THE OATH: I *

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This Article is dedicated to the memory of Judge Jerome N. Frank.

Perhaps the most appropriate manner of honoring the memory of Judge Frank is to attempt to repeat the message he tried to convey. The contribution most characteristically associated with his name is his “fact-skepticism,” an expression of man’s eternal doubt regarding his ability to perceive the outside world, especially the world of past events. Judge Frank’s jurisprudential message may best be described as “idealistic realism.” To him “realism” was not a utilitarian device but an ideal of justice. Legal precepts could not be just unless they were based on an evaluation of the facts of social life and an assessment of the realities of legal procedure in the light of such facts. A great theorist of facts, he was peculiarly qualified to realize the shortcomings of certain rules as they are applied to facts. From this understanding sprang his genius for criticizing those particular rules which pertain to the procedure of fact finding—the rules of evidence. His criticism was principally directed at the ritualistic, symbolical character of some of these rules.a

*This Article is divided into two parts. The first part is devoted to a presentation of the historical evolution of the judicial oath in various legal systems. This presentation is an attempt at showing that the oath has remained an atavistic survival of an ancient ritual—a primitive self-curse. Legal systems in which an early oath tradition is either entirely lacking or is rather tenuous have little or no desire to engage in oath practices. This will be demonstrated by a brief outline of the history of certain legal systems which presently have no oath. Since the concept of “perjury” is predicated upon the notion of the oath, a final section will deal with the history of perjury.

The second part of this Article will appear in the July issue of the Yale Law Journal. It will deal with contemporary oath legislation and present suggestions for reform.

In both parts of this Article, the translations were made by author, unless otherwise indicated by the context. Original sources were used whenever possible; however, English translations exist for many of the works cited.

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INTRODUCTION: THE OATH'S BEGINNINGS

The familiar oath of the present-day courtroom has been traced to a pre-religious, indeed, pre-animistic period of culture. Supernatural beings were unknown, and man believed that he possessed magic power which could produce any desired result. A vehicle of this power was the curse, which could kill as effectively as physical force. It worked through the magic inherent in the word or the magic act. The harm invoked was arbitrarily chosen by the speaker or actor, but his choice worked with the force of fate, which, in later stages of culture, was deemed superior to the gods. The uttered curse became an entity independent of its speaker's will. Curses were not symbols of magic, but rather operative magic performances. Thus, by use of a particular curse, man could determine both disaster and victim. Indeed, that victim could be himself. The oath was a self-curse, uttered in conditional form, operating irrevocably upon occurrence of the condition. Thus the self-curse could be utilized as a means of guaranteeing that a promise would be performed.

The oath as self-curse continued to operate automatically, by virtue of the inherent magic of word or gesture, after the onset of the animistic period and even after the "discovery" of divine beings. The Assyrians, for example, believed in the autonomous operation of the oath long after the deity was first invoked in the oath formula. Their mumit (or mumitu, a term more comprehensive than "oath") could be "placed" into any thing—trees, fire, and parents, as well as gods, though the latter may have been deemed somewhat stronger media of the oath's magic. The automatic sanction was either that

1. See Lasch, Der Eid 3-4 (1908) [hereinafter cited as Lasch].
2. Later "gods" were thought of as men endowed with special magical powers.
3. The magic of language—of the word uttered—is an extremely significant element in the rise of the oath. See Preuss, Der Ursprung der Religion und Kunst, 86 Globus 321, 355, 375, 388 (1904); 87 id. at 394, 395, 413 (1905).
4. See Pedersen, Der Eid Bei Den Semiten In Seinem Verhaltnis Zu Verwandten Erscheinungen Soeine Stellung Des Eides Im Islam 95-96 (1914) [hereinafter cited as Pedersen].
5. See Pedersen 89, 157. The curse may have been the predecessor of "evil spirits," which in turn furnished the patterns for later divine beings.
6. Lasch, however, believes that oath gestures were originally instinctive acts of self-defense. Lasch 10.
7. It was believed that the curse, even in conditional form, could produce the disaster to which verbal expression was given. Therefore, the curse was often expressed in terms of a blessing. Instances of this custom may be found in the Bible. See 1 Kings 21:9. In medieval Europe the oath formula occasionally began with the invocation of God's blessing. See Borowski, Przysięga Dowodowa W Procesie Północnego Średniowiecza 37 (1926). But oath formulae often expressly state the curse. This was common practice for Jews, adherents of Greek Orthodoxy, and, earlier, for pagan Slavs. But among the Roman Catholics, it was exceptional. See id. at 39.
9. There is an instance in the Bible in which a conditional curse, combined with an oath, was "placed" into water. See Numbers 5:19-31.
specified in the oath itself or a particular sanction attaching to perjury generally—for instance, in Greece and Rome, Zeus (Jupiter) was believed to strike perjurers with lightning.  

As divine beings gained significance, the curse ceased to exist as an independent being and gods became the tools whereby the oath was caused to operate. However, although the gods served as media, the oath continued to work magically. The Greeks, for instance, believed that the oath could influence gods as well as men. Eventually, the God of monotheistic religions acted as executor of man's oath. He was thought to respond to its magic, and it was believed to affect his actions with determinative power. The curse of the oath was now infused in a monotheistic deity.

But the curse of the oath could be placed in the object to be affected as well as in the instrument of execution. The object was usually a thing of particular value staked as a pledge of performance. The sanction of the oath—to strike at that object—was normally symbolized by an oath gesture, such as touching the object. Since our present oath is undoubtedly rooted in the Bible it is significant to note the choice of the object by which the oath was there taken. In Genesis 24:2-9, and Genesis 47:29, it was taken on male genitalia. Some authors trace this practice to an early adoration of the Phallus, while

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10. See, e.g., Aristophanes, The Clouds verse 397, at 40-41 (Rudolph transl. 1941); Ovid, Amores III, iii, 30-35, at 459 (Loeb ed. 1931).
11. See Lasch 5.
12. This is not surprising, since the Bible even shows remnants of an old belief that God can be the victim of a curse. The Old Testament penalty for cursing the Lord was death by stoning. See Leviticus 24:11-16.

Bentham pointed to the "absurdity, than which nothing can be greater," of the supposition that "by man, over the Almighty, power should . . . be exercised or exercisable . . . ; man the legislator and judge, God the sheriff and executioner;—man the despot, God his slave." Bentham, "Swear not at all"—Containing an Exposure of the Needlessness and Mischievousness, as well as Antichristianity of the Ceremony of an Oath 3-4 (1817).

13. Pedersen 150, reports that Arabs today still administer oaths by placing the left hand upon the head of the oath taker and the right hand under his belt, grasping his genitals, saying: "I adjure thee by thy belt and thy genitals, by (thy children) which thou already possesseth and those which thou will yet possess, by thy relatives and thy descendants." Women swear by their breasts.

It is noteworthy that under Talmudic law spilling of semen is comparable to murder. 1 The Pentateuch and Rashi's Commentary Genesis 38:7-10, at 383 (Ben Isaiah & Sharfman ed. & transl. 1949). But abortion was hardly punishable. See Tracte Sanhedrin 59a, Tosaphot. The author is indebted to Mr. C. Daniel Chill, a second-year student at the Yale Law School, for this information. See also Jakobovits, Artificial Insufflation, Birth-Control and Abortion, 2 Harofé Haivri 169, 170 (1953).

The present European custom of raising two fingers in oath taking may well be evidence of the survival of the ancient Biblical oath on virility. By tracing medieval Swiss customs, Künsberg has pointed to the probability that the pattern of the "two-finger oath" is the "three-finger oath" to be found in Swiss law books, Künsberg, Schwurfingerdeutung und Schwurgebärde, 61 Zeitschrift für Schweizerisches Recht 384 (1929). Of course, Künsberg relates this, as appears in the sources, to the Holy Trinity.
others regard it as an expression of adherence to the clan, represented by the
enerative power of man.\(^{15}\) Significantly, the oath in these instances is taken
by the genitals of the father and not by those of the oath taker. In another
early Biblical passage, Jacob takes an oath by “the fear of his father Isaac,”
and immediately thereafter eats with his brothers.\(^{16}\) Assuming that—as has
been suggested by one authority—these oaths are related to each other,
they appear to reflect the peculiar phenomenon of a simultaneous fear of the
father and concern for the father.\(^\text{18}\) Perhaps they may be consistently ex-
plained in the light of the Freudian view of early struggles and solutions
within the family group.\(^\text{19}\) In any event, these pre-law Biblical oaths express
the preoccupation of that era’s man with problems of procreation, virility and
family conflicts, and are hardly expressions of an advanced spiritual relation-
ship of man to God.

All advanced monotheistic religions have been disturbed by these peculiarly
primitive features of the oath. They have, therefore, attempted new rationali-
izations, without abandoning ancient forms. As a result, remnants of ancient
practices are combined with the prevailing interpretation of the oath as an
affirmation of faith. For example, both the Bible and the Koran permit the
taking of an oath only in the form of an invocation of the only God, for the oath
is an expression of belief in the Almighty and His power.\(^\text{20}\) Yet, the incon-
gruity between God’s omnipotence and His yielding to the impact of a human
oath pervades Biblical as well as all later history.

Religious efforts in reforming the oath have been directed towards suppres-
sing its function as a form of promise or sanction and elevating its incidental
quality—the confession of faith. In such cases it is transformed into a pure
oath of allegiance to God. In the Old Testament, worship of God and swearing

Freud, however, has singled out “three” as a special symbol of male genitals. \(^\text{Freud,}

\text{Vorlesungen zur Einführung in die Psychoanalyse} \text{166} \text{(5th ed. 1926). It may be}

important to note in this context that, according to Setser, \text{Setser, Tractatus de juramentis} 

lib. I, cap. XV, at 84 (1672), cited in Künningsberg, \text{supra at 404 n.60, only men}

raised their fingers in swearing, while “women place the same fingers on the left breast,

but do not raise the hand, so that the \text{subjectio be evident 'qua viris sunt adstrictae'}”

(that they are limited to men).

\text{15. See Pedersen 150, who points out that in Genesis 24:2-9, the oath is administered}

by the \text{pater familias to a slave.}

\text{16. Genesis 31:53, 54. One might be inclined to interpret this oath as referring to}

the one whom Isaac feared: the Lord. But the term used in this instance to denote “fear”

is not that normally used to express the fear of God—“Yirāh” (reverence, awe)—but

is rather a term indicating anxiety, spontaneous fear—“\text{pahad}.” The phrase, \text{“pahad}

Yashak” (fear of Isaac) in Hebrew, as in English, indicates both Jacob’s fear of Isaac

and Isaac’s fear.

\text{17. Pedersen 151.}

\text{18. On such phenomenon see, e.g., Freud, Analyse der Phobie eines fünfjährigen}

Knaben, in \text{7 Gesammelte Werke} 243 (1941).

\text{19. See Freud, Totems und Tabu, in 9 Gesammelte Werke 154-86 (1940).}

\text{20. See Deuter. 6:14; 10:21; Isaiah 48:1; Psalms 63:11.}

As to the Koran, see \text{Pedersen 160.}
by His Name are often identified, and Islamic doctrine includes the idea that it is better to take a hundred oaths by Allah and breach them than to swear with fidelity by another.

In all monotheistic religions criticism and censure of the oath exists alongside of oaths taken by God as well as by the religion’s leading figures. The Old Testament prohibits idle, unnecessary oath taking, while the Lord Himself swears by His own Name. Islam shows an outright rejection of the binding force of oaths; yet both Allah and Mohammed frequently took them. A direct prohibition of vows may be inferred from the doctrine that Allah will not permit Himself to be thus influenced. And Christ rejected the oath on analogous grounds.

Linguistic usage demonstrates that, notwithstanding efforts to suppress its objectionable origins, the oath, throughout the formative era of monotheistic religions, remained essentially a self-curse, rooted in magic. The Arabic term for oath, "kasam" (El Kasam), is used in Hebrew for "magic." The Hebrew term "alah" is used in the Old Testament to denote either an oath or a curse, much as the Assyrian nunnitu.

Strengthening of the concept of divine omnipotence and use of the oath in "legal" issues led to its transformation into an ordeal form. However, in other ordeals, the decision was thought to be made by the divinity and issued in the form of a sign, such as the healing of a wound inflicted with a hot iron. By contrast, in the oath ordeal, the oath itself determined the issue—its mere utterance resolved the issue in the oath taker’s favor. It was the "divine judgment" and not merely a means of bringing about such judgment.

23. See Exodus 20:7; Deuter. 5:11.
25. 4 El-Bokhari, Les Traditions Islamiques 328-29 (Houdas transl. 1914).
26. Id. at 348-49.
27. Matthew 5:34, 36.

In Christianity, the conflict between swearing by God and total rejection of the oath later resulted in the intermediary solution of swearing by saints. On this and the Greek custom of swearing by god-substitutes see Hirzel, Der Eid, Ein Beitrag Zu Seiner Geschichte 110 n.2 (1902).

28. See Pedersen 180.
29. As "oath," see Ezekiel 17:13, 16, 18, 19; as "curse," see Genesis 26:28. Numbers 5:21, 27 uses the term interchangeably.
30. See Pedersen 108. Compare text at notes 8-9 supra.

Similarly, in medieval Slavic laws, there existed interchangeable use of "oath" and "curse." See Borowski, op. cit. supra note 7, at 10.
31. "Ordeal" will be used in this Article as "judgment of God." It is quite possible that so-called "ordeals," such as the ordeal of fire or water, were originally considered magic, not divine, judgments. Thayer drew attention to the fact that in pre-Christian rites the thing used as means whereby the ordeal was believed to operate is referred to in the adjoining formulæ preceding the test as a "witness." 1 Thayer, Evidence at the Common Law 35-36 n.1 (1896) [hereinafter cited as Thayer].
Obviously, in the oath ordeal man himself was, in a sense, the decision maker, while God intervened merely as sanctioning agent. This identification is reminiscent of man’s pre-animistic status as magic’s moving force. The perjury sanction was not an essential element, for a false oath, although punishable, was as decisive of disputes as a true oath. The judgment-like character of the oath was also reflected in automatic retribution. Until quite late in history the oath required no external legal sanction, for God was believed to be the exclusive penalizer of perjury.\textsuperscript{32}

Since the taker’s anticipation of the results of a breach acts as an automatic deterrent to the breaking of an oath, the question may well be asked as to why the keeping of oaths is considered a virtue. Why do Arabs, for instance, take a particular pride in abiding by their promises made under oath?\textsuperscript{33} The answer to this problem involves the varying concepts of morality and man’s relation to the idea of “truth.” One authority suggests that the modern differentiation between morality and fear of purely external disadvantage, harm, damage or dishonor, was unknown to the ancient Semites. To them, success was virtue and failure was vice. “Truth” was not—as it is in the ideal of modern man—accordance with objective facts, but was successful assertion of one’s cause. For the Germanic tribes as well, the notion of “truth” coalesced with effectively prevailing over another man or another group.\textsuperscript{34} To keep one’s oath was an expression of “power.” This explains the fact that, among the Germanic tribes and in early English procedure, as well as among the ancient Semites, men swore to matters of which they had no knowledge. Those oaths were not means of establishing a fact but expressions of solidarity with the group which the oath taker—a member of that group—wished to prevail.\textsuperscript{35} This amorphous concept of truth\textsuperscript{36} constitutes the link between the promissory and the assertive or judicial oath. The assertive oath also ultimately carries a promise: that it will prevail.

\textsuperscript{32} Thus, biblical legislation differentiates the “vain oath” from false testimony—the false accusation of another. Only the latter is governed by the \textit{lex talionis}, punishment being measured by the fate the offender tried to inflict upon his neighbor. See Deuter. 19:19. When perjury became punishable by law, the type of punishment still often reflected what would have been the automatic response to the self-curse of the oath. Thus, e.g., \textit{Constituto Criminalis Carolina} art. 107 (1532) provided that the perjurer’s “two fingers with which he swore” be cut off. Of course, this type of punishment also reflects the general idea of the magical retributory function of early punishment.

\textsuperscript{33} See \textsc{Pedersen} 28-32.
\textsuperscript{34} A form of prevailing is receiving a reward. There is evidence of an expectation of reward for keeping oaths, corollary to that of punishment for breaching them. On this see \textsc{Knöke, Das Zuchmittel der Drohung im Eide} 47-48 (1896).
\textsuperscript{35} “Truth” thus conceived remains vaguely reflected in Biblical language. “\textit{Emeth}” (truth), “\textit{emuna}” (loyalty), and “\textit{amen}” (so be it) are related concepts. The unity of truth and power is expressed in the root “\textit{tsadok}” (\textit{sidk}), which in Hebrew and in Arabic means “to be right,” “to speak the truth,” “to be as one ought to be,” and “to prevail.” For citations see \textsc{Pedersen} 131.

\textsuperscript{36} It is interesting to note that the test of a “true” prophet in the Bible is the occurrence of an event predicted by him, a successful sign. \textit{Deuter.} 18:16-22.
The notion of "prevailing" as truth may be responsible for the oath's appearance in a form more closely resembling other ordeals. Sometimes it was the occurrence or nonoccurrence of the disaster conditionally invoked in the oath's curse that afforded the test of guilt or innocence. Among the Indian Bhils, a man issues a written statement in which he admits guilt in the event that a serious accident should strike him or his family within a specified period of time.\(^3\) In Greece and Rome, persons who died by lightning were denied a regular burial, for such death was regarded as Zeus' normal punishment of perjurers.\(^3\) Later, however, fear of the occurrence of the event invoked by the oath replaced the event itself as a sanctioning agent. Thus, the oath became proof. But the probative character of the oath has remained predicated upon belief that the oath is operative—that the event invoked will occur if the oath was false.\(^3\) Thus, the oath was the factor that decided the issue, and it rendered a judicial decision unnecessary. Once it came to operate as proof, it was absolute proof, binding upon the judge. A sworn statement was not subject to a court's evaluation, even if the law otherwise recognized the principle of free judicial inquiry. This type of oath, adopted and developed in the Roman law, is preserved in the canon law and may be found in modern, and even contemporary, civil law. Later, with a basic transformation of the concepts of truth and judicial truth-finding, the oath finally developed into evidence, the weight of which the judge was allowed to evaluate with at least some measure of freedom.

The original judicial oath was not incidental to testimonial evidence. Rather the reverse was the case; witnesses supported the oath.\(^4\) Indeed, testimony did not originally constitute an independent means of proof. It was but a means of fortifying the litigants' oath. At best the witnesses swore with the party as compurgators, and did not individually testify to the truth of facts within their knowledge. Their support, however, formed an

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37. \(\) LASCH 22. Primitive man believes himself guilty when he is convicted in accordance with custom. See MELLAND, IN WITCH-BOUND AFRICA 130 (1923).

38. KNOKE, op. cit. supra note 34, at 38.

39. BENTHAM, op. cit. supra note 12, at 4, asserted that the oath must thus automatically operate without exception, lest it be ineffective.

In ancient laws the pure ordeal and the oath are occasionally combined. In the case of a woman suspected of adultery, the Old Testament, Numbers 5, provides for a test by ordeal, operating by the medium of a priest's utterance of a curse put into water and of an oath of the woman, whereas in the Code of Hammurabi §§ 131-32, the woman can purge herself by oath, although the husband may demand an ordeal; and in the Koran, Surah 24, 6-9, the husband testifies fourfold under oath to the truth of his allegation and, fifth, invokes Allah's curse should he lie, whereupon the wife may defend by fourfold testimony and the oath. GRAVEN, L'Obligation de parler en justice, in DROIT ET VÉRITÉ 106, 107 (1946), cites a medieval instance in which a man suspected of an assault at night could purge himself by oath accompanied by placing a finger on red hot iron, which is a form of combining the oath and the ordeal.

40. The first oath was an oath of purgation or innocence taken by the accused rather than the independent oath of a witness. LASCH 21.
integral part of the oath ordeal. Since the decisive oath was an expression of power and varied in strength depending on the magic—and later, social—power of the utterer, family or clan support was significant in adding strength to the oath of the party. Although the decisive oath was eventually replaced by witnesses, their numerical strength remained conclusive, reminiscent of the decisiveness of the number of compurgators. Testimony of sufficient numerical strength became proof which bound the judge. The testimony thus functioned as an ordeal, as the oath had done before.

