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<sup>85</sup> 18 U.S.C. § 1621 (1) (2010).

<sup>86</sup> 18 U.S.C. § 1621 (2) (2010).

<sup>87</sup> 18 U.S.C. § 1621 (2010).

<sup>88</sup> Fla. Stat. § 837.01(1) (2011) (author’s note).



the truth?”<sup>89</sup> This oath requirement, by observation of this author in Orange County Court proceedings, is still at times accompanied by the phrase, “So help you God.”

### ***North Dakota’s Oath***

The oath requirement in North Dakota states, “[d]o you solemnly swear to tell the truth, the whole truth, and nothing but the truth? So help you God.”<sup>90</sup> North Dakota utilizes the stereotypical oath that many people think of when they try to imagine an oath in court. Interestingly, this section of the North Dakota Rules of the Court was updated only twelve years ago for the expressed purpose of “...moderniz[ing] the language used in courtroom oaths...”<sup>91</sup>

### ***Delaware’s Oath***

In Delaware the oath requirement is written as, “[t]he 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>92</sup> While the state of Delaware does allow variations on this style of the oath, the message of religious preference remains clear.

The exception in Delaware law states, “[a] person believing in any other than the Christian religion, may be sworn according to the peculiar ceremonies of such person's

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<sup>89</sup> Fla. Stat. § 90.605(1) (2011).

<sup>90</sup> N.D.R.Ct. § 6.10(a)(3) (1999).

<sup>91</sup> <http://www.ndcourts.gov/rules/NDROC/frameset.htm> (follow: “Rule 6.10 Courtroom Oaths” hyperlink).

<sup>92</sup> 10 Del. Laws § 5321 (2011).

religion, if there be any such.”<sup>93</sup> In this section of Delaware law, concessions are made to other religious ceremonies, *if any exist*.

### ***Pennsylvania’s Oath***

In the Pennsylvania Code of Judiciary and Judicial Procedure, “[e]very 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 [testify truthfully], and that as I shall answer to God at the last great day.’”<sup>94</sup> The Pennsylvania oath seen here is of a much more elaborate and theologically influenced style. It should be noted that no apparent exceptions exist in Pennsylvania law for the differing styles of the oath, as they do in Delaware.

With this background and understanding of the limitations of the oath, it becomes easier to now analyze what a violation of the oath actually entails. In doing so, the issue central to this study can be addressed directly.

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<sup>93</sup> 10 Del. Laws § 5324 (2011).

<sup>94</sup> 42 Pa.C.S.A. § 5901 (2011) (author’s note).

## CHAPTER FOUR: ISSUE

### Question

“Is the ‘oath or affirmation’ requirement in the Florida Rules of Evidence an effective means of ensuring that only the most reliable and truthful testimony is elicited in court?”

The above research most appropriately aides our study in putting into perspective the most empirically measurable way of determining if the modern oath or affirmation requirement is working. As such, our question can most accurately be answered through the creation of a jury instruction that can assist the trier of fact in determining if a witness’s testimony is accurate. It is the hope of this author that this jury instruction will also serve as an edict to witnesses and attorneys alike, that religious preference will not assist or serve as a detriment to testimony.

### Scope

It is important to note, before conducting an examination of the available evidence and creating this instruction, that the scope of our question is limited only to what can be known. This author makes no claim that in all cases, all witness testimony can definitively be called true or untrue. In fact, it is generally known that many gray areas exist. Further compounding the issue is the nature of cross-examination itself: an adversarial process that often uses wording and phraseology to impeach a witness, at times rendering them unreliable in the eyes of the fact finder.

## CHAPTER FIVE: EXAMINATION

En route to creating a jury instruction to supplement the oath or affirmation requirement, it becomes vital to understand the prevalence of false testimony and perjury in the judicial system. In doing so, an examination of all the evidence available for making a determination of what supports and what hinders the most truthful testimony is needed.

During a public address, Dr. Harry Hibschan, LL.D. asserted that in seventy-five percent of all criminal cases and ninety percent of all domestic disputes, there existed instances of perjury.<sup>95</sup> This harrowing analysis of perjury in the modern judicial system drew a curious response from his audience: laughter.<sup>96</sup> It seems that when faced with the reality of our current situation, Hibschan's audience could only respond in disbelief, signaling what could be the misperceptions of a much larger population.

Further muddling the issue is the disconnect between *the act* of perjury and cases of perjury. This can be seen in Dr. Hibschan's works<sup>97</sup> as well as recent media coverage<sup>98</sup>. Hibschan explains that in 1922 a study had been conducted to examine the instances of perjury in selected states. It showed that in the one hundred and thirty years that Kentucky had been a state; the courts had only been called upon to consider only eighty-one cases of perjury. Of these cases, only twenty-five were decided against the defendant.<sup>99</sup>

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<sup>95</sup> Harry Hibschan, *You Do Solemnly Swear! Or That Perjury Problem* 901, 901 (Journal of Criminal Law and Criminology 1934) (1922).

<sup>96</sup> *Id* at 901.

<sup>97</sup> *Id* at 904.

