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THE OATH: II*

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THE OATH IN CIVIL LAW COUNTRIES: CONTEMPORARY DEVELOPMENTS

The Party Oath in Civil Cases

THE oath has survived as a decisive ordeal, rather than as one more probative factor of testimony, in some civil-law countries in the form of the "party oath." This oath does not attest to the truth of testimony, but is an institution sui generis derived from the Roman and canon law.[1] Indeed, the same countries which utilize the party oath do not accept a party's testimony, which they presume to be biased.[2] The rules applicable to the party oath are naturally different from those which govern sworn testimony. The party oath is not compulsory, although failure to take it can mean an unfavorable decision.

Only one party may swear to any one issue. The statement to be sworn to is formulated in advance with utmost precision, and must not be departed from by the oath taker. Only the contents of this prepared statement are covered by the oath.[3] And once a judgment has been rendered on the basis of a party oath, even conviction for perjury affords no ground for reopening the case.[4]

As in the Roman and the canon law, there are two forms of the party oath.

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*Part two of a study of the oath institution. Part one—tracing the oath's background and history—appears in the present volume at page 1329.

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1. See Silving, *The Oath: I*, 68 YALE L.J. 1329, 1338, 1345 (1959).

2. See, *e.g.*, CODICE DI PROCEDURA CIVILE art. 246 (Italy 1940) [hereinafter cited as ITAL. CODICE PROC. CIVILE], in IL NUOVO CODICE DI PROCEDURA CIVILE 47 (Garrone ed. 1951) (excluding as witnesses persons who have an interest in the case which might cause their participation in the trial).

3. See 7 PLANIOL, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 1052 (2d ed. Ripert 1954); CODE DE PROCÉDURE CIVILE art. 120 (Fr. 48th ed. Dalloz 1952) [hereinafter cited as FR. CODE PROC. CIV.].

4. In France, the party against whom the oath was taken cannot intervene in the perjury prosecution as a civil party or claim damages. See 7 PLANIOL, *op. cit. supra* note 3, at 1050. In Italy, such a party can claim damages in case of conviction. CODICE CIVILE art. 2738, para. 2 (Italy Franchi & Feroci ed. 1949) [hereinafter cited as ITAL. CODICE CIVILE].

In the form of the ordeal-like "decisory oath," a conclusive oath is tendered by one party to the other.[5] If the offeree neither takes the oath nor tenders it back to the offeror, he necessarily loses the case.[6] Moreover he cannot tender back if the facts in dispute are personal to him.[7] Although this procedure is rationalized by reference to its transactional character, and is said to be based on freedom and equality of the two parties,[8] the element of compulsion in the offer is obvious.[9] The oath may be tendered as to any relevant issue that will dispose of the case, including facts which may incriminate or disgrace the offeree.[10]

The other form, the "suppletory oath," is reminiscent of the ancient conception of mathematical ratios of proof. The judge, in his discretion, may tender this oath *ex officio* to either party—usually the one in whom the judge has greater confidence—on the theory that when the evidence thus far submitted is entitled to some weight, but is insufficient to form a judicial "persuasion," the oath will afford the missing portion of proof.[11] In France, neither trial nor appellate judge is bound by the oath, and the oath taker is not necessarily victorious.[12] In Italy, however, the judge has no discretion, but must decide in favor of the oath taker or against a party who refuses an offer of the party oath.[13]

The alleged advantage of party-oath procedure is that it affords a method of disposing of an otherwise insoluble case by resort to the parties, within systems which render party "testimony" unavailable. Some measure of trustworthiness is said to be provided by the requirement that a party cannot offer to take a decisory oath himself but can only tender it to the other party in reliance on the latter's truthfulness under oath, and the practice of judges in tendering a suppletory oath only to that party who is "closer to proof." Above

5. CODE CIVIL art. 1357, No. 1° (Fr. 57th ed. Dalloz 1958) [hereinafter cited as FR. CODE CIVIL]; ITAL. CODICE CIVILE art. 2736, No. 1.

6. FR. CODE CIVIL arts. 1361, 1364.

7. FR. CODE CIVIL art. 1362; ITAL. CODICE CIVILE art. 2739, para. 2.

8. See 7 PLANIOL, *op. cit. supra* note 3, at 1049-50, Nos. 1573-74.

9. 2 ENCYCLOPÉDIE DALLOZ, RÉPERTOIRE DE PROCÉDURE CIVILE ET COMMERCIALE *Serment* No. 5, at 885 (1956).

10. 7 PLANIOL, *op. cit. supra* note 3, at 1053, No. 1579.