As testimony emerged as an independent form of proof, it was not predicated upon an oath. Neither the Bible nor the Koran reports that witnesses were sworn. In fact, at times, testimonial evidence was treated as equivalent to the defendant’s oath. Thus, Mohammed said: “Thy two witnesses or his oath.” Variations in oath formulae also record the transition from proof by oath to testimonial proof. Some Old Testament and Arabic oaths invoked God as a “witness.” In these oaths, it would seem, God still functioned as a “compurgator,” adding strength to the utterer’s case rather than testifying as a witness. In the course of its separation from the oath, testimonial proof also underwent a gradual transformation of meaning and function as it was adapted to a changing concept of truth and judicial truth-finding. As early as Biblical times, witnesses testified to facts within their knowledge, although the ordeal character of testimonial proof was preserved by the continued significance of numerical strength. Nonetheless, the witness even then occupied an intermediate position between a medium of proof and a judge or executioner.

Biblical proof was achieved by testimony and not by oath, but later periods of history adapted the Bible’s promissory oath to courtroom needs, mistakenly assuming it to be applicable to testimonial evidence. The assertory or testimonial oath (as distinguished from the promissory and the party oath) developed gradually. The Roman law and later the canon law served as media for its acceptance in the West. Although the testimonial oath was firmly established in Rome in the erroneous belief that it was a Christian tradition, it is not exclusively derived from this Roman misconception. Today, the oath is a general

41. That this conception of the curse still prevailed in the Old Testament may be seen from the fact that the Lord chose to influence Balaam—apparently a professional curser—rather than to nullify his curse. Numbers 22, 24.
42. But see Surah 5, 106 (witnesses to will of person who dies in a foreign country must be sworn).
43. But in some Semitic cultures there existed the custom of pronouncing a malediction to procure testimony. See Boaz Cohen, Testimonial Compulsion in Jewish, Roman, and Moslem Law, 9 IVRA—RIVISTA INTERNAZIONALE DI DIRITTO ROMANO E ANTICO 1, 18 n.72 (1958).
44. See 2 El-Bokhari, Les Traditions Islamiques 224 (Houdas & Marcais transl. 1906).
45. See 1 Samuel 20:23, 42; Jeremiah 42:5.
47. The witness functioned as the first executioner. Deuter. 17:7.
48. See note 56 infra.
phenomenon, appearing in various cultures. In all its various forms, whether promissory or assertory, conclusive or evidentiary, testimonial or party-oath, the oath remains essentially a self-curse, even when disguised as a blessing or an invocation of God’s testimony. The curse “is part of the oath, as the threat of punishment is part of the law.”

THE OATH IN CIVIL LAW SYSTEMS

Roman Law

While pre-Christian Greek and Roman law occasionally employed oaths, the more enlightened philosophers expressed grave doubts about their evidentiary efficacy and moral value. Aristotle characterized the oath as “an unproved statement supported by an appeal to the gods.” Greek censure of the oath, later adopted by Roman exponents of Greek thought, was not based on a belief in man’s incapacity to make the oath triumph over God’s will (the Biblical and Koranic view), but on moral, humanistic considerations. From the fifth century B.C. on, human dignity became more and more highly regarded. Absolute veracity was the mark of a proud, self-confident and free man, lying the mark of a slave. The belief developed that the gods punish all lies, not only formal perjury. The oath, therefore, added nothing to the fear of retribution, and declined in importance. Consequently, later Roman restoration of the Graeco-Roman oath tended to supplement divine retribution with incidental secular punishment.

Testimonial oaths were finally institutionalized in Roman jurisprudence in the fourth century A.D., when Constantine, erroneously believing that he was following Christian practice, required witnesses’ statements to be sworn. This provision was incorporated into the Code of Justinian, and from that source it was adopted by all of European Christendom. The Roman law also afforded the pattern for the distinctive institution of the civil “party oath.”

49. Borowski’s opinion that it is a universal phenomenon, BOROWSKI, op. cit. supra note 7, at 1, appears erroneous. China, for example, has no oath tradition. See notes 325-27 infra and accompanying text.
50. HIRZEL, op. cit. supra note 27, at 139.
51. See 2 SCHOEMANN, GRIECHISCHE ALTERTHUMER 254, 282 (4th ed. Lipsius 1902); THUDICHUM, GESCHICHTE DES EIDES 5-6 (1911) [hereinafter cited as THUDICHUM].
52. ARISTOTLE, RHETORIC 17 (Rackham transl. 1937). The Stoics advised shunning the oath whenever possible. See THUDICHUM 4.
53. See CICERO, DE OFFICIS bk. III, fr. 29 (Loeb ed. 1928). See also CICERO, PRO QUINTO ROCIIO COMODEO fr. 16, com. 46 (Fleese ed. 1930).
55. See particularly the words of Callicles in PLATO, GORGIAS 482 C (Lamb transl. 1932); cf. PLUTARCH, QUÆSTIONES ROMANÆAE 44 (for English translation see THE ROMAN QUESTIONS OF PLUTARCH 139 (Rose transl. 1924)).
56. Constitution of Naissus, 334 A.D. Until this constitution at Naissus, the sources do not mention any oath of witnesses. KUTTNER, DIE JURISTISCHE NATUR DER FALSCHER BEWEISFAHREN 11 n.24 (1931) [hereinafter cited as KUTTNER].
57. CODE 4.20.9.
The nature of the Roman oath philosophy may be inferred from the oath's Latin name: sacramentum. This term had, in the era of the legis actiones (753 B.C.-ca. 150 B.C.), denoted a wager, or a pledge which a losing litigant forfeited to the priests. Thus, the term suggests the loss which any oath taker suffers in the event that the condition of the oath occurs. Indeed, the self-curse was expressly stated in Justinian's oath for officials, who undertook, in case of breach of duty, "to receive and keep [his] share here and in the world to come in the terrible judgment of the Lord God and our Saviour Jesus Christ, together with Judah and the leprosy of Gesy and the trembling of Cain."9

The Roman civil "party oath" should be distinguished from the testimonial oath, the probative value of which is subject to judicial evaluation. The "party oath" functioned as an ordeal; it decided the issue. This decisive oath appeared in two forms. The "decisory oath" was tendered by one party to the other with the understanding that if accepted it would resolve the issue. The "suppletory oath" was tendered by the judge to one party—never to both on a single issue—after some evidence had been given in his favor, and was understood to supply the missing portion of the proof.60 The civil party's decisive oath subsequently was adopted by the canon law, and thereby penetrated the civil procedure of civil-law countries. Even today, the decisive civil-party oath has survived in some legal systems, particularly the French and the Italian.

Through the classical period, proceedings in iure, the stage prior to joinder of issues, were strictly separated from those in iudicio, the trial stage. Correlatively, the oath in iure was sharply distinguished from the oath in iudicio. Originally the "decisory oath" in iure was not the basis of judicial decision but rather a substitute for it. Either the oath or the decision resolved the case ("Ait praetor: 'eum a quo iusiurandum petetur, solvere aut iurare cogam.'").61 If the oath were taken by the offeree, judicial intervention was rendered unnecessary. But the party to whom the oath was tendered could refer it back to the offeror. If he neither took it nor referred it back nor satisfied the claim against him, he was subject to disadvantages, the nature of which are a matter of controversy.62 The prevailing view is that he was treated as a confessus.

58. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 184 (1952). There were two other terms denoting "oath": iusjurandum and iuramentum. It was also described briefly as "religio."
59. The oath continued thus: "and I want, in addition, to be subject to the penalties provided for in the laws of your Mercy." Nov. 8, Coll. II, tit. 3, in 3 CORPUS JURIS CIVILIS 91 (Schoell & Kroll ed. 1954).
60. As will be seen in the second part of this Article, the suppletory oath still binds the judge in Italy.
61. This praetorian edict is reported in DIGEST 12.2.34.6 (Ulpianus lib. XXVI ad edictum). See the classic work of DEMELUS, SCHIEDSEI UND BEWEISEID 37 (1887). See generally BIONDI, IL GIURAMENTO DECISORIO NEL PROCESSO CIVILE ROMANO (1913) [hereinafter cited as BIONDI].
62. Id. at 7, 8.
(one who confessed judgment) or \textit{iudicatus} (one against whom judgment was rendered) or an \textit{indefensus} (one who does not defend).\textsuperscript{63} Roman jurists held this oath \textit{in iure} to be “\textit{pro iudicio}” (equivalent to a judgment).\textsuperscript{64} It has been said that this was a private transaction between the parties rather than a procedural step\textsuperscript{65} and that it served as a means of avoiding litigation rather than as a means of proof.\textsuperscript{66} Since the parties could agree to any solution, resolution by an oath \textit{in iure} might be equated with modern pretrial settlements, and thus thought to have no particular legal significance. But private or not, the oath was a solution by ordeal.

In any event, by Justinian’s time this \textit{in iure} oath undoubtedly had become part of the process of litigation. It had ceased to be a substitute for decision and had become an act which necessarily resulted in a decision in favor of the oath taker.\textsuperscript{67} It functioned as absolute proof; it bound the judge to render decision accordingly.

Oaths \textit{in iudicio} were both “decisory” and “suppletory.”\textsuperscript{68} Again, the decisory oath, being equivalent to disposition of the case by party transaction, might be regarded as a wholly private agreement. However, even in classical times, the decisory oath \textit{in iudicio} necessitated the rendering of a judgment, albeit a predetermined one. In Justinian’s law the oath forfeited much of its private character, since it could no longer be tendered by a party without judicial approval.\textsuperscript{69} And the suppletory oath, offered by the judge, represented a departure from the classical Roman principle that the parties and not the judge were to adduce the proof. This inconsistency then prevailing in Roman procedure has led modern scholars to doubt that this \textit{ius iurandum iudiciale} was part of classical Roman law or is of Roman origin at all. Some believe that it was the product of Christian mysticism, beginning to function as proof of objective truth, and marking a transition from free judicial evaluation to the decisive oath of Justinian’s time.\textsuperscript{70} In Rome itself the question of whether a judge who tendered an oath must then abide by it was a troublesome one.\textsuperscript{71} Binding him to decide the case pursuant to the oath is of course inconsistent with the recognized principle of free judicial evaluation of the evidence.\textsuperscript{72} This inconsistency was reflected in the canon law, medieval law

\textsuperscript{63} See \textit{Demelius, op. cit. supra} note 61, at 134, 148. For citation of divergent opinions see \textit{Biondi} 31.

\textsuperscript{64} \textit{Digest} 12.2.351. See also \textit{Digest} 12.2.34.9; \textit{Biondi} 31-32.

\textsuperscript{65} \textit{Demelius, op. cit. supra} note 61, at 81, calls it “\textit{eidliches rechtskräftiges Parteiurteil}” (sworn final party-judgment). See also \textit{Biondi} 53.

\textsuperscript{66} See \textit{id.} at 6, 52.

\textsuperscript{67} \textit{Id.} at 65.

\textsuperscript{68} See \textit{id.} at 77.

\textsuperscript{69} See \textit{id.} at 98.

\textsuperscript{70} See \textit{id.} at 79-80, 85-87, 88, 90.

\textsuperscript{71} See \textit{Digest} 12.3.4.3 (\textit{Ulpianus lib. XXXVI ad editum}); \textit{Biondi} 107.

\textsuperscript{72} Hadrian’s Rescript instructed the judge to decide “\textit{ex sententia animi tui}” (by the judgment of your [intuitive] mind). \textit{Digest} 22.5.3.2. Compare this with \textit{Digest} 12.2.5.2.
and in modern civil law. As will be shown, the conflict between use of the oath and free judicial evaluation, already noticed in Roman law, became the object of severe criticism during the era of the French Revolution and brought on the oath's abandonment in several legal systems.

_Germanic Law_

The second source of the oath as a legal institution, the source of the "oath of purgation" which left an enduring imprint on criminal proceedings, was the law of the Germanic tribes. Throughout that law's history, the oath dominated all stages of litigation.

During the so-called "Germanic period," the era running through the end of the migration of barbarian tribes, all legal procedure was dominated by the parties; the court played a subordinate role. By the use of ceremonial words and invocation of the gods, the plaintiff stated his claim and adjured his opponent to answer. Upon the plaintiff's formal request, the Rachinburghi—a committee of the general judicial assembly—rendered a so-called "double-tongued" judgment. This judgment both delineated the oath that the defendant must swear in order to prevail and, at the same time, disposed of the issue in the alternative. For instance, a judgment might state that the defendant must either swear an oath of innocence or pay compensation to the plaintiff. By his oath the issue was resolved in the defendant's favor. Whether the defendant chose to swear or refused the oath, the litigation was at an end. Generally, the defendant had the burden—or rather, the benefit—of proof; he could discharge it by taking the oath either alone or with a number of compurgators. These _Eideshelfer_ (oath helpers) were members of his clan and swore that his oath was "pure and not perjurious" (rein und unnwin). Operationally, the oath was an act of tribal solidarity. The compurgators did not swear individually but as a body ("mit gesamtem Munde"—"by total [corporate] mouth"). Only two types of witnesses were known: witnesses who supplied the formality of a legal transaction, and witnesses who reported the community's common knowledge. Accidental perception of an event did not qualify a person as a witness. Moreover, only one side was heard and admission of testimony of the plaintiff's witnesses automatically excluded the defendant's oath. Nor could an oath be opposed by counter-oath, for the manner of proof was determined in advance by the alternative judgment which left no room for a conflict of evidence.


74. Id. at 18. Thus, the judge was merely an "inquirer of the law," the parties conducting the procedure and the Rachinburghi rendering the judgment.

75. If a party was dissatisfied with the judgment, he could challenge it, in which case the decision was reached by ordeal, or, among some tribes, by duel. Unless the judgment was thus challenged, the parties made a contract in accordance with the judgment: this contract contained a promise either to prove or to pay.
Thus, at this time, the oath, along with the ordeal, was the normal means of proof. In contrast to the Romano-canonic procedure in which the oath was rarely used, Germanic law used it even if other means of proof were available. 76 In Roumania a man could escape judgment against him by taking an oath, even if the plaintiff had witnesses ready to testify in his favor. 77 And, by virtue of a Saxon custom, a thief could swear with one hand that he did not possess stolen property while holding it concealed under his clothes with the other, and the plaintiff's demand that the defendant show the concealed hand was not heard. 78  

The early "Frankish" period until the establishment of Charlemagne's empire was marked by Christianization of oath forms and a shift of emphasis from party domination of judicial procedure to court intervention. 79 Instead of raising his claim by invoking the pagan gods, the Frankish plaintiff was required—unless certain types of proof or suspicion were present—to offer and take a preliminary oath, invoking God and the saints, taking the oath upon relics or upon the Gospels. But pagan forms were still preserved for minor oaths, such as the oath upon consecrated weapons and the oath upon cattle. The party's demand of the oath and of judgment in return for the oath was eventually replaced by a court order to the same effect. In Carolingian times the so-called *inquisitio*—a procedure by questioning—was introduced. A royal officer selected trustworthy community members who swore to tell the truth and were thereupon asked to inform of crimes within the community. A person thus informed against could purge himself by oath with oath-helpers or by ordeal.

Significant changes in the nature and function of the oath-helpers took place in the later era of Frankish supremacy. Proof with oath-helpers was made somewhat more difficult by requiring them to swear individually. But the oath-taker's selection of compurgators was no longer limited to members of his clan. In some cases, the opponent of the party who had been admitted to proof could, by offering an oath with a larger number of oath-helpers, force his opponent either to yield his proof privilege or take the oath with a like number of helpers. Conflict of testimony was resolved by a duel between the witnesses. In an effort to increase the credibility of the compurgators, testimonial capacity was made dependent upon certain property qualifications and the witnesses were questioned before being admitted to oath. Thus, trials increasingly featured a balancing of evidence. 80  

During the period from the establishment of the German Reich (887 A.D.) until the end of the Middle Ages procedural formalism reached its peak and

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77. See id. at 132.
78. See id. at 132 n.5.
79. See Brunner, *op. cit. supra* note 73, at 79-84.
80. For procedural details, see Brunner, *Forschungen zur Geschichte des deutschen und französischen Rechts* 88-247 (1894).
the oath figured prominently among the numerous form requirements. As in the case of other verbal forms, strict adherence to formulae was stressed. And the oath came to perform new functions. For example, the plaintiff's oath of "gewewe" ("with fingers and tongues") constituted a pledge that he would not repeat the litigation over the same subject matter once it had been settled. In its evidentiary role, the oath continued to be used by the parties (with or without oath-helpers) and by witnesses. Later, toward the end of the Middle Ages, the compurgators were gradually converted into witnesses. By way of illustration, if a defendant had been apprehended in the act, the procedure became transformed into a search for substantive truth. Thus, those who formerly functioned as oath-helpers were now required to have actual knowledge of the act. A similar principle came to be applied to the "notorious" act; notoriety was established by the testimony of witnesses. Nevertheless, if the accused had not been caught in the act and the accusation was raised without "fight greeting," he could defend by an oath and with the aid of compurgators.

Germanic procedure did not succeed in working its system of proof into an adequate framework of substantive law, and yielded to the inquisitorial canon law procedure. In the inquisitorial process physical torture merely replaced the "tortura spiritualis" of the oath. Throughout history a feeling of a continuity between these two institutions has prevailed. In modern law, physical torture has been eliminated. But the tortura spiritualis may have survived, since the administration of the oath may unduly summon up hidden and painful portions of the psyche, particularly tendencies toward compulsive confession.

Similarly, the German "oath of purgation" has also survived in modern testimonial proof. Contemporary witnesses are the successors of the ancient compurgators. As these "oath helpers" functioned within an "oath" system, the oath then became essential to the testimonial function. Indeed, in the Germanic law the oath was always a constituent part of testimony. Capacity to testify was congruent with capacity to take an oath, and this concurrence reflected the original identity of the witnesses and the compurgator. The ancient view, based on a doctrine of formal proof, that only sworn testimony carried full evidential weight, may also be found in modern legislation providing that unless a statutory ground for not requiring an oath exists, a judgment may not be based on unsworn testimony. The judge is not permitted to release the witness from taking an oath even though he may trust his un-

81. See Brunner, op. cit. supra note 73, at 176-85.
82. Id. at 304.
84. See Löwenthal, Der Gerichtsgeist 21 (1929).
85. It is thus the institution of the "oath helper" which we find reflected in statements regarding modern law, such as that of Faustin Hélie: "It is the oath that makes a person a witness." 2 Hélie, Code d'instruction criminelle 147 (1952 ed.).
sworn testimony or, indeed, even though he is convinced that the witness is about to commit perjury.\textsuperscript{86}

In contrast, the ancient Germanic oath requirements have in a few cases served as a pattern for desirable modern legislation. In Germanic law, a party submitted his oath to the opposing party, not to the court. This philosophy of proof is reflected in modern provisions which permit the parties, by agreement, to release a witness from the oath requirement.\textsuperscript{87} Those countries—such as France—which received the Roman law at a rather early period do not permit such release by consent.

Also of Germanic origin is the doctrine that perjury legislation is designed to protect the purity of the oath, emphasizing the false invocation of God as the essence of the crime.\textsuperscript{88} Biblical and Roman perjury laws, on the other hand, had sought to aid the person who was affected by the false testimony.