<sup>98</sup> Herón Márquez Estrada, *While lying is common, perjury charges are not*, Star Tribune 29 Oct. 2011.

<sup>99</sup> Hibschan, *supra*, at 904.

Similarly, in the eighty-five years that Michigan had been a state, the courts had only heard twenty-four cases of perjury.<sup>100</sup> These average out to just over six-tenths of a case per year for Kentucky and just under three-tenths of a case per year for Michigan.

Admittedly, this is not enough to empirically prove any sort of ineffectiveness associated with the oath or perjury statutes themselves. Perhaps Kentucky and Michigan had inordinately honest populations. But on whole, it was estimated that at the time of publication, “not a hundred and fifty persons in the whole United States [were] serving sentences for [perjury].”<sup>101</sup> Combined with Dr. Hibschman’s previous assertion that there exists perjury in seventy-five percent of all criminal cases, this fact yields a certain type of inclination. This inclination is further expanded when he delves into the requirements for proving perjury.

### **Perjury Today**

“[P]erjurii poena divina, exitium; humana, dedecus.”

(The crime of perjury is punished by heaven with perdition, and by man with disgrace.)<sup>102</sup>

Cicero

There are four main elements to prove the crime of perjury. In order for the elements to be met, it must have proven that the witness was properly sworn in, that the statement made was material to the case, that the witness made the statement

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 904 (author’s note).

<sup>102</sup> James B. Stewart, *Tangled Webs: How False Statements are Undermining America: From Martha Stewart to Bernie Madoff* 1 (Penguin Books 2011) (2011).

knowingly and willfully, and that the statement was false.<sup>103</sup> In theory, this test may not appear to be overwhelmingly difficult to prove.

However, the difficulty arises in practice. Hibschan says of this, “It is not sufficient, for instance, to prove in a given case that the accused on one occasion testified one way under oath and on another occasion testified to the exact opposite. The state must prove on which occasion [the witness] testified falsely; and it cannot make its case by merely proving the conflicting statements under oath.”<sup>104</sup> In the same vein, he calls perjury one of the most difficult crimes to prove by law and to the satisfaction of juries.<sup>105</sup>

So difficult it seems, that there is a severe lack of data on instances of perjury. In his book, “Tangled Webs”, author James B. Stewart asserts, “[w]e know the precise numbers for reported instances of rape, robbery, aggravated assault, burglary, larceny, and vehicle theft. No one keeps statistics for perjury and false statements... even though they are felonies punishable by up to five years in prison. There is simply too much of it, and too little is prosecuted to generate any meaningful statistics.”<sup>106</sup>

In an article in the Star Tribune, author Heron Marquez interviewed Dakota County Attorney James Backstrom. Mr. Backstrom spoke of the prevalence of perjury, “I suspect there are far too many instances where individuals lie under oath.”<sup>107</sup> In that

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<sup>103</sup> U.S. Congressional Research Service. *Perjury Under Federal Law: A Brief Overview* (RL98808; 5 Nov. 2010), by Charles Doyle. Text in: *Congressional Research Digital Collection*; Accessed: 28 Oct. 2011.

<sup>104</sup> Hibschan, *supra*, at 904 (author’s note).

<sup>105</sup> *Id.*

<sup>106</sup> James B. Stewart, *Tangled Webs: How False Statements are Undermining America: From Martha Stewart to Bernie Madoff 1* (Penguin Books 2011) (2011).

<sup>107</sup> Estrada, *supra*, at 1.

same article, both Dakota County and Ramsey County staff report that in over 25,000 cases, only nine have ever resulted in perjury charges.<sup>108</sup>

The Florida Supreme Court's Committee on Standard Jury Instructions (Criminal) determined which elements to include in a five-part test for proving perjury. It states, "[b]efore [the jury] can find the defendant guilty of Perjury in an Official Proceeding, the State must prove the following five elements beyond a reasonable doubt: (1) [the witness] took an oath or otherwise affirmed that [he or she] was obligated by conscience or by law to speak the truth in [the proceedings], (2) [t]he oath or affirmation was made to [an administer of the oath], (3) [the witness], while under an oath, made the statement, (4) [t]he statement was false and (5) [the witness] did not believe the statement was true when [he or she] made it."<sup>109</sup> Keep these elements in mind while this study frames them into a hypothetical for the purpose of establishing a practical application of the law.

### **Hypothetical**

Imagine for a moment that you are charged with a Life Felony and that on some level you are guilty of what is being charged. In this situation, a number of difficult questions would undoubtedly arise, such as the issue of whether or not to testify on your own behalf. The American system of Criminal Justice allows for the choice to testify on your own behalf or to remain silent. Per the Fifth Amendment right to not self-incriminate, many defendants opt for the latter for a variety of reasons.

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<sup>108</sup> *Id.*

<sup>109</sup> Standard Jury Instr. *Criminal Cases no. 92-1*. No. 79,320 Supreme Ct. of Fla (author's note).