11. FR. CODE CIVIL art. 1367; ITAL. CODICE CIVILE art. 2736, No. 2. If the judge has already formed a persuasion, he has the duty of rendering judgment accordingly. Conversely he cannot tender the oath to a party when there is no proof at all. See *ibid.* The available evidence or "commencement of proof" must conform to general evidentiary requirements. Thus, a presumption will constitute a "commencement of proof" only when proof can be made by testimony, but not when there must be "commencement of proof" in writing.

12. See Boissol v. École secondaire d'Auteuil, Cour de Cassation (Ch. soc.), May 4, 1944, [1945] Dalloz Jurisprudence [hereinafter cited as D.] 87 (Fr.); Tobler et Stauffler v. Époux Vetter et Louis Gerber, Cour de Cassation (Ch. req.), April 29, 1933, [1933] Sirey Recueil Général I. 216 (Fr.).

13. See 1 CARNELUTTI, ISTITUZIONI DEL NUOVO PROCESSO CIVILE ITALIANO 405 (3d rev. ed. 1942), inferring this from ITAL. CODICE CIVILE art. 2736, No. 2; art. 2738, para. 1.

all, the procedure has been praised for making the result foreseeable by the parties and for facilitating the judicial function.[14]

But the procedure has been vigorously criticised for its artificiality and almost mechanical operation. The rigidity of the statement to be sworn, the difficulty of formulating it in such a fashion as to exclude mental reservations, the practical impossibility of determining on any given issue which of the parties is "closer to proof," and, finally, the fact that the device tends to reduce judicial responsibility, have been grounds for attack.[15] Thus, while the party oath has been gaining strength in Italy,[16] Austria paced a movement for its elimination.

Anglo-American procedure has served as a pattern of reform. There, the party is treated as a witness and admitted to testimonial oath. The testimonial oath of a party, however, is comparable to the oath of the accused in criminal cases, which civil-law countries have overwhelmingly and unexceptionally rejected, because of the conflict of conscience and the perjury danger thought to be incident to its use. Additionally, administration of an oath to two adversary parties in support of contentions which necessarily contradict each other, and of which one is likely to be perjurious, has been found objectionable by the civil law.[17] Doubts have also been expressed as to the wisdom of administering an oath in advance of knowledge of the nature and probable credibility of party statements.[18] As a result of such conflicting policy considerations, several countries have adopted a compromise solution to replace the party oath. Although varying from country to country, the compromise procedure consists in substance of an unsworn "party hearing" (*Parteivernehmung*), with subsequent discretionary administration of the oath on any particular issue to only one party.[19] A tendency exists to dispense with

14. See 2 POLLAK, SYSTEM DES ÖSTERREICHISCHEN ZIVILPROZESSRECHTS 687 (2d rev. ed. 1931).

15. *Ibid.*

16. This is evident in recent rulings of the Corte di Cassazione, whereby "the suppletory oath may be tendered even on the basis of simple clues (*indizi*) which do not satisfy such requirements of gravity, precision and consistency as to have the value of a true and proper presumption (and which moreover would render superfluous the very oath)." Decision of Nov. 13, 1957, Tribunale Firenze, 110 Giurisprudenza Italiana 682, 686 (Italy) (citing Corte di Cassazione decision of July 11, 1957, No. 2773).

17. Permanent Commissions of the Upper and Lower Chamber of the Austrian Parliament, *Joint Report of June 5, 1895 (Gemeinsamer Bericht der Permanenzcommission des Herrenhauses und des Permanenzausschusses des Abgeordnetenhauses über die Civilprozessordnung, die Jurisdictionsnorm, sowie die dazu gehörenden Einführungsgesetze)*, in 2 MATERIALIEN ZU DEN NEUEN ÖSTERREICHISCHEN CIVILPROZESSGESETZEN 310, 324-26 (1897).

18. The Joint Report, *ibid.*, rejected imposition of penal sanctions on preliminary unsworn statements which were made by both parties.

19. A beginning was made by the Law Concerning Procedure in Minor Matters, April 27, 1873, [1873] Reichsgesetzblatt [hereinafter cited R.G. Bl.] 249 (Aus.) After considerable modification in a series of drafts, the present Austrian system was enacted, forming part of the ZIVILPROZESSORDNUNG (Code of Civil Procedure [hereinafter cited as

the oath after "party hearing" whenever possible. Nevertheless, many rules applied to the "party hearing" and the posthearing oath are traceable to the now abandoned "party oath."