\textit{Canon Law}

To a very considerable extent, the oath as a legal institution reached the western world through the medium of the canon law, which in turn derived it from three sources: supposed religious foundation, the ancient Germanic law, and the Roman law.\textsuperscript{89}

Whether the oath had any foundation in Christianity is couched in controversy. Both Jewish\textsuperscript{90} and Christian authorities\textsuperscript{91} recognize that there is no warrant in the Bible for the requirement of a witness's oath. In fact, several Biblical passages suggest censure. For example, a clear condemnation of oath taking generally is expressed in Christ's words:

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\textsuperscript{86} See Löwenthal, \textit{op. cit. supra} note 84, at 24-25.
\textsuperscript{87} See, e.g., \textit{Codex Juris Canonici} canon 1767, § 3, and sources cited in the second part of this Article.
\textsuperscript{88} Löwenthal, \textit{op. cit. supra} note 84, at 28.
\textsuperscript{89} See Esmein, \textit{Le Serment des inculpés dans le droit canonique} 11 (1896), in \textit{La Bibliothèque de l'École des Hautes Études—Sciences Religieuses} 231-48 (1896) [hereinafter cited as Esmein]; 2 Garraud, \textit{Traité théorique et pratique d'instruction criminel et de procédure pénale} 49-50 (1909) [hereinafter cited as Garraud].
\textsuperscript{90} In Jewish law, as it interprets the Bible, the oath of the witness is unquestionably not a condition of the validity of testimonial evidence. See Boaz Cohen, \textit{The Testimonial Oath, A Study in the Reciprocal Relations of Jewish and Roman Law in Medieval Europe}, 7 \textit{Historia Judaica} 51 (1945). For criticism of taking an oath by God as a witness, as implying an unwarranted assumption of a knowledge of God, see Philo, \textit{The Decalogue} §§ 82-95, in \textit{Philo} 49-55 (Colson transl., Loeb ed. 1937). Thesuperfluous of the oath has sometimes been argued on the ground of the general obligation of every Jew to tell the truth, imposed by the oath of his ancestors at the Covenant of Mount Sinai and the curses pronounced upon the conclusion of the Covenant. See Responsa of R. Isaac ben Sheshet (1326-1408), cited in Boaz Cohen, \textit{supra} at 59-59.
\textsuperscript{91} See the statement of the Council of Rome of 1725, cited in Moriarty, \textit{Oaths in Ecclesiastical Courts, An Historical Synopsis and Commentary} 33 (Catholic University of America Canon Law Studies No. 110, 1937) [hereinafter cited as Moriarty].
Again, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths; But I say unto you, Swear not at all; neither by heaven; for it is God's throne; Nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black.
But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil.

St. Paul remains the foremost Christian spokesman for the oath. He stressed that God made his promise to Abraham under oath, and argued that to men "an oath for confirmation is...an end to all strife." Among the Church Fathers, Hieronymous claimed that Christ merely prohibited swearing by heaven, earth, Jerusalem or one's own head, and not oaths in general. This interpretation, which disregards the opening and closing words of Christ's teaching was adopted by Gratianus in his Decretum and, in that form, was approved by the Popes.

Acceptance of the oath in Christianity was achieved only after a considerable struggle, and even then the acceptance was not unqualified. The controversy was compromised by using a distinction made by St. Augustine. According to this view, only oaths taken to a falsehood or without necessity (fallsum, vel sine necessitate) were prohibited. With this exception, the oath was merely an act of imperfection, not one of iniquity. Abstention from oath taking was recommended not on the ground that the oath was inherently evil but rather because of the dangers it entailed. It was conceded to be a "necessity" or a "medicine," which though disagreeable, was at times indispensable. The canonists urged that the oath should be used only "in dubiis et necessariis," hence only as a subsidiary means of proof. A Decretale of Pope Alexander III disapproved the practice of tendering the oath to a party who had previously established his claim by documents or witnesses, and then deciding in accordance with the oath. In contrast, the Legists, approved the oath, not merely on religious grounds, but because it was found in Roman sources.

93. See Romans 1:9; 2 Corinthians 1:23; 11:11, 31; Galatians 1:20; Philippians 1:8; 1 Thessalonians 2:5, 10; 1 Timothy 5:21.
95. See Hebrews 6:16.
96. Decretum Gratiani pars II, causa 22, quaetio 1-5 & 8, cited in Thudichum 10 n.3.
97. See id. at 10.
98. See Lévy, op. cit. supra note 76, at 135.
99. Cited in id. at 136.
100. Luther, Melanchton and most other leaders of the Reformation claimed that in the cited Bible passage, Christ did not speak as a legislator. But they condemned the oath
Under the impact of Germanic influences, the oath of the canon law assumed, in criminal cases, the form of an oath of purgation. Before Gratian's day, the decision to attempt purgation, in accordance with the ancient Germanic pattern which was based on the accusatory, adversary system, depended not so much on the will of the judge as on the will of the accused. In the course of time, however, the purgative oath was made compulsory by judicial mandate. A defendant who refused to take the oath or who could not produce the required number of oath-helpers was deemed to have confessed. Yet, the oath was regarded as a rational means of proof. In this capacity as purgatio canonica, it replaced the purgatio vulgaris or ordeal by water or by the iron, which had been prohibited in 1215. 

Knowledge, as such, was not in issue. Later, the oath became a vow of the suspect de veritate dicenda (to tell the truth), with compurgators, whose oath was a jusjurandum de credulitate, attesting to the character of the suspect or to the compurgator-witness's belief in his cause.

The oath de veritate dicenda was an anomaly, and thus some writers deny its existence in the canon law. That an oath sworn should not necessarily carry proof, was so unusual that it was admissible only in the absence of proof of guilt, that is, only where there was “probatio semiplena.” It also caused great discomfort among religious writers for theological doctrine had steadily maintained that a man could not be required to incriminate himself. If no duty of self-incrimination existed, theologians were initially troubled by the apparent absence of basis of the authority to demand an oath. By a rather unpersuasive argument, that authority was derived from the inquisitorial function of the judiciary. Another question arose: since theological doctrine admitted that “necessity” exempts, or at least excuses,
otherwise illegal conduct, could an accused person defend himself falsely? In his *Summa Theologica*, St. Thomas Aquinas argued that he who takes the oath is not obligated to “tell the whole truth.” He may remain silent, for there is a difference between silence and falsehood. But where there has been *infamia*, or express evidence of guilt, and he is asked to confess, he must not conceal the truth.\(^{111}\)

There is evidence of Church opposition to the accused’s oath *de veritate dicenda* even in medieval times. The Synod of Wroclaw (Breslau) held in 1248, censured this type of oath and demanded that proof against the accused be adduced by the prosecution.\(^{112}\) This opposition grew in strength, until in 1698, upon order of Pope Innocent XII, Franciscus Memmius made a thorough inquiry into the question of the “expediency of abrogating the custom of requiring accused persons, prior to interrogation, to take an oath to tell the truth.”\(^{113}\) He arrived at the conclusion that the custom should be abolished, since it was “violent and unjust.” Memmius carefully distinguished this type of oath from both the purgatory oath which put an end to the controversy and a voluntary oath.\(^{114}\) The difference, he said, was that the “necessary” oath *de veritate dicenda* places the oath taker in “danger” and in “fear,” to which he should not be exposed, whether his fear be “just or unjust.” Such oath “tortura est acerrima”\(^ {116}\) (is the gravest torture), “crudelior, quam tortura corporalis”\(^ {117}\) (more cruel than bodily torture), in that it tortures the soul by inflicting a fear of dishonoring God’s Name. Inflicting that fear is unjust, for nature has implanted in man an instinct of self-preservation, which dictates that he exempt himself from punishment.\(^ {118}\) Indeed, says Memmius, when man finds himself in such state of necessity, he “quasi invitus peierauerit” (perjures himself quasi-involuntarily), so that he is immune from any perjury punishment.\(^ {119}\) Since about ninety of a hundred accused persons were believed to commit perjury,\(^ {120}\) the judge who exposes a defendant to such temptation “kills not only the soul of the accused but also his own.”\(^ {121}\) Memmius significantly added that those who confess do

112. See *Borowski, Przysiega dowodowa w procesie polskim późniejszego średniowiecza* 20 (1926).
113. Memmius, cited in full note 105 *supra*.
114. See *id.* No. 41, at 8, 9; No. 78, at 17; No. 115, at 26; No. 203, at 50; Nos. 219, 220, at 53; No. 239, at 57.
115. *Id.* No. 95, at 20; No. 140, at 32; No. 203, at 50.
116. *Id.* No. 160, at 38.
117. *Id.* No. 162, at 38-39. Memmius apparently justified bodily torture, describing it as a “*species defensionis*.” See *id.* No. 166, at 40.
118. *Id.* No. 51, at 11.
119. *Id.* No. 159, at 37-38.
120. *Id.* Nos. 124, 125, at 28.
121. *Id.* No. 101, at 21-22, citing St. Augustine (*can. ille, qui hominem, and can. qui exigit 22; quest. 5*) admonishing him, who provokes a man to swear and knows that he
so for reasons other than fear of perjury. Nor did he limit his criticism to the accused's oath de veritate dicenda, even though it appeared to him the most objectionable. Even the decisive purgatio canonica appeared to him "suspected," and he suggested that the oath be abolished in civil as well as criminal cases.

In the light of modern psychoanalytical knowledge and the contemporary concept of human dignity, his findings are particularly relevant today. The hidden psychic conflicts called forth by the oath and the ritualistic impediment it places on man's strivings toward freedom and rationality may be equally termed "crudelior, quam tortura corporalis."

Under the pressure of such criticism, the oath of the accused (de veritate dicenda) was abolished by the Council of Rome of 1725. The Council prohibited tendering the oath to an accused in a criminal trial and declared that if an examination were conducted under this oath, the examination and all the acts of the process were null and void and lacked all binding force against the criminal. However, the reason stated by the Council for abolishing the oath of the accused was not that it was inherently immoral but rather that it failed to extract truthful statements.

Today, the canon law in civil actions imposes a mandatory oath upon witnesses, and upon parties in contentious cases whenever the public good is involved. Furthermore, the judge may require a party oath whenever he deems it advisable in his prudent judgment. The only witnesses of whom the canon law does not require an oath are witnesses in a private trial if the parties agree that they not be sworn, and unsuitable or suspected witnesses.

swears falsely, that he is committing an equivalent of homicide, and that he is killing two souls. From this, the doctors infer that a judge should not refer an oath to a party who may be thereby prejudiced; nor should he refer an oath to one who has no adversary. Memmius mentioned that the judge may be excused if he acts in good faith, which may result from the custom of imposing oaths. Id. No. 103, at 22. But he added that where there is a high probability of perjury, as in the case of criminal defendants, there is a ground for conjecture that the defendant will perjure himself, and in such cases the judge must not impose an oath. Id. No. 106, at 23. Hence, such oath is generally barred in criminal cases.

122. Id. No. 125, at 28.
123. Id. No. 203, at 50. Memmius notes that purgatio is permissible, since it terminates the controversy. This admission seems inconsistent with his general thesis concerning the probability of perjury inherent in the oath of the accused. And he cites authorities to the effect that the purgatio canonica had been abolished.
124. Id. No. 221, at 53. Memmius favored the oath's retention in spiritual matters (causa spiritualis). Id. Nos. 248, 249, at 60. He also argued that anyone who wishes to swear should be admitted to the oath. Id. No. 227, at 54, citing St. Thomas and Suarez.
126. Canon 1767.
127. Canon 1744.
128. Canon 1767, § 3.
129. Canons 1757, § 1; 1758; 1764 §§ 1-2.
When a witness refuses to swear, the judge may impose penalties, including monetary fines. Canon 1766, § 2.
The oath of witnesses (and parties in civil canonical trials) is presently *de veritate dicenda*, the oath to tell the truth. By canon 1767, section 1, the oath taker has this obligation; but he need answer only the questions asked. Clearly, this privilege of silence originated in the compromise view of the oath obligation adopted by theologians such as St. Thomas Aquinas. While the oath of the contemporary canon law is an oath in a modern sense, expected to aid the search for truth it carries implications reminiscent of the ancient oath ordeal. Although the oath is not an indispensable condition of validity, the value of unsworn testimony is not considered equal to that of testimony under oath. Thus section 2 of canon 1791 provides that even though witnesses are absolutely trustworthy, give coherent depositions about matters of personal knowledge—the numerical requirement (two or three witnesses) being also satisfied—they must be sworn in order that their testimony be taken as full proof. This requirement gives the oath the character of a formal means of proof, which the canon law has transmitted to civil-law countries.

While the evidentiary, testimonial oath of the canon law, combines elements of legal proof with free judicial appraisal, its oaths for parties only, following the Roman law pattern, are "probatory oaths" that decide the issue. The "decisory oath" requires judicial approval and is admissible only in matters which can be disposed of by contract. The "suppletory oath" can be ordered or permitted by the judge in the event that only half proof has been presented and no other means of proof are available. It cannot be tendered in criminal cases.

Roman jurisprudence also pervades the canon law oath philosophy. It has retained the character of the Roman law "*sacramentum*" or the self-curse of ancient law. It is thus defined by one writer: "He who takes the oath, ... places his testimony in the hands of God Himself ... Whose unfailing justice will punish, in time or in eternity, any deliberate falsehood which shall pass his lips." In contrast, however, to the Greek and Roman law, which referred perjurers to direct divine punishment, the canon law has introduced elaborate provisions on the penalties of false testimony and perjury but these penalties are spiritual—the Church ban, and denial of ecclesiastical burial—not secular.

130. See Moriarty 41.
131. In the Roman law, however, there existed an inconsistency between the force attributed to the oath and the principle of Hadrian's Rescript, instructing the judge to decide "*ex sententia animi tui*."
132. Canons 1791, 1869.
133. See text at notes 61-66 supra.
134. Canons 1835, 19, 29, 30; 1836, § 10.
135. Cannon 1829.
136. Canon 1830, § 2.
137. Moriarty at IX.
138. Canons 1743, § 4; 1755, § 3; 1794.
The Oath in French Law: Impact of the Revolution

An examination of the oath in France will shed light on parallel problems in all continental countries, since the French Revolution had a decisive impact on the civil law.

The history of the oath, in the territory that now is France, was not distinctive before the Enlightenment. In the early Germanic era, the focus had been on the accused's oath of purgation in which he was supported by "oath helpers" (co-jureurs) who gave the suspect "a certificate of morality." Since the oath, as compared with the ordeal, was deemed the more "rational" means of proof, the ordeal was employed only if compurgators were not available.

In the feudal era exculpation by "oath-helpers" became rare. Nevertheless, the defendant was put under oath both in civil cases and in trials of minor criminal offenses. In the decision of major crimes both purgation and ordeal yielded to trial by battle, an ordeal form in which appeal, supported by the oaths of both parties, was made to the direct judgment of God. Since trial by battle involved a risk of defeat for the accuser, many sought to prove their causes by means of witnesses. The witnesses would repeat a formula stating that the declarant was an eye-witness. His declaration then had to be confirmed by an oath upon relics. Testimony thus given was absolutely binding upon the judge. It could be challenged only by an accusation of perjury which was then decided by battle.

Later, when magistrates began to decide criminal cases by weighing the testimony, there was introduced the "information" (dénonciation). Unlike the direct accusation, this form of denunciation did not expose the informer to responsibility in the event that the accusation proved groundless. Therefore, in order to protect the accused against malicious secret denunciations, the informer, in some parts of France was required to take the oath de calumnia (to avoid false accusation of a crime).

Rejecting ordeals and compurgators as superstitious, the Church favored the inquisitorial practice, as the means of implementing the divine mission of finding the right judgment. The accused was thereby deprived of all rights in the presence of a charismatic judge. Royal ordinances fossilized this pro-

139. 1 Garraud 41-42 (1907).
140. 1 Garraud 42.
141. Essein, A History of Continental Criminal Procedure 57 (Simpson transl. 1913) [hereinafter cited as Essein-History].
142. Combat "was applied to all the phases and all the actors in the procedure. One battled with the accused, one battled with the judge in the case of a complaint of denial of right; one battled with the witnesses." 1 Garraud 44.
143. Essein-History 60.
144. 1 Garraud 47; Moriarty 3-4, 9-10.
145. The Church regarded its judgment as the true judgment of God. This is the psychological explanation of the transformation of the old Frankish procedure into the Church's inquisitorial practice. 1 Garraud 50-51.
As a corollary of the precious judicial art of the interrogatory, the *ordonnance criminelle* (1670) imposed upon the accused the obligation to take an oath, "assimilating him to a witness in his own cause." In opposition to this requirement, Lamoignon had pointed out that "if it is obligatory, it will infallibly invite the accused to commit an additional crime and to add to the untruth which is inevitable at such junctures a perjury which could be avoided." But in Pussort’s view, the oath seemed "not entirely useless," for "timid consciences are to be found which the fear of perjury might force to acknowledge the truth." This approach prevailed. The oath was deliberately preserved as a *tortura spiritualis*—designed to extract a confession when one was indispensable to imposition of the heavier sentences.

But the theological anti-oath arguments which condemned the *tortura spiritualis* and considered perjury excused by "necessity" because of the "right of self-preservation," when set into the framework of a new ideology, proved extremely effective. That ideology was supplied by the Enlightenment. The "self-preservation" argument apparently had a stronger appeal when it was based on reason and human nature than when it was derived from a theological "law of life." Fashion, which is as significant in politics and law as in art and dress, was a strong moving force. Thus, the French Encyclopedists received with enthusiasm Beccaria’s *Dei delitti e delle pene*, which set forth "rationalistic" and "utilitarian" considerations for abolishing the oath. "There is a palpable contradiction," he said "between the laws and the natural sentiments of mankind in the case of oaths, which are administered to a criminal to make him speak the truth, when the contrary is his greatest interest." Since it is not in accordance with reason that man should prefer immediate destruction to a remote religious retribution, the oath must be ineffective as a means of eliciting the truth. These ideas of Beccaria, which purported "to follow the steps" of the "immortal Montesquieu" and to produce the Benthamite ideal of "the greatest happiness of the greatest number," were read by Voltaire "with infinite satisfaction."

146. Foremost among these ordinances was that of Louis XIV of August 1670, commonly called *Ordonnance criminelle*.
147. J. GAillard 54.
148. This appeal for abolition of the compulsory oath of the accused resembles the argument of the theologian Memmius.
149. See ESMIEUX-HISTORY 224-26.
150. Id. at 358.
151. Id. at 364.
152. See BECCARIA, AN ESSAY ON CRIMES & PUNISHMENTS 62 (Gould transl. 1809) [hereinafter cited as BECCARIA].
153. See BECCARIA 63. ("The motives which religion opposes to the fear of impending evil and the love of life are too weak, as they are too distant, to make any impression on the senses.")
154. BECCARIA 13.
155. See Commentary (attributed to Voltaire) in BECCARIA 137. Voltaire added a humanitarian appeal for the oath’s abolition. See id. at 187-90.
Another important challenge to the oath of the accused was implicit in the attack upon the system of legal proofs within which the oath operated. Strict formal rules determined the force of each type of evidence. In this scheme, the oath performed an important function. For example, in civil cases, two witnesses were required to constitute “full proof,” binding upon the judge. If there was only one witness, i.e., “half proof,” the missing half was supplied by a suppletory oath. In criminal cases under the inquisitorial process, the oath, though not decisive, was used to secure the decisive confession. This system of proof was attacked on epistemological grounds. The reformers demanded “free evaluation of the evidence” or the system of “intimate conviction,” in which the fact finder would not be bound by any particular type of proof but could decide by independently scrutinizing the evidence. Formal legal proof, intended to afford the moral certainty of facts, had become of dubious value and the “probability, but which is called a certainty,”156 that replaced it, was thought to be “much easier to feel . . . than to define . . . exactly.” The jury, as a body endowed with a capacity for such special feeling, was thought especially fit to apply the principle of intimate conviction. The laymen’s “common sense” evaluation of facts was to replace the artificial thinking of professional judges who were assumed to have been prejudiced by their training.157 Moreover, the same principle of intimate conviction was to be applied by the judges when they functioned as fact-finders. In the Enlightenment’s reform movement the oath was found to be inconsistent with the free evaluation of the evidence.