Assume, for the sake of this example that you decide to testify on your own behalf. You are then posed with the decision central to this study. The decision being, whether to tell the truth, the whole truth, and nothing but the truth regarding what actually happened. In doing so, a clear cost-benefit analysis arises: do I testify truthfully regarding my involvement or do I knowingly violate one (or all) of these three edicts in an attempt to avoid incarceration?

How can this question be answered? The answer is most certainly dependent upon who is making the decision and how. Is it a sense of self-preservation guiding the decision or is it something else? If the answer is motivated by something more akin to an ethical, moral or quasi-religious obligation, it is *possibly* more likely that the decider will feel the need to abide by the oath he or she swore to. It was the opinion of legal scholars prior to Common Law, that the witness would be compelled to tell the truth if first put under oath.

But what of the cost-benefit analysis alluded to earlier? Looking at the situation purely through this lens provides us with a clearer answer: tell the truth and potentially serve a lifetime in prison, or lie and limit the potential exposure to incarceration for perjury: a mere five years in prison under Federal Law.<sup>110</sup>

Faced with the above example, most understandings of human nature would dictate choosing the lesser sentence. Indeed, the American Criminal justice system actually encourages this system of thought. Settlements in the civil realm and plea bargains in the criminal realm nearly necessitate that a defendant think in terms of

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<sup>110</sup> 18 U.S.C. § 1621 (2010).



potential exposure to incarceration and not in terms of what helps preserve the sanctity of our system as it exists today. This can be viewed as a sub-conscious encouragement to value self-preservation (in the form of dishonesty under oath) over the integrity of the system itself. The connection between the two comes into play when one further understands the “Paradox of the Oath”.

### **Paradox of the Oath**

It is this counter-intuitive means of decision making that underscores our current problem. When posed with a more withdrawn and distant decision; one of whether to support the system as a whole or to degrade it for one’s own benefit; there might be a different answer, but probably not. This is the “Paradox of the Oath”.

There exists a paradox because, while witnesses are compelled to tell the truth by the oath, the nature of our legal system seems to say differently. In both civil settlements and criminal plea bargains, witnesses (primarily defendants) have their allegiances torn between the truth and what may be in their best interest. The paradox is compounded in criminal court when co-defendants are forced to consider a plea bargain that serves their self-preservation needs while simultaneously encouraging false testimony, if only on a subconscious level.

### **Florida’s Current Jury Instruction**

It is here that a revised use or application of the oath can be helpful. With better guidance from our court system, decisions of whether to testify falsely on one’s own

behalf may be lessened. Additionally, if a jury instruction is developed that precludes religious undertones; the decision to testify falsely in general may be reduced. Both of these options, coupled together, could subtly provide witnesses with less of an incentive to testify falsely, while giving the jury a better understanding of its obligation to differentiate truth from falsehood.

The current Jury Instruction in Florida for “Weighing the Evidence” enumerates five considerations for jury members to use when determining to believe or disbelieve all or any part of the evidence or the testimony of any witness.<sup>111</sup> It also lists another five considerations to be used as the evidence specific to a case dictates.<sup>112</sup>

These considerations or questions are intended to help the jurors evaluate witness testimony for truthfulness. They include: “[d]id the witness seem to have an opportunity to see and know the things about which the witness testified?”, “[d]id the witness seem to have an accurate memory?”, “[w]as the witness honest and straightforward in answering the attorneys' questions?”, “[d]id the witness have some interest in how the case should be decided?”, and “[d]oes the witness's testimony agree with the other testimony and other evidence in the case?”<sup>113</sup> These questions are certainly helpful in assisting the jury’s evaluation of testimony. They aid in guiding the members of the jury to believe testimony that would tend to be more truthful based on logic and common sense.

The additional jury instruction that this thesis proposes will add to this assistance by encouraging the jury to disregard any religious preference, or the lack thereof, of any

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<sup>111</sup> Fla. Supreme Ct. Jury Instr. § 3.9 (1981).

<sup>112</sup> *Id.*

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

witness thereby eliminating the issues associated with bias by way of theological or religious partiality.

## CHAPTER SIX: RECOMMENDATION

This research into the background of the oath in the courtroom has allowed for a deeper understanding of how and why the oath is administered in most courts. It is clear which traditions and customs are helpful and which are not. Additionally, this study, if reviewed in the light of the Nation's avoidance of religious preference in court, permits the creation of a new addition to the Florida Supreme Court's Jury Instructions.

This new instruction should not be construed as enhancing the protection of witnesses as much as it is a message to the legal community; that religious preference in the form of swearing under oath is not to be used as a benefit or detriment to the testimony of witnesses.

The following statement should be added to the "Final Charge to the Jury" instruction, number 3.9, regarding "Weighing the Evidence", in substantially the following manner:

At the end of the instruction, to add:

"You should not rely upon any religious preference, or the absence of it, in coming to your conclusion about any witness. The fact that a witness agrees or declines to swear their oath to God should not be considered in deciding whether to believe or disbelieve the testimony of any witness. Elements of the oath that contain religious elements are based on tradition and should not be interpreted to mean that a witness is more truthful or less truthful as a result."

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