In the Austrian and German "party hearing," the party declares "like a witness," not "as a witness."[20] This distinction is meaningful, for, while the party has an obligation to state the truth even without being sworn, this duty is not subject to penal sanction, as is the corresponding duty of the witness.[21] Nor is unjustified failure or refusal to appear, to declare, to answer

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AUS. Z.P.O.]), [1895] R.G. Bl. 365, [1945] Staatsgesetzblatt No. 188, [1946] Bundesgesetzblatt [hereinafter cited as B.G. Bl.] 149, as amended, ÖSTERREICHISCHES RECHT 330 (Aus. 5th ed. Andreas & Guttenfeld 1952); see 2 POLLAK, *op. cit. supra* note 14, § 136, at 686-88.

The Austrian system, in turn, served as a pattern in many other countries. The "party hearing" was introduced in Japan (Law of Civil Procedure of 1898); Hungary (Law of 1911); Zurich (Code of Civil Procedure 1874, now Code of Civil Procedure of April 13, 1913); Norway (Law of Procedure of August 13, 1915); Denmark (Law of April 11, 1916); Sweden (Law of Procedure of 1942); Finland (Law of July 29, 1948); and in the Swiss Cantons Uri and Thurgau (Laws of Procedure of 1928). See ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS 561 (6th rev. ed. 1954). Of course, there are many variations and independent contributions in these laws. The most significant variation in the present context is the total abandonment of the oath in Zurich. Contrary to Austria and Germany, Zurich, Norway, Denmark, Sweden, and Finland use the "party hearing" in a manner resembling the Anglo-American practice—as a principal rather than a subsidiary means of proof.

20. ROSENBERG, *op. cit. supra* note 19, at 561; 2 POLLAK, *op. cit. supra* note 14, § 136, at 688.

21. The question of whether a party in civil litigation should be required to tell the truth has been the subject of vigorous controversy for many decades. Under the rule of the "common law" (*gemeines Recht*) in Germany, *i.e.*, until the enactment of the Civil Code, the general opinion was that untruthful allegations and denials of parties in civil cases did not constitute criminal fraud. In 1908 Konrad Hellwig began a campaign against the so-called "procedural lie," his term for the undue extension of litigation by production of untruthful statements and unjustified denial of true statements. He recommended that such conduct be punishable as fraud. A provision incorporated in a 1908 draft of an amendment of the law of civil procedure, imposing upon the parties the duty of making "complete and truthful" declarations, was struck at the instance of the Bar. Hellwig reacted by an attack against lawyers. He claimed they would tell their farmer-clients: "You better tell me the truth; I will take care of the lying." Hugo Neumann and Richard Schmidt came to the defense of lawyers. Schmidt said: "The lie in litigation, to be sure, is not ethically permissible or even commendable; but it is ethically indifferent—exactly as anywhere else in human life—also outside of legal life—where man's conscience, in the struggle for free self-realization, compels him to lie." While Binding joined Hellwig, Phillippsborn took an intermediary position. He pointed out that there is considerable doubt regarding the question to whom a litigant owes the alleged duty of truthfulness, to the court, to the adversary or to both.

The rules regarding the burden of proof presuppose that a litigant has no duty of complete truthfulness. However, as to matters within his knowledge, the party cannot, when asked, untruthfully deny such knowledge. See Adam, *Die Lüge im Recht*, in DIE LÜGE 180-82 (Lipmann & Plaut ed. 1927). The duty of truthfulness is imposed upon the parties by AUS. Z.P.O. § 178, which provides that "each party shall in his allegations state

any particular question, or to take the oath directly punishable; but it is subject to judicial evaluation as part of the evidence.[22] While Austria grants a party the right to refuse testimony on the same grounds that are available to a witness,[23] Germany does not.[24] In both, the "party hearing" serves only as a subsidiary means of evidence; it is permitted only in the absence of full proof when no other method of obtaining further evidence is available.[25]

In Austria, both parties, after being admonished that they may be put on oath, are initially heard regarding the same evidentiary issue.[26] The court in its discretion may then impose the oath on one or the other party if "the result of the unsworn questioning is not sufficient to convince the court of the truth or untruth of the facts to be proven."[27] Rules regarding the burden of proof do not control the court's discretion. The circumstances appearing in the proceedings and the greater credibility of a party are usually decisive, but, if these guides are not available, the party not having the burden of proof