The Revolution implemented these theories with political action. The 1789 cahiers, reflecting general public opinion, demanded abolition of the accused’s oath,158 describing it as “contrary to the natural sentiment of self-preservation common to all.”159 By decree of the Constituent Assembly of October 8-9, 1789, the accused was no longer required to take an oath, except an oath in the nature of a juramentum calumniae, “when he wishes to object to the competency of the witnesses.”160 In dealing with the suspect’s interrogation, 1791 legislation provided that he shall not be required to take an oath to tell the truth, for “common sense suffices to convince of the uselessness and immorality of such oath, which places the suspect between perjury and punishment. . . .”161 Nor was the questioner to indulge in any “ensnar-
ing question" (question captieuse), for he was to receive "the free declaration of the suspect." This type of interrogation was deemed to fit into the general system of preuves de conviction (proof by persuasion), which was substituted for the previous system of formal legal proof.\textsuperscript{162} This change is reflected in the formula of the oath required of jurors: "You swear... to decide in accordance with the charges and the means of defense and in conformance with your conscience and your inner persuasion, with the impartiality and firmness fitting a free man."\textsuperscript{163} One revolutionary statute\textsuperscript{164} went so far as to abolish the oath of witnesses and to require merely a simple "promise to tell the truth"—a promise to be made under the sanction of the testimony being deemed a nullity. However, this sweeping reform was soon abandoned. The Code d'_instruction criminelle of 1808 required an oath of witnesses and, indeed, strict abidance by the statutory oath formula.

Throughout subsequent legislative changes and landmark events,\textsuperscript{165} two concepts have been preserved in French law: the prohibition against putting an accused in a criminal case under oath, and the principle of intime conviction.\textsuperscript{166} In the Napoleonic era, these two principles were carried to other countries of continental Europe. To be sure, Germany had been the first to cease administering the oath to the accused.\textsuperscript{167} And, France has not abandoned either the oath of the witness or the decisive party oath in civil cases, nor granted as extensive concessions to those nonconformists who objected to oaths as did some other countries.\textsuperscript{168} But the impact of the French Revolution, spiritually as well as geographically, introduced a decisive change of attitude toward the oath which has been the source of many reform movements aimed at limiting or abolishing the oath.\textsuperscript{169} By way of example, when Poland recently introduced the "promise to tell the truth" in lieu of the oath, she clearly copied the French revolutionary Code du 3 Brumaire An IV.\textsuperscript{170}

\textsuperscript{162} Law of September 25—October 6, 1791, cited in 1 Garraud 69, 74.

\textsuperscript{163} The instruction regarding the jury said: "The jurors owe the judge respect and deference... but they do not owe him at all the sacrifice of their opinion for which they are accountable solely to their conscience." 1 Garraud 75.

\textsuperscript{164} Code du 3 Brumaire an IV, in 3 Les Codes Annotés De Sirey 98 (1877).

\textsuperscript{165} E.g., the Code d'instruction criminelle of 1808, the Law of December 8, 1897, the abolition of the jury and the introduction of tribunals composed of professional and lay judges deliberating as a body. See 1 Le Pottévin, Dictionnaire-formulaire des Parquets et de la police judiciaire 1144-46 (8th ed. 1954).

\textsuperscript{166} See notes 205-13 infra and accompanying text.

\textsuperscript{167} Muyart de Vouglaux, cited in Esmein-History 372, states that Germany relinquished the practice on the ground "that it is presumable that a person who has been capable of committing the crime is capable of committing perjury to conceal it."

\textsuperscript{168} On this see text at notes 187-88 infra.

\textsuperscript{169} Thus, when countries of the Soviet bloc abolished the oath, they did so on the ground that it is inconsistent with the system of free evaluation of the evidence, in which they take particular pride. Although they claim that system as their own, it was known not only in the Roman and in the Canon law, but was institutionalized in Civil law countries by the French Revolution.

\textsuperscript{170} See text at note 164 supra.
The Oath Controversy in Continental Europe After the Revolution

The oath institution has historically been challenged on several grounds: religion, humanistic ethics and legal policy.

The Religious Issue

Although it was introduced into civil law systems through an essentially religious medium—the canon law—the oath became the subject of great religious controversy after the middle of the eighteenth century. According to one view, religious references in the oath were inconsequential additions that did not affect its essence;\(^{171}\) the religious oath formula did not even imply a theistic attitude.\(^{172}\) Moderates maintained that it was at least possible to secularize the oath by omitting religious references. In the extreme opposing view, even omission of all express religious content could not deprive the oath of its essentially religious connotation. Assuming that the terms "I swear" may be assigned any chosen meaning, some commentators have raised the question of what that meaning is if it is not religious: "the so-called 'secular oath formula' has either a religious meaning . . . or no meaning at all."\(^{173}\)

These divergent positions have all found legal expression. The prevailing view in French law is that whatever importance may be attributed to the secular elements in the oath, its religious quality is the principal source of the credit given to testimony thereunder. Even where the oath formula does not refer to God, the oath "preserves its religious foundation and is taken quasi deo teste."\(^{174}\) In Germany it was said that the terms "to swear" and "oath" have, in themselves a religious meaning.\(^{175}\) The Swiss Federal Council,\(^{176}\) on the other hand, held that the formula "I swear" does not have a religious character, so that requiring a citizen to take the oath in this form, without addition of phrases such as "So help me God" does not violate the provision of the Swiss Federal Constitution that "no one may be compelled . . . to perform a religious act."\(^{177}\)

Of the oath's religious formule, "So help me God" does not express any particular monotheistic creed. Its generality and moderation contrast favor-


\(^{172}\) Baehr, in 51 Preussische Jahrbücher para. 292, 293, cited in Löwenthal, op. cit. supra note 171, at 49 n.3.

\(^{173}\) Id. at 49.


\(^{176}\) Conseil fédéral—Bundesrat is the highest directive and executive authority of the Swiss Federation. Federal Const. art. 95.

ably with the manifold variants of historical formulae. In pagan times oaths were taken on diverse objects and by many gods. After the introduction of Christianity, they were taken by the Gospels, by all the Saints, by specific Saints, by the Holy Virgin, and so on. Often they included atrocious self-curses. Formulae which deviated even slightly from the prescribed form were not tolerated. Occasionally, however, members of deviant religious groups were permitted to be sworn by special rites. But these rituals reflected the antagonism of the community to the oath-taker rather than deference to his religious view. Particularly humiliating were the oaths administered to Jews. Thus it was a mark of progress when Emperor Joseph II of Austria provided in 1782 that “henceforth, everywhere no other oath formula must be used but ‘So verily help me God.’” This formula was to be used by every oath taker, regardless of his religious persuasion. Other countries followed Austria’s example. In this way, the indignities of the oath were somewhat mitigated.

Introduction of the uniform religious formula, however, raised new problems. In Prussia in 1880 a Lutheran minister, testifying in a Wittenberg court before a Jewish judge, insisted on saying: “I swear it, so verily help

178. For examples of the oaths taken in paternity matters see Spoerry, Das Verschwinden des Beweiswiders im Zürcherischen Zivilprozess seit der Reformation 43-44 (1941) [hereinafter cited as Spoerry]. In swearing, the woman was required to say:

If I swear falsely and unjustly, then . . . God the Father, my creator, God the Son, my Redeemer shall no longer come to my aid when my body and soul in the last end are separated from each other; . . . the sacred and bitter suffering and death of the Lord Jesus Christ . . . shall be lost to me and I shall find no consolation for it in all eternity and my sins shall not be purified or washed away by the precious blood of Jesus Christ; . . . God shall never help me when I stand as a perjurer on the Last Day or Judgment with fear, trembling and sadness and my body and soul is judged before the severe Judgment of God and I shall be thrown into the glowing fire, prepared for the devils and all damned and be robbed of the joyful sight of Eternal Grace and God’s sight in Eternity.

After she swore such an oath, the man had to acknowledge paternity of the child.

179. Some of the oath practices required of Jews were spitting on the circumcision genitals, see Frankel, Die Eidesleistung der Juden 69 (1847), and standing barefoot on a raw pig hide, see Schwabenspiegel art. 263 (Gangler ed. 1873) (a 13th century law book).


181. France omitted self-curses, see, e.g., Code d'instruction criminelle (Code of Criminal Procedure) of 1808, and introduced uniform formulae for each category of oath-takers, see Code d'instruction criminelle (1808), as amended by the Law of Feb. 16, 1933 (D.P. 1933.4.51), art. 312 (jurors); art. 75, 155 (witnesses.). See also Fr. Code of Civil Proc. art. 35. For these formula see note 185 infra.

The German Codes of Civil and Criminal Procedure of 1877, § 443 and § 62 respectively, introduced the formula: “The oath begins with the words, ’I swear by God the Almighty and Omniscient,’ and ends with the words, ’so verily help me God.’”

The Norwegian Law of May 3, 1893, introduced the formula: “I swear this, so verily help me God the Almighty and Omniscient.” See Thudichum 117.
me God by Jesus Christ.” The judge ruled that the oath was invalid, since it contained an addition not given in the statutory formula, and he fined the minister for refusing to take the required oath. His decision was reversed.\footnote{183} In 1884, the Reichsgericht held that additions to the formula do not affect the validity of the oath so long as they do not contradict or limit its meaning or add a reservation.\footnote{183} This view has been criticized as introducing an element of inequality among the oath takers.\footnote{184} In France today any deviation from the oath formula, however slight, renders the testimony invalid; if the judgment depends on that testimony, it is reversible.\footnote{185}

\footnote{182} THUDICHUM 109.

\footnote{183} Id. at 111.

\footnote{184} See id. at 112-13. Thudichum is particularly concerned with the effect produced in the popular mind when one juror adds to the legal formula “So help me God” the phrase “and all Saints,” another “and Saint Peter,” and a third one, “and the Holy Virgin,” etc.

\footnote{185} 1. GARRAUD 593. Before the Judge-Investigator, before the Tribunal correctionnel and Tribunal de police, witnesses swear “to tell the whole truth, nothing but the truth.” Fr. Code of Crim. Proc. arts. 103, 446 & 536, Law No. 57-1426, Dec. 31, 1957, [1958] Journal Officiel 258, as amended and completed, Ordinance No. 58-1286, Dec. 23, 1958, [1958] Journal Officiel 11711. Before the Cour d'assises they swear “to speak without hate and without fear, to tell the whole truth, nothing but the truth.” Fr. Code of Crim. Proc. art. 331, para. 3. Experts, on the other hand, swear to “accomplish their mission to make their report and to give their opinion on their honor and conscience.” Fr. Code of Crim. Proc. art. 160, para. 1. In civil cases witnesses swear “to tell the truth.” Fr. Code of Civil Proc. art. 263, para. 2, as amended, Decree No. 58-1289, Dec. 22, 1958, [1958] Journal Officiel 11608. In Procureur général près la cour d’appel de Pau c. Dame Fengas et Costedoat, Cour de Cassation (Ch. crim.), Feb. 16, 1950, [1950] Dalloz Jurisprudence [hereinafter cited as D.] 213 (Fr.), upon appeal of the Procureur Général from an acquittal on a charge of abortion, and complicity in abortion, the court held that the statement in the judgment reciting that the witness was heard after having “taken the oath in conformance with law” (conformément à la loi) violated the requirement of art. 155 of former law, for “in view of the diversity of the formule provided for by law, this statement is insufficient to establish that the witness, whose testimony was relied on [in the judgment], took the oath according to the terms of article 155; the judgment is, therefore, invalid.” But the Chambre criminelle held a statement that the witness was heard after having taken the oath “in conformance with article 155, Code d'instruction criminelle” to be sufficient. Janton v. Min. publ., Cour de Cassation (Ch. crim.), May 27, 1933, [1933] Dalloz Recueil Hebdomadaire 381 (Fr.). Testimony under oath to tell “the truth, nothing but the truth” rather than “the whole truth, nothing but the truth” was held invalid. Lacascade, Cour de Cassation (Ch. crim.), Jan. 25, 1912, [1912] D. V (Sommaires) 28 (Fr.). Even before the tribunal de simple police, a statement in the judgment that the witnesses simply swore to “tell the truth” was held reversible error. Platet, Cour de Cassation (Ch. crim.), March 2, 1950, [1951] Sirey Recueil Général I. 104 (Fr.). The oath formula for experts need not be observed quite as rigidly as that for witnesses. But a statement in a judgment rendered by a tribunal de simple police that the expert “took an oath in court on June 30, 1949,” was held insufficient, Code d'instruction criminelle art. 44 being interpreted as requiring terms at least “resembling those which evince from the wording used by the legislator.” Dame Chartier, Cour de Cassation (Ch. crim.), Aug. 7, 1951, [1951] D. 588 (Fr.).

Since deviations continue to occur, this oath formalism has been a source of considerable annoyance to appellate courts. Maurice Patin, President of the Chambre criminelle
“By taking the oath man invokes God as a witness of his sincerity and implicitly offers himself as subject to divine vengeance in the case of perjury.” This statement probably reflects the predominant theory in civil law countries. In partial acknowledgment, all countries that recognize the oath afford more or less far-reaching concessions to religious dissenters. They may be sworn in accordance with the rites of their own religion. Those who object to the oath on religious grounds or because they are non-believers are usually permitted to take it without a religious clause. But a witness may not refuse a simple affirmation or a testimonial oath that lacks

of the Cour de Cassation, reporting in Procédure Criminelle, Revue de Science Criminelle et de Droit Pénal Comparé 638, 639 (1958), states that it is “depressing for the Cour de cassation to have to reverse a judgment of a Cour d'assises and order a new trial simply because the witnesses swore to tell ‘the truth, nothing but the truth,' whereas they should have sworn to tell ‘the whole truth, nothing but the truth.’” He adds that “one might say that this is a matter of mere form,” but that “we must not forget that observation of forms is one of the fundamental guaranties of liberty.”

186. VITU, PROCÉDURE PÉNALE 198 (1957).

187. Privileges are granted in France to Jews, Muslims, Anabaptists and Quakers upon request. See 2 ENCYCLOPÉDIE DALLOZ, op. cit. supra note 174, at 846-47. France does not require, but merely permits, members of non-conformists groups to follow the rites of their own religion. 2 id. at 847.

It has been said that such a person cannot be prevented from taking the oath in accordance with the rite common to all Frenchmen, “for it would be unfair to him to claim that his conscience is not bound by such an oath, when he makes assurances to the contrary.” Cited in 2 GARSONNET & CÉZAR-BRU, TRAITÉ THÉORIQUE ET PRATIQUE DE PROCÉDURE CIVILE ET COMMERCIALE 570 (3d ed. 1912). The German Strafprozessordnung (Code of Criminal Procedure) § 66e, provides that where a “witness declares that he is a member of a religious sect which the law permits the use of certain affirmation formulas in lieu of an oath, the affirmation made in accordance with the formula of such religious sect is deemed equal to an oath.” See also German Zivilprozessordnung (Code of Civil Procedure) § 484. The formula or rite for the sect must be observed, or a judgment based on it will be a nullity. See SCHMIDT, LEHRKOMMENTAR ZUR STRAFFPROZESSORDNUNG UND ZUM GERIChTSVERFASSUNGSGESETZ comment to § 66e, at 159-60 (1952).

188. The former Swiss Federal Law on Federal Procedure (Law of November 22, 1850, concerning Procedure before the Federal Tribunal in Civil Litigation) was considered automatically amended by enactment of the constitution of 1874, so as to permit refusal to take an oath containing a religious clause. See BURCKHARDT, op. cit. supra note 177, at 452. There is no oath in the present Swiss Federal Civil Procedure. Bundesgesetz über den Bundeszivilprozess vom 4. Dezember 1947, BUNDESRECHTSPFLEGE 53-74 (Bundeskanzlei ed. 1953). In criminal procedure anyone required to swear may take a vow instead of an oath. Bundesgesetz über die Bundesstrafrechtspflege vom. 15. Juni 1934, art. 86, BUNDESRECHTSPFLEGE 92 (Bundeskanzlei ed. 1953).

a religious clause on the ground that in his view both carry religious implications and that he is a non-believer. Such an oath has been held either not to be a religious act 189 or to be both a civic and a religious act. 1890 Norway is an example of the more lenient jurisdictions. There, legislation has long provided that a person who refuses to swear on the ground that the oath is contrary to his religious persuasion or because he does not believe in an almighty and omniscient God—even though the witness is still a member of the state church—shall affirm upon his honor and conscience, subject to the same responsibility that attaches to the taking of a religious oath. 191

Catholic and most Protestant religious authorities are not opposed to use of the oath by the state; indeed, some favor it as an affirmation of religious influence in secular matters. 192 Since most sectarian and atheistic objections to the oath are met by various provisions granting relief to the objectors, religious opposition to the oath has, in the course of time, ceased to be a serious practical issue.

Ethical and Humanistic Objections to the Oath

The most weighty objections to the oath have been raised by secular philosophers, humanists and humanitarians. Kant, in part reflecting earlier ecclesiastical arguments, stigmatized the oath as "tortura spiritualis" 193 and as "civil blackmail," 194 based on exploitation of a superstition. He also challenged the right of the legislature to authorize judges to require the oath, claiming that compulsion to take the oath violates "inalienable human freedom." 195 Fichte also implicitly condemned the immoral role which the State assumes in administering the oath. 196

Utilitarian rationalists, among them Beccaria and other continental Benthamites, stressed the irrationality of the oath requirement. They pointed out

189. See holdings of the Swiss Federal Council, cited note 177 supra. According to the German interpretation, the taking of an oath is not "a religious practice." See SCHMIDT, op. cit. supra note 187, comment 1 to § 66c, at 158.
190. ENCYCLOPÉDIE DALLOZ, op. cit. supra note 174, at 847 n.7.
191. See NOR. CODE OF CRIM. PROC. §§ 188, 197(5) (1887), as amended, Act of May 10, 1893, No. 2; NOR. CODE OF CIVIL PROC. §§ 219, 247(4), Act of Aug. 13, 1915, No. 6. In the case of those whose refusal to swear is based on individual grounds the court must inquire into the earnestness of their convictions.
192. See Hegler, op. cit. supra note 175, at 26, 28 n.159.
193. 8 KANT, METAPHYSISCHE ANFANGSGRÜNDEN DER RECHTSGLEHRE § 40 (Rosenkranz ed. 1838).
194. 8 KANT, DIE RELIGION INNERHALB DER GRENZEN DER BLOSSEN VERNUNFT 190 (Kirchmann ed. 1869).
195. 8 KANT, op. cit. supra note 193, § 40.
196. See FICHTE, GRUNDLAGE DES NATURRECHTS 139-40 (1797).
that punishment for perjury is often less disadvantageous to the declarant
than would be the results of truthfulness. 197

More recent arguments have invoked the aid of ethnological and anthropo-
pological knowledge. It has been said that the oath is not a truly religious
institution, for it is not an expression of man's relationship to a personal God
and does not actually invoke him as a witness. Rather it carries the mystical-
magic meaning of a "self curse" in which man stakes himself, his life, his
salvation or some other precious possession (originally, his weapon or his
horse) as a pledge of truth. The oath taker thereby uses superhuman forces,
which harm him if he lies. 198 Reliance on such supernatural powers is in-
consistent with twentieth century man's strivings toward rationality.

The most powerful argument advanced against the oath has been the one
based on the proposition that the requirement postulates a distorted image of
man, one of an unworthy, undignified, contemptible creature. This challenge
to the oath is implicit in Kant's belief that man has an absolute duty of truth-
fulness which transcends any ulterior purpose. 199 Of course, the idea of a
"rational man" conceived in this Kantian view differs from that of the ration-
ally calculating egoist of the utilitarian school. A more utilitarian version of
the Kantian position may be found in Fichte's doubt that a statement uttered
under oath is any more reliable than unsworn testimony, if given by an un-
trustworthy declarant. 200

Adherents of the oath answered the challenge that it is an institution based
on "superstition," and therefore immoral, by arguing that while superstition
is primitive, it is not ipso facto reprehensible as immoral. 201 They met the
criticism of the oath as violative of liberty and equality by saying that the
substitutes proposed for the oath, the affirmation for example, are subject to
the same criticism, for they too interfere with liberty and operate unevenly in
the case of different individuals. 202 And the rationalistic utilitarian criticisms
are easily shown to be a result of decline of religious influences. When re-
ligion is a potent force in men's minds, the very premise of the rationalistic
argument, that a lesser disadvantage attaches to perjury than to truthfulness,
is absent. And recent psychology has made it appear doubtful that man will
invariably lie just because the evil he fears as a consequence of perjury is
smaller than that which he anticipates as a result of truthfulness.

The decisive argument—the one that ultimately prevailed over repeated
reform projects—is that the oath affords "a particular safeguard to truth
finding" and that "the State should not forego utilizing this means of in-

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197. See text at 52-54 supra.
198. See Hegler, op. cit. supra note 175, at 24, 25.
199. See Kant, Religion innerhalb der Grenzen der blossen Vernunft 2 (1st
   ed. 1798).
200. Fichte, op. cit. supra note 196, at 139 ("[A] person who is capable of publicly
    affirming a falsehood will swear a false oath as well").
201. See Hegler, op. cit. supra note 175, at 27.
202. Id. at 28.
Those considerations of utility have afforded the most effective support of the oath institution in continental Europe. Of course, if paramount significance is attributed to such “utility,” then the value of the oath might at least superficially be said to be enhanced rather than weakened by its foundation upon a superstition, for superstitions often have a more forceful impact upon men than explicit worldly sanctions.

Legal Policy Arguments

The principal legal criticisms of the oath during the post-revolutionary period on the continent were that it conflicts with the principle of free evaluation of the evidence and that it produces a virtual “pestilence of perjury.”

The first objection must be considered in the light of the historical background of the oath. The oath of purgation had operated as a formal means of proof which governed the judge’s decision. It was an ordeal, not a form of invoking a “Judgment of God.” Even after this oath of purgation disappeared in criminal cases, its corollary in civil cases, the decisive party oath, was preserved in the canon law and in the legal systems of civil law countries. But the trend prevailing at present is to limit or exclude the party’s decisive oath entirely. Several countries have replaced it with the English rule permitting parties in civil cases to testify “as witnesses in their own case” and admitting them to a testimonial oath.

Wholly aside from the formal, decisive party oath, the question has been raised whether even a testimonial oath, which is not decisive of the issue but undoubtedly has some impact on the judicial mind, is consistent with the principle of “free evaluation of the evidence” (“intime conviction” or “freie Beweiswürdigung”). Clearly, under this principle, a judge is perfectly free to believe the unsworn testimony of one witness in preference to the sworn testimony of another. But the scope of that freedom has been differently conceived in successive periods of legal history as the prevailing notions of judge and jury functions have varied. In the heyday of its popularity in civil law countries, the jury was thought to be divinely endowed with a unique fact-finding ability. Indeed, the view that the “twelve men good and true” represent the twelve Apostles and are inspired by Grace and guided by the light of the Holy Spirit was seriously advanced. Echoes of this view are found in the classic form of instruction which the chairman of a French jury

204. This Civil Law phenomenon will be discussed in the second part of this Article.
205. “Free evaluation of the evidence” was introduced into modern civil law by the French Revolution as part of a comprehensive system of reform, particularly as incident of jury trial. Basically, it means that there are no formal methods of proof. See 2 Vidal, COURS DE DROIT CRI MiNEL ET DE SCIENCE PÉNITENTIAIRE 1043 (9th ed. Magnol 1949).
was required to read to the jurors. This instruction exhorted them that "in silence and in self-communion they ask themselves and in the sincerity of their conscience seek for the impression which the evidence adduced against the accused and the means of defense have made upon their mind." However, as enthusiasm for the jury waned, the views of proper jury discretion were revised. It was denied that "free evaluation" by juries meant determination by sheer emotional reaction. Although the same jury instruction was held to be equally applicable to judges, they were obliged to state the bases on which they reached their fact findings, so as to afford an opportunity for review.

Since today "intimate conviction" "does not relieve [the judge of the requirement of using] a logical method in evaluating the evidence submitted to him," he must supply persuasive rational—and not merely emotional—grounds for his trust in a particular witness and his lack of confidence in another. In this context the fact that one witness testified under oath while another was not sworn can hardly be disregarded. For that reason, the oath has been thought to be even more inconsistent with "free evaluation of the evidence," when that evaluation must satisfy a rationality standard than when it is interpreted—as it was previously—to consist of a purely intuitive method of fact finding. Moreover, various legal rules indicate a preference for sworn testimony. The fact finder cannot disregard this preference even within the framework of "free evaluation." Thus, French commentators have termed the

208. It was also to be affixed in the jury room. French Code d'Instruction Criminelle art. 342 (repealed in 1941). This instruction read in full as follows:

The law does not call jurors to account for the means by which they have been persuaded; it does not prescribe any rules on which they must specifically make dependent the completeness and the sufficiency of proof; it provides that in silence and self-communion they ask themselves and in the sincerity of their conscience seek [to find] what impression the evidence adduced against the accused and the means of defense have made upon their mind. By no means does the law tell them: You shall take to be true a fact attested to by a given number of witnesses; You must not consider as sufficiently established any proof which was not adduced by a given type of report, a given document, a given number of witnesses or a given number of clues; it does not ask them any questions but a single one, which contains the full measure of their duties: Do you have an intimate conviction?

This instruction, except the sentence "By no means ... given number of clues," has been restored by the new Fr. Code of Crim. Proc. art. 353. It is now read by the president of the tribunal to "judges," not only "jurors."

209. The jury has been severely criticized by the positivist school of criminology. Garofalo, Criminology 355-64 (Miller transl. 1914); Ferré, Criminal Sociology 485-97 (Kelly & Lisle transl. 1917). As a result, it has been replaced in many civil law jurisdictions by professional and lay judges deliberating together.


212. Vitu, op. cit. supra note 186 at 188.
distinction drawn between witnesses who testify under oath and unsworn witnesses a survival of the system of “preuves legales” (formal legal proof) and incompatible with the system of intimate conviction.\textsuperscript{213}

Much as incompatibility of the oath with the evaluation of evidence “\textit{ex sententia anini tu}” (by the judgment of your [intuitive] mind) was already noted in Roman law, so the tendency of the oath institution to produce a virtual “perjury pestilence” was observed before the era of enlightenment. The theological writer Memmius estimated perjury to occur in ninety of a hundred criminal cases. He, like Beccaria at a later date, thought that where self-preservation is at stake, perjury was natural, inevitable and hence excusable. But perjury occurs far beyond situations of necessity, perhaps as a result of indiscriminate use of the oath in trifling matters. Among the several alternative means of coping with the perjury problem, that one which tends to reduce the scope of the crime and therefore the number of punishable instances deserves particular notice, both as a method of economy of punishment and as a means of restoring to the oath its proper role. Ernst Ferdinand Klein, a noted jurist and a collaborator on the Prussian codes, advocated the abolition of all promissory oaths and, among the judicial oaths, all those required in criminal and minor civil cases. In important civil cases, he thought swearing could be abolished, so long as a party might demand that a witness swear to a particular sentence. He also demanded that affirmation on honor and conscience be sanctioned by legal penalties.\textsuperscript{214} Such reform projects had a special impact on the development of modern civil law legislation.

\textbf{HISTORY OF THE OATH IN ANGLO-AMERICAN LAW}

The development of the oath practice in common law countries was decisively influenced by Germanic practices. Naturally enough, in view of the Anglo-Saxon heritage, early procedure in England was but a variant of the ancient Germanic procedure. Even that distinctive English feature—the jury trial—grew out of Germanic oath practices. Later, the canon law served as a medium whereby continental ideas reached the common law. A marked parallelism of ideas between the civil-law and common-law systems, confirms theories of cross-fertilization.

\textit{Early Methods of Proof: The Oath}

The earliest form of trial in England was “a proceeding between the parties, carried on publicly, under forms which the community oversaw. They listened to complaints which often must follow with the minutest detail cer-
tain forms ‘de verbo in verbum,’ which must be made probable by a ‘fore-oath,’ complaint-witnesses, the exhibition of the wound, or other visible confirmation.”215 The fore-oath was a preliminary oath by which the plaintiff evidenced his good faith; thereafter he asserted his claim in set words, addressed to the defendant.216 After defendant’s denial, which was also formulated in terms of a legal conclusion that the plaintiff had no claim, the assembly proceeded to render “a proof-judgment, determining which of the parties had the right to prove, what he was to prove, and how the proof was to be made.”217 As in all Germanic laws, proof was “one-sided”; only one party was admitted to proof. His proof decided the issue and dispensed with any ultimate judgment. It was the judgment.

Apart from documents, the following forms of proof or trial were recognized: witnesses; the party’s oath, with or without fellow-swearers; the ordeal; and battle.218 The oath played a role in several of them. In some it was not an oath as to the truth of facts within the declarants’ knowledge. In others the “truth” attested to was a borderline concept between truth as an expression of social power and truth as accordance with objective reality.

Trial by witnesses “appears to have been one of the oldest kinds of ‘one-sided’ proof. There was no testing by cross-examination; the operative thing was the oath itself, and not the probative quality of what was said, or its persuasion on a judge’s mind.”219 The function of the oath was to provide a standard form for executing the magic ritual, which was believed to produce a just result. Therefore, observance of the ritual, rather than truthfulness of the allegation, was of the utmost importance. “Any stumbling or stammering, any variation from what has been ordained as to gesture or bodily position, is fatal; the oath is then said to have ‘burst,’ and the proving party has lost his cause.”220 In the twelfth century such elaborate forms of asseveration had been devised that, rather than attempt them, men preferred to take their chances with the hot iron.221 Among the witnesses produced by the parties, only one swore to something approximating an allegation of fact—actually, a legal conclusion. The others swore that the oath thus taken was “clean and

215. 1 THAYER 8-9.
216. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 13 (1952) [hereinafter cited as MILLAR].
218. There was no technical “trial” in a modern sense. The terms used to describe the event are probatio, purgatio, defensio, and only seldom, if ever, in the earlier period, triatio. 1 THAYER 16.
219. 1 THAYER 17.
220. MILLAR 14.
free from falsity."\(^\text{222}\) The number of supporting witnesses seems to have been
decisive, as demonstrated by the fact that the court would adjourn in order
to afford either party an opportunity to increase the number.\(^\text{223}\)

In "trial by oath" the case turned on the defendant's oath which he gave
with fellow-swearers (probably his kinsmen). As among all other Germanic
peoples, these declarants were not true witnesses but compurgators, although
they were constantly called by the ambiguous name \textit{testis}.\(^\text{224}\) While the re-
quired number of compurgators could be as high as three hundred persons,
a foreigner might, according to certain customs, substitute for compurgators
his own oath taken in the six nearest churches, that is, six times.\(^\text{225}\) Clearly,
the magic of the oath lay in its sheer external force, determined by the num-
er of swearers or repetitions. This form of trial—the right to purge oneself
conclusively by oath—was regarded as a precious privilege.\(^\text{226}\) Known as
"wager of law" it is probably related to the Roman "\textit{sacramentum.}" Since it
was deemed based upon "\textit{in positivo ley},"\(^\text{227}\) this system withstood all chal-
lenges that the defendant might swear falsely. In 1833 it was finally abolished
by Parliament.\(^\text{228}\)

According to the dominant view, proof by witnesses or by oath at this
early period was actually an ordeal.\(^\text{229}\) However, this interpretation may be
incorrect, if ordeal is equated with divine judgment. For belief in self-opera-
tive magic of the oath is acknowledged to have preceded belief in divine
intervention. Thus, it is quite possible that the oath functioned autonomously—
without the gods' assistance. And the witnesses are believed to have func-
tioned as instruments of magic. At a more advanced period, when the ordeal
was undoubtedly conceived of as a divine judgment, the oath often served
as an alternative to, or a supplement of, the ordeal. To the extent that the
oath eventually was predicated upon God's judgment it may loosely be referred
to as an ordeal. However, even then it remained distinctive, for the oath itself
rather than divine intervention decided the issue at bar. Perhaps it was due
to this independence that the oath was regarded as a more "rational" means
of proof than the ordeal. In England as well as on the Continent, the oath was
substituted for the ordeal after the ban on the latter by the Fourth Lateran
Council in 1215.\(^\text{230}\)

\(^{222}\) 1 \textsc{Thayer} 19.
\(^{223}\) 1 \textsc{Thayer} 22.
\(^{224}\) 1 \textsc{Thayer} 25.
\(^{225}\) 1 \textsc{Thayer} 28.
on the case "takes away the defendant's benefit of wager of law, and so bereaves him
of the benefit which the law gives him, which is his birthright.")
\(^{227}\) See the opinion of Ayshton, J., in Y.B. 33 Hen. 7, f. 7, pl. 23 (1454-1455);
\(^{228}\) Statute of 3 & 4 Will. 4, c. 42, § 13 (1833).
\(^{229}\) See, \textit{e.g.}, Millar 14.
\(^{230}\) 1 \textsc{Thayer} 39.
Trial by battle, a Norman import, appears (in combination with the oath) as an *ultima ratio* of proof for the first time in the case of Bishop Wulfstan *v.* Abbot Walter, in 1077, of which it was reported: "Thereof there are lawful witnesses . . . who saw and heard this, ready to prove it by oath and battle."\(^{231}\) Before the battle the champions usually swore to the truth of their allegations which were based on their own personal knowledge or that of their fathers.\(^{232}\) In this context, the "power" of truth was established by arms and oath magic. This combination clearly points to the social rather than cognitive character of the "truth" in issue, for trial by battle has been said not to have been an ordeal at all since it had aspects other than an appeal to Heaven.\(^{233}\)

**The Jury Oath**

The Normans had brought to England the inquisition in matters of public administration. This investigation consisted of summoning, by public authority, a number of likely people who might be expected to tell the truth and in examining them under oath as to matters that occurred in the vicinity. This process gave birth to the jury system. The original nature of the jury institution is rooted in proof by witnesses. As stated by Brunner, "[T]he history of juries should record the remarkable fact that the trial jury [*Beweisjury*—jury of proof] is accompanied by remnants of an obsolete procedure by witnesses, while alongside it proof by compurgators is not only preserved with undiminished strength but has also partly penetrated the area of proof by witnesses."\(^{234}\) Jury proof was but a special type of proof. "*Lex*" in the Germanic law was not "law" (as in the Roman "*legis actiones*") but a mode of trial or "proof." There are the "*lex apparent* (manifesta)" which was the ordeal, the "*lex disraisinae*" which was the oath of purgation, the "*lex probabilis*" which was a collective name for miscellaneous types of proof, and the "*lex recordationis*," proof by select witnesses concerning transactions which had taken place in their presence in court. Proof by the "*lex inquisitionis*" was an addition to this group.\(^{235}\) Trial by jury (*per legem terrae*) emerged as one of these prevailing formal and mechanical "trials." Thayer compared all these "trials" to a prize-fight, in which the issue was decided by a struggle. That comparison surely holds for the various ordeals:

> [T]he accused party "tried" his own case by undergoing the given requirement as to hot iron, or water, or the crumb. So of the oath; the question, both law and fact, was "tried" merely by the oath, with or without fellow-swearers. The old "trial by witnesses" was a testing of the question in like manner by their mere oath. So a record was said to "try"

\(^{231}\) 1 Thayer 40.

\(^{232}\) 1 Thayer 43.

\(^{233}\) See 1 Thayer 39. The last appearance of this institution was in 1815. See Ashford *v.* Thornston, 1 B. & Ald. 405, 106 Eng. Rep. 149 (K.B. 1818). It was abolished in 1819 by statute. Act to Abolish . . . Wager of Battle, 1819, 59 Geo. 3, c. 46.

\(^{234}\) Brunner, *Die Entstehung der Schwurgerichte* 195 (1872).

\(^{235}\) Id. at 177-89.
itself. And so when out of the midst of these methods first came the trial by jury, it was the jury’s oath, or rather their verdict, that “tried” the case.\textsuperscript{236}

The jury developed from “a corporate association of witnesses.”\textsuperscript{237} The jury oath constituted it the “oath community” reminiscent of the community of the Germanic compurgators who swore together as a unit “with total mouth.” As a method of proof, the jury was preferred to the duel because “by as much as the testimony of several credible witnesses outweighs in courts that of a single one, by so much is this process more equitable than the duel. For while the duel goes upon the testimony of one sworn person, this institution requires the oaths of at least twelve lawful men.”\textsuperscript{238} It was the power of the oath which decided the case and the number of jurors, like the number of compurgators, served to increase the force of the oath, and enhanced its magical or social rather than cognitive function.

It is difficult to trace the process of thought which led to separation of the jury verdict from the jury oath or to determine the exact time in history when the members of the jury began to function as judges who reach a decision on the basis of evidence presented during trial. In all probability this development was similar to that which resulted in the transformation of compurgators into witnesses deposing as to facts within their knowledge, upon oath \textit{de veritate dicenda} rather than \textit{de credibilitate}. There is room for doubt that this latter process of development has ever been completed, for even today fact and legal conclusion cannot be neatly severed. Therefore it may be argued that an oath cannot ever be a pure oath \textit{de veritate}.\textsuperscript{239}

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\textit{The Accused's Oath: Origins of the Privilege Against Self-Incrimination}
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It is perhaps due to the inherent inadequacy of fact finding by any rational process of legal proof, added to inertia and atavism, that symbolical fact finding by prescribed forms or rituals has been preserved long after its irrationality had been recognized. Perhaps also these are the reasons that, in England, trial by battle survived until 1815 and wager of law was not abolished until 1833. However, there seem to be other more practical reasons for the survival of these primitive procedures. They were often advantageous to defendants and, accordingly, were prized as privileges, indeed, as civil liberties. In civil wager of law or criminal purgation, the defendant could avoid all liability merely by taking an oath, and as stated in \textit{Slade's Case}, “men’s consciences grew so large that the respect of their private advantage rather induces men . . . to perjury.”\textsuperscript{240} Also, punishment of perjury was, for a long

\begin{itemize}
\item \textsuperscript{236} Thayer, “\textit{Law and Fact}” in \textit{Jury Trials}, 4 Harv. L. Rev. 147, 156-57 (1890).
\item \textsuperscript{237} Brunner, \textit{op. cit. supra} note 234, at 279.
\item \textsuperscript{238} Glanvill, \textit{De Legibus et Consuetudinibus Regni Angliae} bk. 2, ch. 7, at 63 (Woodbine ed. 1932), translated in 1 Thayer 42 n.1.
\item \textsuperscript{239} See Silving, \textit{Law and Fact in the Light of the Pure Theory of Law}, in \textit{Interpretations of Modern Legal Philosophies} 642 (Sayre ed. 1947).
\item \textsuperscript{240} 4 Co. Rep. 92b, 95a, 76 Eng. Rep. 1074, 1078 (Q.B. 1602).
\end{itemize}
time, relegated to divine retribution. Many a defendant deeply resented any attempt to deprive him of his "birthright" (to wage his law or purge himself) by submitting him to a more rational method of proof. The right to secure acquittal in a criminal case by taking an oath of purgation was asserted against attempts of ecclesiastical authority to force the accused to state the truth by compelling him to take the canon law oath *de veritate dicenda*. That oath had been introduced as part of the procedure *ex officio* (which replaced the adversary, party dominated, old Germanic procedure) and originally was aimed at ascertaining substantive truth by the somewhat more rational method of questioning. It was the introduction of the oath *de veritate dicenda* which seems to have created the controversy from which our privilege against self-incrimination resulted.

Mary Hume Maguire has shown that, contrary to Wigmore's assertion, jurisdictional jealousy between temporal and ecclesiastical courts was not the only root from which the privilege developed.\(^{241}\) She found that opposition to the oath *ex officio* as "repugnant to the ancient customs of our Realm" and contrary to the spirit of the common law was an even stronger factor in the development. The common lawyers objected to initiating proceedings by an *ex officio* oath instead of by the conventional methods of accusation and denunciation.\(^{242}\) They defended the ancient Germanic adversary procedure and the right to defend oneself by oath of purgation, characteristic of that procedure, against the inquisitorial procedure and the oath *de veritate dicenda* incident thereto.\(^{243}\) This, indeed, appears from a proper reading of the maxim:


\(^{242}\) They objected to the official rather than private form of proceedings, as well as to the "fishing interrogatories *viva voce*." *Id.* 203, 208.

\(^{243}\) This is Lilburne's account of the oath he was asked to take in the Star Chamber:

... and then he bid me pull off my glove, and lay my hand upon the book. What to do, sir? said I. You must swear, said he. To what? "That you shall make true answer to all things that are asked you." Must I so, sir? but before I swear, I will know to what I must swear. ... And withal I perceived the oath to be an oath of inquiry; and for the lawfulness of which oath, I have no warrant; and upon these grounds I did and do still refuse the oath.

Trial of John Lilburn, 3 State Trials 1315, 1320-21 (G.B. Star Ch. 1637). The court order also stated that Lilburne and Wharton "denied to take an oath to make answer to Interrogatories." *Id.* 1323. The clearest expression of Lilburne's position is contained in the following colloquy:

Then said the Lord-Keeper, Thou art a mad fellow, seeing things are thus, that thou wilt not take thine Oath, and answer truly.

My honourable lord, I have declared unto you the real truth; but for the oath, it is an oath of inquiry, and of the same nature as the High-Commission Oath; which oath I know to be unlawful; and withal I find no warrant in the Word of God for an oath of inquiry, and it ought to be the director of me in all things that I do: and therefore, my lords, at no hand, I dare not take the oath. (When I named the Word of God, the court began to laugh, as though they had nothing
"Licet nemo tenetur seipsum prodere, tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare." Wigmore translated the sentence as: "Though no one is bound to become his own accuser, yet when once a man has been accused (pointed at as guilty) by general report, he is bound to show whether he can prove his innocence and to vindicate himself." In this translation the decisive term "licet" is omitted and "ostendere" is erroneously translated as "prove." The following translation comes closer to the original: "No one is bound to inform against himself (literally, produce himself); but, when exposed by public repute (fama), he is held (tenetur) and permitted (licet) to show, if he can, his innocence and purge himself." Notice that there is no mention in the maxim of a confession or admission. The only possibility is a "showing" of "innocence." This, indeed, was the function of the conclusive oath of purgation, the "oath of innocence," a corollary of wager of law. It was accorded to the accused by both the Germanic and the canon law, as his "right and duty, against an accusation, to show his innocence by oath of purgation [with compurgators]." Obviously, the maxim modified Thomas Aquinas' argument which had supplied the justification for the oath de veritate dicenda of the canon law inquisitorial procedure, that if there had been infamia or probatio semiplena, the suspect—when asked to confess—must neither lie nor conceal the truth. Significantly, even within the system of inquisitorial procedure at canon law no one was ever required to inform against himself—"prodere seipsum." That procedure merely demanded of the proditus (accused) that he confess. Wigmore's version of the maxim would be but a re-statement of the inquisitorial rule, except that he did not mention confession to do with it.) My lords (said Mr. Goad) he told me yesterday, he durst not take the oath, though he suffered death for the refusal of it. And with that my Lord Privy-Seal spoke: Will you (said he) take your oath, that that which you have said is true? My lord (said I) I am but a young man, and do not well know what belongs to the nature of an oath, (but that which I have said, is a real truth) but thus much; by God's appointment, I know an oath ought to be the end of all controversy and strife, Heb. 6. 16. and if it might be so in this my present cause, I would safely take my oath, that what I have said is true. Id. at 1325. (Emphasis added.) Obviously, Lilburne offered to take the conclusive "oath of purgation," his "birthright" under the common law, the corollary of "wager of law," at issue in the Slade's Case. After being punished for contempt, Lilburne stated that he was condemned "because I would not accuse myself." Id. at 1329. Notice also that Lilburne used the old theological argument against the oath, that it violates man's right of self-preservation: "Withal, this Oath is against the very law of nature; for nature is always a preserver of itself, and not a destroyer. . . ." Id. at 1332.

244. Wigmore, Nemo Tenetur Seipsum Prodere, 5 HARV. L. REV. 71, 83 n.2 (1892).

245. "Ostendere" is not equivalent to "probare." The passage does not indicate that the suspect must "prove" anything. He "shows" his innocence by merely taking the oath. This is not "proof" in a technical sense. Also "tenetur" has a double meaning; it may mean "he is bound," but also "he is held (deemed, believed)."

246. See 4 HINSCHIUS, SYSTEM DES KATHOLISCHEN Kirchenrechts MIT besonderer Rücksicht auf Deutschland 840 (1888).
—the very object of inquisition. In the absence of any reference to confession and in the light of the emphasis placed upon the "showing of innocence," the meaning of the maxim is plain: it grants to the suspect exemption from the oath de veritate dicenda and confers upon him the right and duty of purging himself conclusively by taking the ancient Germano-canonic "oath of purgation." Obviously the maxim was so understood by "Freeborne John" Lilburne, who defied the Council of the Star Chamber, and secured the celebrated granting of the self-incrimination privilege.

The English prohibition against administering the oath de veritate dicenda to an accused was a modern view of the subject, upon which the enlightened minds of continental Europe looked with admiration and envy. Many believe that civil law countries simply adopted the English prohibition. Differences in the justification and scope of the continental and English rules as well as a long history of opposition to the oath in continental Europe render this temptingly simple explanation rather doubtful. In any event, the popularity of the English rule in civil law countries did not guarantee its survival in England or the United States. It was repealed in England in 1898, and defendants were first granted the "privilege" of giving evidence sworn to be true. In the United States the oath of an accused had been accepted earlier. Only Georgia has, until the present time, withstood all temptations of permitting the accused to be sworn. Indeed, unlike civil law countries and the remaining American states, Georgia does not subject the accused to any inquisitorial questioning at all, but instead affords him an opportunity to make "just such statement as he sees fit"—a statement which the jury is free to believe in preference to the sworn statement of witnesses. Clearly, the Georgia

248. Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36 § 1(e).
249. As stated by Thayer, A Chapter of Legal History of Massachusetts, in LEGAL ESSAYS 310, 323-24 (1908), "This remarkable inroad upon the common law had been first made in Maine by a statute of 1864, c. 280; and it has long been the law in most of our States. It was introduced in the Federal Jurisdiction by a statute of March 16, 1878." The latter statute is Act of March 16, 1878, ch. 37, 20 Stat. 30.
250. GA. CODE ANN. § 38-415 (1938), which reads as follows:
In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer.
251. See Prater v. State, 160 Ga. 138, 143-45, 127 S.E. 296, 298-99 (1925), reversing a homicide conviction on the ground that the trial judge had prevented the accused from making a statement pertaining to what happened after the shooting and in incorrectly instructing the jury on the evidentiary value of defendant's unsworn statement. The Court held that the rules of evidence as to relevancy and materiality of testimony do not apply
rule is closer to the privilege given Lilburne, than are the rules prevailing in other jurisdictions of the United States and in England.

to the defendant's statement, since such statement is not evidence. The court elaborated thus on the value of defendant's statement:

To show that this court has never treated the statement of a defendant as evidence, it has been held times almost numberless that a theory arising only from the defendant's statement need not be presented to the jury, nor need the jury be instructed as to the law applicable to the theory presented in the statement, in the absence of a written request for such instruction. The statement not under oath "shall have such force only as the jury may think right to give it." But it is to be, not what may be relevant or material according to the strict rules of law, but "such statement in the case as he [the defendant] may deem proper in his defense." The defendant is not subject to cross-examination upon the statement; and yet, although the statement is in a sense outlawed as evidence, and the jury may disbelieve a part and disbelieve another part or disbelieve it in toto, and though it is not evidence, the jury "may believe it in preference to the sworn testimony in the case." The last consideration certainly places the statement above all classification of evidence, if the jury see proper to believe it. The privilege of making this statement has existed in this State for many years, and the nature of the statement of the defendant in a criminal case has frequently been considered. The court may prevent repetition of the same statement, or debar all circumstances wholly disconnected in fact with the facts upon which the defendant bases his defense. But the statement of the defendant is not to be curtailed by either ruling or interruption merely because the facts stated by the defendant, and which constitute a part of his narrative of his connection with the case, may under the rules of evidence be irrelevant and do not present in law a valid defense. . . . [T]he defendant is not confined to matters which are legally pertinent to the issue.

. . . .

It matters not that it appears anomalous that a defendant can state that which is irrelevant and that which in law can offer him no just ground of defense. Facts and circumstances wholly disconnected from any legal defense, and which might appeal merely to the sympathy of the jury and offer no reason for an acquittal, might cause a defendant indicted for murder to be recommended to life imprisonment rather than be subjected to capital punishment. . . . Or in case of doubt as to the credibility of the State's testimony,—the jury having no less the right to consider the appearance and credibility of the defendant than the appearance of the witnesses against him,—the statement of the defendant, his manner of stating it, and the apparent candor of the reasons he might present as to the motives which influenced the act, even though he may overlook or omit any reference to the main charge, and though some of his statements under the rules of evidence might be objectionable as conclusions or hearsay, the statement allowed might create and justify such reasonable doubt of the defendant's guilt as would authorize an acquittal.

It is interesting to note that the right to make such statement is one personal to the defendant. Counsel may make suggestions to the defendant, but only by the permission of the court and at the risk of "greatly disparaging, if not altogether discrediting, every material fact that the defendant may have stated."

The Board of Governors of the Georgia Bar Association last December called for an amendment of the Georgia rule "to provide that a defendant shall be entitled to testify in his own behalf, provided that . . . the accused [be permitted] to elect to make a sworn
The Party Oath in Civil Cases

Wager of law in the common law corresponds to the conclusive party oath which has been preserved until today in several civil law countries. It implies that he is different from an ordinary witness, so that his "testimonial" oath is not received. Consistently, testimony of a party was barred at common law, although the rationale advanced for the rule was that a party was disqualified as an "interested witness." This reason, in a way assimilating a party to a witness, forecast a change of policy. The disqualification, criticized by Bentham, was abolished in England in 1851, less than twenty years after repeal of wager of law. It was thereafter gradually repealed in the United States, jurisdiction by jurisdiction. Subsequently, the English institution of party testimony and the testimonial oath of a party—as distinct from the conclusive party oath—was imitated in Austria, and under her leadership, in other civil law countries.

Criticism and Reform Projects

The most significant English project for the reform of oath legislation was that advanced by Bentham. Rather paradoxically, while theological and metaphysical writers often attacked the oath on utilitarian grounds, Bentham, the foremost utilitarian, based his argument against the oath mainly on theological grounds. He stressed the logical inconsistency of the religious oath with the notion of an almighty God, the profanity of invoking the name of God in matters of a shilling or a half-penny, and the superfluity of secular perjury sanctions when divine punishment is expected. Citing the Bible, he suggested that the oath be abolished and that all mendacity "uttered upon a legal occasion, for a legal purpose" be punished "according to the nature of the mischief."
Abolition of the oath has been advocated in the United States particularly on the ground that it is incompatible with freedom of thought and religion, as well as because of its ritualistic, superstitious nature. Some critics have said that since no distinction is presently made between an affirmation and an oath, the oath has become meaningless. On the other hand, some writers have argued that the affirmation is in effect an oath.

The Religious Issue

Primitive belief in the magical power of the oath could not sustain modern use of the oath. A new rationale was necessary. To replace the old “objective theory,” according to which the oath was viewed as an independent instrument of magic, modern writers advanced the so-called “subjective theory of the oath.” Greenleaf advocated the following Copernican turn: “The design of the oath is not to call the attention of God to man; but the attention of man to God;—not to call on Him to punish the wrong-doer; but on man to remember that He will.” Wigmore formulated this interpretation in somewhat more explicit terms: “This being the function of the oath, it must involve the calling to mind of some superhuman moral retribution which according to the witness’ belief is calculated to induce him to refrain from false statements and thus to avoid retribution.” The turn of thought from the objective to the subjective level amounts to the fact that while the state itself has ceased to countenance the magic operation of the oath and is fully aware of its illogical nature, it, nevertheless, utilizes the fallacious belief of its citizens as a medium of legal control.

By way of contrast, the earlier common law hesitated to employ any deception in administering the oath. The state, of course, accepted the objective theory—that the oath was an external instrument of magic. And, to be admitted to oath, an individual had to share this view. Thus, nonbelievers were prevented from deceiving the state—taking the oath while not accepting its supernatural significance. Eventually, however, politics determined a change of approach. Concerned about the interferences with “trade” that barring infidels from the oath and hence from testifying would bring about, commerce-minded England abandoned Coke’s view of the oath as a Christian prerogative. In the leading case of *Omychund v. Barker*, the Chief Baron said: “Upon the whole, not to admit these witnesses (Gentous) would be destruct-
tive of trade, and subversive of justice, and attended with innumerable inconveniences.266 Lord Chief Justice Willes, rejecting significant authority, stressed that "they lived in popish times, when no other trade was carried on except the trade of religion," and expressed the hope that "such times will never come again."267

Even in the face of the needs of expanding trade, however, the courts in Omychund v. Barker and subsequent cases insisted on at least a modicum of common belief between the state and the oath taker: the declarant must believe in a Supreme Being who will punish him if he speaks falsely. A controversy, "as foolish as it was needless,"268 as to whether it is necessary for the witness to believe in Divine punishment in an after-life or whether it is sufficient if he believes that God will punish him in this life,269 was resolved in favor of the latter solution.270 In time provision was made for persons who objected to the oath on religious grounds. Focus then shifted to the problem of the witness who is a nonbeliever.271

It was no longer "essential to the competency of a witness that he shall know where he will go after death."272 However, although this lack of faith would not disqualify him as a witness, it "might affect his credit with the jury."273 Once the validity of a nonbeliever's oath was admitted,274 the question arose as to the weight that should be given to his sworn testimony as well as to the proper method of testing his belief for purposes of challenging credibility. Reasonable doubts also arose as to the credibility of a nonbelieving witness who did not avail himself of the opportunity to affirm rather than to invoke God. But the methods of challenging a witness' belief cut deeply into constitutional rights, particularly in the United States.275

Undoubtedly, "personal scrutiny" into the state of man's "faith and conscience" is "contrary to the spirit of our institutions."276 Nonetheless, scrutiny of this nature has been barred only as to self-disclosure, and not disclosure by "other means than examination upon the stand."277 As increasing protec-

266. Id. at 44, 26 Eng. Rep. at 30.
267. Ibid.
268. See White, supra note 259, at 391.
269. See cases cited in id. at 392 nn.36 & 37.
270. See 6 WIGMORE, EVIDENCE § 1817, at 288-89 (3d ed. 1940).
271. See White, supra note 259, at 396-414. As regards those who have conscientious scruples against administering the oath, see id. at 443-44.
273. Ibid.
274. See Oaths Act, 1888, 51 & 52 Vict., c. 46, § 3; UNIFORM DRAFT EVIDENCE ACT § 17 (1938); 6 WIGMORE, EVIDENCE § 1828, at 314 (3d ed. 1940) (collecting the statutes dealing with this problem).
275. See 6 WIGMORE, EVIDENCE § 1820, at 299-301 (3d ed. 1940).
tion is given to man's right of privacy, the problem of whether his faith should be opened to scrutiny, whatever the sources of information utilized, becomes more acute. Requiring that a man support his objection to being sworn by disclosing "either that he has no religious belief or that the taking of an oath is contrary to his religious belief"278 or even placing him in a situation where he must admit by implication that he holds either a nonconformist belief or no belief at all 270 seems an unwarranted invasion of his conscience. Finally, there is the question of whether any attempt to define other people's beliefs is compatible with the prevailing conception of religion as an area of thought in which doubt is still possible.280

The Children's Oath

Placing children under oath raises the most serious problems of common law oath administration. In civil law countries children are, for their protection, immune from oath. Indeed, a determined effort is made to protect children from the experience even of unsworn testimony in court.281 Of course, in a criminal case the strong interest of the accused must be weighed against the need for protecting the child from an undesirable experience.282 Yet a cursory perusal of the history of the children's oath in this country should suffice to show the unfortunate implications of admitting children to oath in order to protect the accused. Perhaps no better demonstration may be offered than a recital of one colloquy between a judge and a child witness, a conversation conducted for the purpose of determining the child's "moral and religious sensibility,"283 on which often depends its capacity to take the oath and to testify.

278. See The Oaths Act, 1888, 51 & 52 Vict., c. 46; Moore, The Passing of the Oath, 37 Am. L. Rev. 554, 559 (1903).
279. Lamont refused to take a religious oath on the ground that the institution of an oath requires an at least implied or express declaration of faith or of atheism. See The Lamont Case, History of a Congressional Investigation 20-21 (Wittenberg ed. 1957).
282. In Judgment of Aug. 30, 1951, Bundesgerichtshof (II. Ferienstrafsenat), 1 Entscheidungen des Bundesgerichtshof in Strafsachen 342 (Ger. Fed. Rep.), the German Bundesgerichtshof resolved such conflict in favor of the accused's right to have an adverse witness testify in open court.
283. In Judgment of Aug. 30, 1951, Bundesgerichtshof (II. Ferienstrafsenat), 1 Entscheidungen des Bundesgerichtshof in Strafsachen 342 (Ger. Fed. Rep.), the German Bundesgerichtshof resolved such conflict in favor of the accused's right to have an adverse witness testify in open court.
283. More recently, see State v. Merritt, 236 N.C. 363, 364, 72 S.E.2d 754, 755 (1952), citing State v. Edwards, 79 N.C. 648 (1878). In the latter case, the witness, a six and a half year old daughter of the victim of murder, "gave the ordinary answers to the ordinary questions put in such cases,—such as that God made her, that He would punish her if she told a falsehood, that she was sworn to tell the truth and would be punished if she did not do so." Relying on this precedent, the North Carolina Supreme Court in Merritt, decided in the year 1952, upheld a conviction based on testimony of a child "4 years, 10 months and 5 days of age," after pointing out that the record revealed, among other things, "her concept of Deity and responsibility for telling the truth."
The child was six years of age. She was asked the following questions, among others, and gave the following answers:

By the court: Q. "What is your name?" A. "Olie Leverett." Q. "Who made you—do you know?" A. "No, sir." Q. "Don't you know God made you?" A. "Yes, sir." Q. "Did you never hear about that?" A. "No, sir." Q. "Did you never hear about the old bad man?" A. "No, sir." Q. "That gets bad children and burns them up?" A. "Yes, sir." Q. "Did you never hear about that?" A. "Yes, sir." Q. "When they tell lies?" A. "Yes, sir." Q. "Did you never hear about people going to the penitentiary or to jail for telling lies?" A. "No, sir." Q. "Don't you know that, if you were to tell a lie, a man were hung on your evidence, that you would be hung, too?" A. "Yes, sir." 284

To be sure, the Georgia Supreme Court reversed the conviction on the ground that the child's sworn testimony was improperly admitted since she did not sufficiently understand the obligation of an oath, 285 and had no more than "the slightest conception of any future, much less of any future punishment for perjury or other bad conduct in this life." Yet hope was expressed that "on a second trial, as she advances in age and moral training, she may better understand these obligations and penalties, and may become competent." Of course, this took place in 1885, but later cases show little more refinement in testing children's moral and religious competency to be sworn. Children have been asked, "Do you expect to live forever?" 286 "Where is hell?" 287 and similar questions apt to baffle even a theologian. The absurdity of such methods of determining a child's credibility in the light of modern psychological knowledge should be apparent. 288 Even when children are admitted to oath after "persistent questioning" aimed at discovering whether they appreciate the obligation to tell the truth when under oath, 289 it would seem that psychologically more sophisticated methods could produce a more effective inducement to veracity and could, at the same time, minimize inhibitions about the testimony to be secured. 290

285. No full report is published and the following quotations are from the headnotes of the case.
287. See 6 Wigmore, Evidence § 1821, at 305 n.7 (3d ed. 1940).
289. A ten year old girl was permitted to be sworn in Doran v. United States, 205 F.2d 717 (D.C. Cir.), cert. denied, 346 U.S. 828 (1953). Although she did not know "what it meant to tell the truth or to swear to tell the truth nor did she know what would happen to a person who swore to tell the truth but told a 'story' instead," the oath was administered to her because "persistent questioning by the trial judge elicited the information that she did know what it was to tell a story; that she must not tell a story if she swore to tell the truth...."
290. In such cases it seems desirable to secure the assistance of experts in child psychology. Compare the Israeli law, cited note 281 supra.
A growing realization of the futility, unreality and psychological cost of administering oaths to children has led some jurisdictions to limit the practice. For example, New York early permitted judges to forego putting children on oath in criminal cases. No such discretion has been accorded in civil cases, notwithstanding the fact that protection of a party in a civil case against false testimony is undoubtedly less important than that of an accused in a criminal case. In other jurisdictions, in civil as well as in criminal cases, only an interested party’s failure to object will cure the defect of an omission to put a child witness under oath.

It would seem consistent with the practice of permitting children to be sworn that they also be accorded the privilege of affirming instead of swearing—a privilege implicit in freedom of conscience. But in a recent New Jersey case, the appellate court criticized the trial judge for accepting a child’s “affirmation.” Apparently, that affirmation lacked the solemnity ordinarily required, and the child did not claim the privilege to affirm rather than to swear. Hence, the case can hardly be regarded as authority for denying a child the right to affirm. In the absence of other precedent, the issue of a child’s right to affirm, in all its complexities, is still an unsettled question.

THE TRADITION OF LEGAL SYSTEMS WITHOUT THE OATH

There are three groups of legal systems in which the oath has either never existed or has been wholly or to a very large extent abolished: the law of the

291. N.Y. CODE CRIM. PROC. § 392, codifying N.Y. Sess. Laws 1892, ch. 279, permits children “actually or apparently under the age of twelve years” to testify in special cases without taking an oath, though such evidence is not sufficient to convict, unless corroborated or supported.

292. The trial court must ascertain whether the child has sufficient capacity to comprehend the obligation of an oath, and, if so, must have him sworn. Unsworn testimony of a child is inadmissible in a civil case. Napierliski v. Pickering, 278 App. Div. 456, 106 N.Y.S.2d 28 (1951); Stoppick v. Goldstein, 174 App. Div. 306, 160 N.Y. Supp. 947 (1916). “Where it appears probable that the unsworn testimony of an infant was given weight in the determination below, the interests of justice require that such determination be set aside and a new trial ordered.” Clarke v. Steeplechase Amusement Co., 9 Misc. 2d 342, 172 N.Y.S.2d 761 (Sup. Ct. 1957). Apparently, the belief prevails that the oath can cure the inadequacy of such testimony.

295. After satisfying himself by the usual inquiry, that the child (8 years of age) was competent to testify, the judge “obtained an agreement from her to tell the truth and said: ‘All right. I will let her testify on that affirmation.’” The child was then permitted to testify without being sworn. The conviction was reversed on other grounds, but the court set forth the principles controlling a child’s testimony with a view to the forthcoming new trial. Relying on King v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (Cr. Cas. 1779), it said that if found competent, the child must be sworn in a criminal case. Of course, this very reliance on ancient case law in a matter relating to credibility of a child’s testimony in our age sheds doubt on the use of common law methods where scientific knowledge is available.
area of Chinese political rule, the law of several Swiss cantons and the law of some Slavic, presently Communist, countries. In spite of a great diversity in rationale, one element is common to these systems—the lack of the oath. There is either no ancient oath practice or a traditional philosophy which does not favor the oath. In the absence of an ancient and favorable tradition, the oath practice has been easily abandoned on rational grounds. Where, as in Poland, the oath tradition was somewhat stronger than it was in other jurisdictions that presently abjure the oath, substitutes have enjoyed a position somewhat comparable to that formerly occupied by the oath. The history of these countries is helpful in evaluating contemporary arguments for the oath’s abandonment.

The Oath in Slavic Culture

Ancient Russian practices indicate that the oath was not a favored institution. It first appears in Oleg’s treaty with the Greeks in 912 A.D. to which both parties swore adherence.296 In addition, the first provision of Oleg’s document, one that dealt with procedures to be followed in the event of discord between the Greeks and the Russians,297 stated that if there were no clear “traces” of a damaging event, a claimant was required to “swear according to his faith.” The oath thus appears to have been used as a secondary method of proof limited to litigation with foreigners. In litigation between Russians, the preferred method of proof was by clear traces such as wounds, marks, possession of things belonging to another, and eye witnesses.298 When this kind of evidence was unavailable, arbitration was often employed to settle differences.299

The oldest known Russian statute, Iaroslav’s Pravda (the first issue of the Russkaia Pravda, probably promulgated in 1020 A.D.), similarly provided for an oath only in minor matters involving foreigners.300 That oath was an ordeal-like device that conclusively disposed of the issue in controversy.301 The third issue of the Russkaia Pravda (in the middle of the 12th century) made wider use of the oath, and also introduced oath helpers (porotniki or pomochniki) familiar in the Germanic law of that era. The spontaneity of this parallelism may well be doubted.302 In any event, oath helpers were admissible only in

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296. See Ewers, Das älteste Recht der Russen in seiner geschichtlichen Entwicklung 119-20 (1826) [hereinafter cited as Ewers].
298. Ewers 137.
299. Ibid.
300. Thus, Article X provides that when “a man pushes another either from himself or toward himself ... he must produce two eye witnesses (vidoka) or if he be a Varyager or Kolbyag, upon oath” (to na rotn). The Russian text is cited in Ewers 267. Ewers explains this distinction between the treatment of Russians and of foreigners by the fact that the foreigner who possessed no house or family in Russia could more easily be offended secretly and be unable to produce witnesses. Ewers 277.
301. Ewers 339.
302. See 2 Pravda Russkaia—Kommentari comments to art. 18, at 327-28 (Grekov ed. 1947) for this parallelism. Doubt as to its spontaneity has been raised by Schultz, Russische Rechtsgeschichte 62-63 (1951).
cases of murder. These early features—the oath's strictly subsidiary nature and the limitations placed on its use—are peculiar to Russian law.

In subsequent legal sources the oath appeared in various forms,303 the patterns of which resemble those of other cultures. Since Russia was engaged in international trade relations, these patterns were probably imported from abroad. From the beginning of the period of the absolute empire (Peter the Great), foreign influences were no longer a matter of conjecture. Through the medium of the Military Code (voinskii ustav) of 1716, the German inquisitorial procedure was adopted in the Collection of Laws (svod zakonov) of 1832.304 In accordance with this system of formal proof, if the evidence against the accused was not sufficient to support a conviction so that he was “left in a state of suspicion,” in cases of lesser consequence he could purge himself by oath.305 The Code of Criminal Procedure of 1864, based on the French Code d'instruction criminelle (1808), introduced the accusatorial system and free evaluation of the evidence. As in the French pattern, witnesses were sworn, and, in the Russian adaptation, the oath was administered by a priest in court.306 In contrast, the Code of Civil procedure of the same year did not adopt the French party oath.307

When evaluating current Soviet rationales for repealing the oath in the Soviet Republics, rationales that represent this repeal as a specifically Soviet achievement attributable to a peculiarly Soviet conception of the system of free evaluation of the evidence, it is well to remember that the oath never became a focal point of procedure in Russian history as it did in the Germanic procedure.

Polish law before the end of Polish independence (third partition in 1795) shows several distinctive traits. In medieval history, the oath of the witness was but a fortified oath of the party. No strict distinction was drawn between testes qui fuerunt praeentes (eye witnesses) and testes qui scint (co-jura-

303. The Court Book of Pskov, Pskovskaiia sudnaia gramota, of controversial date (the document itself bears the date 1397, but is believed to have been issued not before 1462), permits the plaintiff to elect either taking the oath himself or offering it to the defendant. Id. at 88-97. The Court Book of Novgorod, Novgorodskaia sudnaia gramota, of about the middle of the 15th century requires the plaintiff to take an oath that his accusation is well founded. Id. at 99. In the Court Book of Tzar Ivan III, of 1497, Sudenik velikovo kniazia Ioanna Vassilevicha, the oath is used only where there is no other evidence or where a party contests the testimony of the other party's witnesses. The defendant is given the choice of taking the oath or referring it to the plaintiff. Id. at 132. In the Code of Tzar Alexey Michailovich of 1649, Ulozhenie Tsara Alexeia Michailovicha, the significance of the oath as a means of proof is reduced; here also it is used only where there is no other proof, and in matters of small value the lot serves as a substitute for the oath. Id. at 149.

304. Id. at 197, 212-13.

305. Id. at 212-13. In major matters torture was used. Torture was formally abolished in 1762 but was again used during the reigns of Catharina II and Paul. Alexander I eliminated it entirely in 1801. See id. at 213.

306. Id. at 214.

307. Id. at 216.
tors); in the event that the required number of the former could not be pro-
duced, they could be supplemented by witnesses of the latter type.\textsuperscript{308} The law showed great concern for the purity of the oath and established qualifications aimed at preventing perjury.\textsuperscript{309} Only persons who were \textit{"fidedigni, bonae famae, in honore suo non suspecti, homines probi"} (trustworthy, of good reputation, not suspected in their honor, decent men) were admitted to oath. Thus a witness suspected of a defamatory crime or a party suspected of hav-
ing committed the act in issue were not allowed to swear. A provision of Mazovian law permitted a person to take an evidentiary oath not more than three times within one year, much as old Moscovite legislation limited oath taking to three times within a person’s life. The court or the opposing party could release a party or his witness from taking the oath. No compulsion to induce the oath was applied, except that in the case of the party oath, a party who refused to take the oath would lose the case. A person who had no \textit{facultas iurandi} (oath capacity), for example, because he had been excom-
municated, could be heard by the judge without oath and his testimony could be considered, although it was given \textit{sine iuramento} (without oath). This feature is the most striking demonstration of the fact that the oath had no deep roots in Polish legal history. This fact, in turn, is undoubtedly significant in realistically evaluating the actual basis of the recent abolition of the oath in Poland, however important the Soviet example may have been.

\textbf{Swiss Cantons}

In several Swiss cantons, the oath has disappeared. In Zurich, the leading example, its use clearly ceased before the legislation of 1715 which formally abandoned the institution in most cases.\textsuperscript{310} One writer attributes the develop-
ment in Zurich to the fact that the Roman law was never received there.\textsuperscript{311} As an added cause, he mentions the strict conception of the oath’s sacredness introduced by the Reformation, which considerably reduced the number of oaths taken.\textsuperscript{312}

At the time of the Reformation, the judicial oath in Zurich existed only in the form of the original Germanic oath of purgation. In the fifteenth and sixteenth centuries an oath was used in civil cases where other methods of determining the issue were not available. In those instances, however, the oath was far more than “evidence” in a strict sense, for it conclusively determined the issue on a theory of an implied settlement.\textsuperscript{313} The testimonial oath was adminis-
tered to witnesses until about 1620. From 1620 to 1670, the records

\textsuperscript{308} See Kutrzeba, \textit{Dawne Polskie Prawo Sapowe w Zarysie} 7 (2d ed. 1927).
\textsuperscript{309} The following account of Polish law of the late middle ages is based on Bobows-
\textsuperscript{310} Spoerry 52-60.
\textsuperscript{311} Orelli, \textit{Studien üuber den gerichtlichen Eid} (1858).
\textsuperscript{312} On this see Spoerry 71-72.
\textsuperscript{313} Spoerry 69-71.
make no reference to a witness taking an oath. Later records often evidence a “real oath”—a religious oath—apparently contrasted with a secular oath. In general, Zurich court records reflect an increasing reluctance to use the oath. In the late seventeenth century, without the slightest evidence as to cause, the oath simply disappeared from the scene.

Perhaps the oath never took roots in the native Zurich procedure to which lay judges gave great weight. Lay judges would naturally have favored free evaluation of the evidence and spontaneously rejected formal and binding means of proof. This preference developed into a tradition. Thus, substantial judicial opposition was evoked by a proposal to reintroduce the oath in 1844. Stress was laid on the fact that “this institution is totally foreign to popular sentiment.” And it was argued that: “Yearly 2,000 civil cases are decided without oath and we are none the worse because of it.”

Swiss abandonment of the oath was undoubtedly motivated in part by religious considerations. But the oath was discredited far beyond the demands of the prevailing theology. Saint Augustine and other Catholic theologians had, in fact, approved of the oath. Yet, in the Catholic Canton of Zug, the oath was almost never used after the middle of the eighteenth century. Zwingli, the Reformation’s Zurich leader, vigorously opposed the “pranks of the Anabaptists” which severely condemned the oath. He took the position that the oath was a command of neighborly love and a “Divine thing” and warned only against its abuse. Interestingly, the oath was preserved in the precise area in which Zwingli and others thought it abusive, namely, as an oath of office. Conversely it practically disappeared in the area on which these reformers did not focus their attention, namely, as a judicial oath. In the face of both Catholic and Reformation approval, a deeply rooted popular tradition must have been at work to effect the oath’s abolition.

314. Sperry 58-60.
315. See Sperry 72-73. For citation of Cantonal legislation giving the party oath the effect of formal proof, see Guldener, Beweiswürdigung und Beweislast nach schweizerischem Zivilprozeßrecht 3 n.7 (1955).
316. See Sperry 68.
317. See Sperry 73.
319. Between 1750 and 1850 less than ten cases of a witness or a party being sworn are reported. Thudichum 65-67.
320. Sperry 45.
321. Sperry 46. Zwingli’s view that the oath is a command of neighborly love is based on his adoption of St. Paul’s view, Hebrews 6, that the oath puts an end to all controversy, that is, the notion of the decisive oath, not that of the assertory oath. Ibid.
322. Ibid.
323. Zwingli did not expressly refer to judicial oaths, but in relying on St. Paul, he impliedly included them. Sperry 46-47. Sperry also cited the “Eydis-Acta” of 1564-1672, which contain resolutions, opinions and projects for a reform of the entire oath practice, which was adopted in 1650. Like Zwingli, the Eydis-Acta concerned themselves solely with oaths of office. See Sperry 60-63.
Swiss legislation limiting the oath was in evidence as early as the sixteenth century. Section thirty-five of the City Statute of Berne in 1539 provided that no oath should be taken by parties in matters involving five Shilling Denares or less. The Statute of 1614, concerning Court Procedure for Berne, prohibited oaths in matters "touching a person's soul, honor, body or life," (criminal and religious matters) and permitted use of the oath in other instances only if the litigation involved more than three pounds Pfennig or was a controversy over land. The Zurich City and Land Law of 1715 provided that witnesses in civil matters must never be sworn and admitted a party to oath only in paternity cases. Even in these cases, the oath was limited to plaintiffs and defendants of good reputation. Only exceptionally were witnesses to be sworn in criminal cases. Provisions containing far-reaching restrictions of the oath were also enacted in Appenzell, Basel and Zug.\(^{324}\)

**Chinese Law\(^{325}\)**

Apparently, for reasons grounded in their culture and the development of their legal system, the Chinese have never introduced the oath.

Until the overthrowing of Manchus dynasty and the founding of the Republic in 1911, the political philosophy of China was strictly authoritarian. Government officials were believed to have the function of controlling, not serving, the people. The magistrate of a "hsien"\(^{326}\) was addressed by the local inhabitants as "wu-mou-kwan," literally conveying the idea that he stood *in loco parentis* to the people of his district. Under the tradition of filial piety, district residents owed him absolute obedience. In a proceeding in which the magistrate performed the functions of both prosecutor and judge, the accused was hardly in a social or legal position to deviate from the truth. If he did, he would be disgraced under long established patriarchal tradition and immediately subjected to violent inquisitorial action by the magistrate. Therefore, an oath was unnecessary. Nevertheless, even under this system, formalities were not entirely lacking. An accused person was required to sign his name or, in the case of an illiterate, to place the finger print of his right thumb, at the end of a statement reduced to writing by a clerk designated by the magistrate.

The absence of the oath in Chinese culture is attributable to the influence of Confucian teachings. Its basic tenets are that man is by nature good and must maintain his dignity; government by the impact of ethical standards is preferable to government by law.\(^{327}\) Honesty and dignity were imbued in the

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\(^{324}\) See Thiinckum 66-67.

\(^{325}\) The following account of Chinese law and its cultural background is an abbreviated version of an unpublished paper by Mr. Li Chun, Associate Professor of Law, Soodow University, Taipei, Taiwan, a Graduate Fellow at Yale Law School, 1958-1959. The present writer is greatly indebted to Professor Li for his contribution.

\(^{326}\) A "hsien" is a political sub-division in the Chinese administrative system, similar to a United States county.

\(^{327}\) See Tze Sze, *The Doctrine of "Mean"* ch. I, § 1 (1929).
people as the primary rules of conduct. Since an oath presumes that man is fundamentally untruthful, dishonest and undignified, a Chinese imbued with Confucian teaching would naturally be averse to swearing.

**History Of Doctrines Of Perjury**

Oath conceptions are reflected in the character of the sanctions imposed for breach of an oath, that is, perjury. Thus, the development of the notion of “perjury” is an integral part of the evolution of the “oath.”

Infected by the atavistic features of the oath, the concept of “perjury” has developed irrationally. The mystical awe surrounding the oath—a carry-over from times long past—has greatly contributed to the confusion in perjury legislation. And the varieties of prehistoric and historic oath concepts which, though inconsistent with each other, manage to coexist even at advanced stages of legal development, clearly affect the perjury notion.

What is it that is punished under the law of perjury? This question, a corollary of the question, what is the “oath”? has never been uniformly answered, even within the confines of a single legal system. It is, therefore, necessary to go back to fundamentals and try to isolate the various conceptions of the oath, as they are reflected in various notions of perjury.

From the historical presentation, it should be evident that the oath was not originally incidental to testimony. The oath was a conclusive instrument of legal decision. Testimony was a supplementary, and later, an alternative, means of disposition and, in the course of time, it became an alternative means of proof. Accordingly, perjury and false testimony were separate phenomena, though neither was originally geared to “untruth” in a modern sense. As a more advanced concept of “truth” took shape, “false testimony” became a crime predicated on the assumption that the “untruth” was socially harmful. In contrast, perjury for long periods of history applied not to an assertory utterance, the contents of which might conform or fail to conform to reality, but only to a constitutive act, the oath. The earliest form of oath was the vow, oriented to loyalty rather than to truth. Its next stage was the oath of purgation, the exact nature of which has never been defined. It was apparently an intermediary notion, occupying a place between the vow and an assertion of truth conceived in the ancient sense of combining righteousness with power. Thus, untruth in the sense of a false presentation of reality was not at issue in an accusation of perjury. Recognizing the distinction between perjury and false testimony, enables the historian better to understand the origins of perjury. But the problem is by no means resolved.

The conceptual separation of perjury and false testimony was not uniformly observed even in early law. When the oath became the essence of testimony—as it was particularly in the old Germanic law—the crimes of perjury and false testimony tended to merge. The characteristic feature of each affected the other. In some systems, a substantially complete merger has taken place, although vestiges of separation remain. For example, in France even now
there is no separate concept of false testimony. "Faux témoignage" of article 361 of the Penal Code is "perjury," inasmuch as the oath is the essence of testimony. Where perjury finally came to be regarded as an aggravated form of false testimony, one might expect the original separation similarly to have been overcome. However, that separation still persists and is, indeed, often accentuated in contemporary law.

When perjury, as well as false testimony, was encompassed by the general concept of falsum, perjury was transformed into a crime affecting the rights of others. Perjury was integrated into the general scheme of crime against social interests and reliance on the oath became its central rationale.

The impact of a strong centralized state upon litigation gave a new imprint to the oath and the perjury sanction. The state increasingly, though imperceptibly, adapted the allegedly "religious" notion of the oath to its own practical needs. The testimonial oath was introduced into Roman law by imperial order under the pretense that it was a Christian institution. Since the pretense was effective, there was no need to impose secular perjury sanctions. Appearing on the historical scene at a time when the concept of truth had undergone a fundamental transformation and asserting a public interest in all litigation, states began to utilize the oath and its incident, the perjury sanction, to exact man's "truth," to which the state claimed it was entitled. There emerged the institutional, "governmental" concept of the crime of perjury, which asserts as the dominant interest protection of the administration of justice rather than the avoidance of harm incidental to false testimony or a misleading oath. The state assumed what had been the status of the Divinity and of the Church, as the authority to whom "truth"—truth per se—is due, regardless of the results of falsehood. Under this theory, which partially equates the state to God, perjury is punishable as blasphemy once was—a crime ranging next to idolatry—and hence severely and mercilessly. Actually, the state went further than the Church, for the ecclesiastical view of perjury was far less rigorous and authoritarian than is the modern "governmental" concept. Conversely, ancient theological ideas have helped to modify the rigidity of this governmental concept of perjury by introducing the idea of the mitigating or, indeed, immunizing effect of a "state of necessity."

A brief outline of the conceptions of perjury and false testimony in the legal systems which helped to shape the ideas of modern law will show how the various conceptions have interacted, but have failed to assume a clear and final shape.

Biblical Law

The magic of the oath was reflected in the Biblical concept of perjury, which appeared in the context of other probably magical acts. The breach of a vow was punishable in the Bible, but to ascertain what type of punishment was imposed upon it, one of the most obscure Old Testament passages, dealing with atonement for the breach of a vow sworn by the Children of Israel
to the Gibeonites, must be deciphered. The word used in this context to describe the execution (hoqa) is similarly used only in one other instance in the Bible, where the crime atoned for was idolatry combined with whoredom, and consuming blood. A relationship between these two isolated passages can be demonstrated if we assume—as is linguistically probable—that the execution involved in both instances was the “spewing out” of some matter; the elimination of the curse contained in the blood or in the oath.

False testimony, as distinguished from the false oath, was governed by the lex talionis: the false witness was to suffer, as a penalty, the same injury he attempted to inflict upon his brother. The crime was clearly conceived as a rational social crime, predicated upon the socially dangerous consequences of the act.

Roman Law

In Roman law perjury was not punished, since it was believed subject to direct divine retribution, unless the act of perjury simultaneously constituted another crime, such as a crimen laesae maiestatis (crime of injured majesty), or a stellionatus which was a crimen extraordinarium, a general crime comparable to the civil law dolus. Throughout the classical period, as in Biblical law, Roman witnesses were not sworn; thus a witness could

328. 2 Samuel 21:6, 9, 13.
330. Rashi, 4 THE PENTATEUCH AND RASHI’S COMMENTARY Numbers 25:4, at 266 (Ben Isaiah & Sharfman ed. & transl. 1950), suggests that hoqa refers to hanging, and meets the objection that the crime punished in 2 Samuel 21, idolatry, was normally punishable by stoning, by conjecturing that all who were stoned were also hanged. Gray, A Critical and Exegetical Commentary on Numbers, in INTERNATIONAL CRITICAL COMMENTARY ON THE HOLY SCRIPTURES OF THE OLD AND NEW TESTAMENTS 383 (1903), assumes that hoqa is some kind of capital execution, but that “it is scarcely hanging, for which the Hebrews used another word [talah]. . . .” W. R. SMITH, LECTURES ON THE RELIGION OF THE SEMITES 398 (1889), suggests the meaning of hoqa to be “cast down.” Dillman, Note to Numbers, cited in DRIVER, NOTES ON THE HEBREW TEXT OF THE BOOKS OF SAMUEL 351 (2d ed. 1913), conjectures that the word means something more than the ordinary talah (hanging). He notices that hoqa is used elsewhere in the sense of separation, dislocation (Genesis 32:26), severing, alienation (Jeremiah 6:8; Ezekiel 23:17, 18). Therefore, we may assume that hoqa refers to some act preceding the execution. If the word means “to cause to vomit” or “spew” (this requires a slight emendation [aleph instead of ayin], then it implies purging of the magic of eating with the blood and of the oath.

Notice in this context the view, COOK, THE OLD TESTAMENT, A REINTERPRETATION 197 (1936), of sacrificial blood as a means of “unsinning” men.

331. See Deuter. 19:18, 19.
332. See KUTTNER 11.
333. See MAURACH, DEUTSCHES STRAFRECHT—BESONDERER TEIL 234-45 (1953).
not commit perjury.\textsuperscript{334} The party oath was not a means of cognitive proof but an ordeal-like act, so that no legal recourse was open against a false oath. Not only was a criminal action (\textit{stellionatus}) against the perjuring party barred, but even in a civil action the \textit{exceptio iuris iurandi} (exception setting forth the fact that an oath had been taken) could not be challenged by a \textit{replicatio doli} (replication that the oath was fraudulent).\textsuperscript{335}

By contrast, false testimony was punishable in Rome at an early period. According to the law of the Twelve Tables, a witness who testified falsely was thrown from the Mons Tarpeius.\textsuperscript{336} The reason for this choice of execution is obscure. According to one interpretation, being "cast down" was the Biblical execution for breaching an oath. Even if this be true, no explanation, other than the similarity of the two acts in modern thought, is available for the extension of a punishment for perjury to false testimony. In any event, a death sentence for false testimony in capital crimes appears in the \textit{Lex Cornelia de sicariis et veneficis} (concerning assassins and poisoners, first century B.C.).\textsuperscript{337} False testimony was there treated, like poisoning, as a rational crime, sanctions for which were oriented to harmful social consequences.\textsuperscript{338}

\textbf{Germanic and German-Roman Law until End of the Middle Ages}

The \textit{leges barbarorum} were the first laws to treat the \textit{falsum} as intentional deception of another and perjury as a religious crime.\textsuperscript{339} These laws also

\textsuperscript{334} But see the authorities cited in \textsc{Kuttner} 11 n.24, which Kuttner considers unpersuasive because of the total silence of the \textit{Digests} regarding the testimonial oath.

\textsuperscript{335} See \textsc{Kuttner} 13. Even after introduction of the accused's oath \textit{de veritate dicenda}, apparently, the accused could not be punished for perjury. Serpillion, a seventeenth century writer, remarked that "there is actually almost as much perjury as there is oath on this occasion; but the accused cannot be punished for such false swearing." \textsc{Serpillon, Code Criminel} 659, cited in \textsc{Esmein-History} 379.

In the German "common law," decisively influenced by Roman law, whether a false oath of purgation was punishable as perjury was the subject of vigorous controversy. For a list of authorities pro and con see \textsc{von LIszt}, \textit{Die falsche Aussage} 133 (1887). After abolition of torture, the inquisitorial procedure used penalties for lying and for disobedience. \textsc{Schmidt, Einführung in die Geschichte der deutschen Strafrechtspflege} 299 (1947).

\textsuperscript{336} See the report of Gellius, cited in \textsc{Kuttner} 5. \textsc{Mommsen, Romisches Strafrecht} 668 n.1 (1899), interprets this passage as applicable to perjury and evincing the strong protection accorded to the sacredness of the oath. But the Twelve Tables speak expressly of "\textit{falsum testimonium}" rather than of the breach of an oath. As stated by 1 \textsc{Strachan-Davidson, Problems of Roman Criminal Law} 48 (1912):

The Roman people could incur the wrath of Heaven only by the breach of an oath taken by the representative of the people, the Fetial. Perjury by a private man is a matter which from first to last is left to the vengeance of the gods, and the law never threatens secular penalties against the offender.

\textsuperscript{337} \textsc{Kuttner} 6; \textsc{Mommsen, op. cit. supra} note 336, at 615, 628. The punishment of the false witness who caused the execution of another was one of the rare cases in Roman law where the penalty of death followed condemnation in a private suit. \textsc{Strachan-Davidson, op. cit. supra} note 336, at 41.

\textsuperscript{338} See text at note 331 \textit{supra}.

\textsuperscript{339} See \textsc{Kuttner} 14-17.
introduced the penalty of loss of the hand with which the false oath was taken.\textsuperscript{340} Still, however, uniformity among these laws regarding the entire area of false testimony and perjury was noticeably lacking. Some laws stressed the former, others the latter, a disjunction that is in fact typical of the entire German criminal law throughout the Middle Ages. In medieval sources, evidences of penalties for false testimony and perjury are rare. The \textit{Sachsen-spiegel}, the most important medieval German law book, does not mention any, which may only indicate that its authors regarded these offenses as exclusively within ecclesiastical jurisdiction. Among the other law sources, some speak only of false testimony, others only of perjury. Among the discussions of perjury, some stress the religious element of the crime, while others classify it together with crimes of falsification.\textsuperscript{341}

\textit{Canon Law}

Significantly, even the canon law, which might be expected to have introduced a firm religious orientation toward perjury, accentuated the duality of approach by distinguishing the crime of perjury from the sin of perjury and predicking only the crime upon an intention to deceive. According to this conception, the crime of perjury consists in abusing another person’s reliance on the sacredness of the oath, not in wrongfully invoking God’s name.\textsuperscript{342} The canon law also preserved the Roman distinction of perjury and false testimony.\textsuperscript{343}

\textit{Modern Development in Civil Law Countries}

Italian scholars of the fourteenth, fifteenth, and sixteenth centuries were the first to elaborate false testimony as a subspecies of a general substantive concept of the \textit{falsum}, which they understood as a conscious untruth that would probably damage another. As in the canon law, the injury need not have occurred, but it must have been at least possible. Since the crime of false testimony was predicated upon potential damage, the relevance of the testimony was of the essence. In the Italian theory, the \textit{falsum} element seems also to have penetrated the crime of perjury, still distinguished from false testimony. As a result, perjury too was not punishable if it did not and was not apt to harm anyone.\textsuperscript{344}

The \textit{Constitutio Criminalis Carolina}\textsuperscript{345} classified perjury in context with blasphemy and magic. At the same time, however, it dealt with false testimony

\textsuperscript{340} Ibid.
\textsuperscript{341} Kuttner refuted von Liszt’s view of perjury as a religious crime until the modern era and showed that the historical notion of perjury was by no means uniform. KUTTNER 16.
\textsuperscript{342} Id. at 17-20.
\textsuperscript{343} See id. at 19.
\textsuperscript{344} See id. at 20-24.
\textsuperscript{345} Printed in Die \textit{Pestliche Gerichtsordnung Kaiser Karls V}, at 1 (Kohler & Scheel ed. 1900).
against an accused in a criminal case both in the article devoted to perjury and in a separate article, whether the classification of perjury between blasphemy and magic, and the treatment of false testimony as a species of perjury, indicate that the Carolina regarded perjury as a purely religious crime, is uncertain. According to Carpzov, perjury by a party was clearly a religious crime—a crimen laesae maiestatis divinae—an adaptation to God of the protection accorded Roman emperors in the crimen laesae maiestatis. Significantly, it was not the Church, but the Germans that elaborated this purely religious concept of perjury. On the other hand, Carpzov considered actual damage an essential element of the crime of false testimony; in the case of a mere possibility of damage only a conviction for criminal attempt was available.

In eighteenth-century Germany, party perjury and false testimony coalesced. Both were classified as a crimen falsi, a labeling that had been suggested long before in the Italian doctrine. Yet the falsum itself has remained a vague and indefinite crime. Thus, this classification of perjury did not actually introduce a final clarification of its meaning.

Nor did the great theorists of German criminal science, Feuerbach, Mittermaier and von Liszt, succeed in clarifying the concept of perjury. Much in their theories is pure verbiage. During the era of the Enlightenment, when the religious interpretation of perjury was on the wane, two opposing views emerged: one, represented particularly by Feuerbach, regarded both perjury and false testimony as special instances of fraud; the other, advanced by Mittermaier, characterized perjury as a falsification comparable to counterfeiting, violating the publica fides, that is, public reliance on the formality of the oath as a guarantee of genuineness. Actually, the latter view is but a modified version of the canon law conception of perjury as an abuse of other persons' reliance upon the sanctity of the oath. As shown by von Liszt, however, "publica fides," a term derived from Cicero's oratory, was elaborated by German and Italian doctrine into a comprehensive system, in which the sacredness of the oath figured as the cornerstone of the administration of justice and of the total state organization.

347. Art. 68.
349. See KUTTNER 24-30.
350. Carpzov, born 1595, died 1666, is regarded as the founder of German legal science. See SCHMIDT, op. cit. supra note 335, at 129-36.
351. See KUTTNER 30-31.
352. See id. at 33-34.
353. von LISZT, op. cit. supra note 335, at 10.
354. Id. at 14.
but today it is a rudimentary creature, an empty form, long since forsaken by the idea which gave it life, a plant grown stiff in the frost of religious indifference.” Von Liszt himself suggested that, sworn or unsworn, false testimony is a crime against public administration and endangers the security of judicial decision. The criminal character of the acts consisted in the abstract jeopardy of judicial security; it was unnecessary that they actually or even potentially influence a concrete decision.355

Out of such variety of historical and dogmatic roots there grew a wide divergence of approaches to perjury and false testimony in the legislation of civil law countries. Among these, the most moderate traditional approach is that represented by French law, conceiving of perjury as a crimen falsi, whereas the newest extreme “government oriented” position is reflected in contemporary German law.356

Common Law Countries

“Very ancient law seems to be not quite certain whether it ought to punish perjury at all. Will it not be interfering with the business of the gods?”357 This observation seems equally applicable to English as to continental systems. Originally, of course, perjury punished itself. Later it was punished by a divinity. When the crime was legally sanctioned, it was conceived to be a crime of blasphemy, ranging right after idolatry, and hence a capital crime. Gradually, however, the sanctions imposed became milder. Thus, Blackstone remarked that the penalty was “anciently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment and never more to be capable of giving testimony.”358 As in the civil law, this development seems traceable to changing conceptions of the oath. The oaths of parties and witnesses were originally “oaths asserting not the existence of particular facts, but the goodness of the swearer’s cause.”359 The laws of King Edward the Elder speak of “perjurers” where “an oath failed to them,” that is when they failed to produce the required number of compurgators or when one of the compurgators refused to join in the oath. For such “perjurers” it was provided merely that “they afterwards should not be oath-worthy but ordeal-worthy.”360 Temporal punishment was first imposed upon the offense by King Henry VIII’s statute in 1540, which punished some instances of subornation of perjury by a fine, but left perjury itself unpunished. In Devonport v. Sympson, decided in 1596, it was said that “there was not any punishment for any false oath of any witness at the com-

355. Id. at 20, 21.
356. On the present state of the law see the second part of this Article.
358. Blackstone, Commentaries *138, citing 3 Coke, Institutes *240.
360. 3 id. at 241. “[F]or several centuries no trace is to be found of the punishment of witnesses for perjury.” 3 id. at 242.
mon law.” This is explained by the statement that “the law intends the oath of every man to be true.” Apparently “true” was used to mean “final.” The statement thus suggests that punishment of perjury would conflict with the finality of judgment. This legal presumption is reminiscent of the oath that “tries” the case, the ancient oath which was the judgment and not merely a basis of judgment. Later rationalizations for granting immunity from perjury sanctions to witnesses who were called to testify in royal indictments and in cases of felonies or murder were rather utilitarian: to render such evidence examinable for perjury would “deter men from giving evidence for the king” and “bring public scandal upon the justice of the kingdom.” The only persons subject to perjury punishment by lay courts were jurors. But in most cases, even they “stood in no terror of a law against perjury,” for “if both parties to the litigation had voluntarily ‘put themselves’ upon a jury, neither of them could complain of the verdict.” In other instances, punishment was imposed “only in a casual, incidental fashion in the course of attaints which were regarded mainly as a means of reversing untrue verdicts.”

When witnesses were given the function of testifying to facts, there developed a social interest in substantial, and not merely symbolical, punishment of perjury. This, of course, changed the character of the crime itself. In time perjury developed into a crimen falsi, involving “the element of falsehood” and including “everything which has a tendency to injuriously affect the administration of justice by the introduction of falsehood and fraud.” As such, perjury was classified together with “forgery . . . suppression of testimony by bribery or conspiracy to procure the absence of a witness, barratry, the fraudulent making or alteration of a writing, to the prejudice of another man’s right.” Even as a crimen falsi, perjury was limited to interference with the administration of justice in judicial proceedings and the materiality of the false statement was an essential requirement.

Whether perjury has continued to bear the character of a crimen falsi may be doubted, for, as stated by one writer: “the gist of the offense is the abuse of public justice, and not the injury to an individual.” It does not matter whether the false oath was believed or disbelieved, or whether it caused any injury to the person against whom it was given. At the same time, the crime of perjury remained applicable only to judicial proceedings. As sworn

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361. 3 id. at 245.
362. Ibid.
363. HUDSON’S TREATISE 71-82, cited in 3 STEPHEN, op. cit. supra note 359, at 247.
364. 2 POLOCK & MAITLAND, op. cit. supra note 357, at 541-42.
365. Perjury by a witness was declared punishable in Rowland “ap Eliza,” Mich. 10 Jas. (1613), cited in 3 STEPHEN, op. cit. supra note 359, at 248.
366. 3 id. at 240.
367. See PERKINS, CRIMINAL LAW 382 (1957).
370. See 1 id. at 326 n:14 (citing authorities).
statements came to be required in many matters other than judicial proceed-
ings, the common law provided a separate penalty for wilful and corrupt false
swearing in these other contexts.\textsuperscript{371} Perjury and false swearing have remained
distinct offenses, the latter at times being held to be a lesser offense included
in the former and at other times not to be so included.\textsuperscript{372} At common law,
however, perjury itself was only a misdemeanor. It was made a felony in
most jurisdictions by statute. This increase in the gravity of the crime marks
the beginning of the present development of the law of perjury.

\textbf{Conclusion}

In the history of culture, institutions of ancient origin are often adapted
to newly emerging situations, either because their ancient rationale has been
of permanent value or because of a change in their nature or justification.
The oath has survived unsupported by either reason. Originally a primitive
conditional self-curse, the oath has undergone only superficial renovations.
In the pre-animistic stage, the oath was a meaningful expression of man's
belief in his own magic powers; within the framework of such belief, it was
a rational means of social control. So long as social rather than cognitive
elements dominated procedure, the procedural act of a dispositive self-curse
was well suited to the ends of litigation. As man ceased to believe in his ability
dominate the course of events through supernatural media, the oath as a
self-curse became an anachronism. As litigation became oriented to a cognitive
concept of truth, the oath, even where it ceased to be conclusive and developed
into a probative device subject to judicial evaluation, became obsolete. For
notwithstanding its change of function, the oath has never quite lost its primi-
tive roots in the decisive magic rite.

If, as von Liszt thought, our law is deeply entrenched in atavism, or if,
as Freud believed, we preserve in our unconscious archaic elements of our
culture, there are still present in our motivation to veracity under oath—the
oath to God—ancient primitive roots of Jacob's oath upon "pahad" of his
father. That an anxiety of such nature is an effective means of inducing
veracity is, at best, uncertain. But most certainly such anxiety is apt to reduce
the spontaneity of testimony and the capacity to reconstruct faithfully the
objective reality of past events. Administration of an oath is an appeal to the
compulsive unconscious. Thus, in a modern sense it remains a \textit{tortura spiri-
tualis}, a "civil blackmail," for in order to extract testimony it violates the
privacy of man's personality and disturbs his striving toward rationality.

\textsuperscript{371} See \textsc{Perkins}, \textit{op. cit. supra} note 367, at 382.

\textsuperscript{372} In Commonwealth v. Scowden, 92 Ky. 120, 122, 17 S.W. 205 (1891), the court
said:

The offense of false swearing is a statutory one, and distinct from that of perjury,
which existed at common law. The two have no connection. The former is not
mentioned by the common law writers, and the elements of the two are different.
The charge of perjury does not embrace that of false swearing.

\textit{But see} The Queen v. Hodgkiss, L.R. 1 Cr. Cas. Res. 212 (1869).
Plainly, as a self-curse, the oath is inconsistent with our contemporary notions of the dignity of the man who takes it and of the state that administers it.

The historical analysis of the evolution of the oath reveals a continuity in conceptions of the oath throughout the ages. Likewise, criticism of the institution has obtained in all cultures and in all ages which accepted it. At the present time, when modern psychology has directed our attention to irrational elements in our mental processes, there is new ground for reevaluation of this atavistic survival in our law.

Criticism of the oath in civil law countries has, in recent decades, contributed to important reforms. Against the background of history of the oath, the advances made in some contemporary legislation, as contrasted with survivals of past ages preserved in other modern laws, may realistically be evaluated. This is the purpose of the second part of this Article.