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in accordance with truth, fully and definitely . . . all the factual circumstances required in a given case to justify his motions." Following this provision, the German ZIVILPROZESSORDNUNG (Code of Civil Procedure [hereinafter cited GER. Z.P.O.]) § 138, paras. 1, 3, consol. text, Law of Sept. 20, 1950, [1950] B.G. Bl. 533 (Ger. Fed. Rep.), introduced a similar duty of truthfulness. The scope of this duty, however, as well as the consequences of untruthfulness are highly controversial. A procedural lie may constitute criminal fraud, provided that all elements of that crime are fulfilled. German STRAFGESETZBUCH (Penal Code [hereinafter cited as GER. ST. G.B.]) § 263, Law of Sept. 1, 1953, [1953] B.G. Bl. 1083 (Ger. Fed. Rep.); see DEUTSCHES INSTITUT FÜR RECHTSWISSENSCHAFT, DAS ZIVILPROZESSRECHT DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK 38 (Nathan ed. 1957); ROSENBERG, *op. cit. supra* note 19, at 276. A person damaged by an untruthful allegation may sue for damages, provided that such suit is not barred by res judicata. *Ibid.* Even more controversial than "truthfulness" is the concept of "completeness." See LENT, ZIVILPROZESSRECHT, EIN STUDIENBUCH § 26, at 66-67 (7th rev. ed. 1957).

The problem of independent criminal responsibility for an untruthful unsworn party statement is particularly intricate in Austria, where the crime of false testimony is couched in terms of "fraud." False party allegations and defenses in civil procedure have been held not to constitute "fraud," simply because the court decides on the basis of proof and not on the basis of party allegations. See 2 RITTLER, LEHRBUCH DES ÖSTERREICHISCHEN STRAFRECHTS § 42, at 133-34 (1938) (collecting authorities).

22. AUS. Z.P.O. § 381; GER. Z.P.O. §§ 446, 453, 454, para. 1. AUS. Z.P.O. § 380, para. 3, expressly bars use of compulsory measures in order to bring about the party's appearance or declaration.

23. AUS. Z.P.O. § 380, para. 1. Of course, this privilege does not extend to refusal of testimony on the ground that it would cause the declarant or one of his close relatives "an immediate financial disadvantage"—though such refusal is available to a witness. AUS. Z.P.O. § 321, para. 1, No. 2.

24. ROSENBERG, *op. cit. supra* note 19, at 361.

25. See AUS. Z.P.O. § 371, para. 2; GER. Z.P.O. § 445. The reason for permitting the parties to be heard only as a last resort measure is distrust of the parties, who are deemed necessarily biased. See 2 POLLAK, *op. cit. supra* note 14, § 136, at 689-90; LENT, *op. cit. supra* note 21, § 56, at 151.

26. AUS. Z.P.O. § 376; see DIE JURISDIKTIONSNORM UND DIE ZIVILPROZESSORDNUNG § 371 comment (now AUS. Z.P.O. § 376) (Hermann ed. 1937).

27. AUS. Z.P.O. § 377, para. 1.

is normally sworn.[28] The court may limit the oath to a part of the testimony, or a particular statement, or determine the form of the statement,[29] as long as the sworn declaration does not go beyond the former unsworn one.[30] The oath cannot simply refer back to the prior unsworn statement; rather, it must be followed by a new hearing "under oath," in which prior statements may be repeated.[31] Administration of the oath requires a special order of proof (*Beweisurteil*), issued by the court en banc, under which a continuance may be granted to give the party to be put on oath time for deliberation.[32] Austrian judges have managed to reduce oath taking to a minimum with a skill which is the object of admiration in other countries.[33]

In Germany, clear survivals of the old "party oath" appear on the very threshold of the party hearing. Burden-of-proof rules largely determine which party will be "heard." The party with the burden of proof is free to propose only that his adversary be heard,[34] but may be heard himself only in the discretion of the court, and with consent of the adversary.[35] The court may order a party hearing of either or both parties on its own motion only when some evidence is already available,[36] and the court has examined and affirmed the credibility of the party to be heard.[37] As a rule, the party is heard without oath. But the court must order the oath to be taken if it has not been persuaded by the unsworn declaration but would give credit to a sworn one.[38] The oath is taken after the testimony (*Nacheid*), and refers back to the prior hearing.[39] It may be limited to that part of the declaration which is essential to the judgment to be rendered.[40] Even when both parties have been heard, only one may be sworn as to any given issue.[41] The appellate court may

28. 2 POLLAK, *op. cit. supra* note 14, § 136, at 690-91.

29. AUS. Z.P.O. § 377, para. 2. 36. DEUTSCHER JURISTENTAG, VERHANDLUNGEN vol. 2, at 638, 733-34 (1931) (cited in ROSENBERG, *op. cit. supra* note 19, § 121, at 565), recommended a similar provision for witnesses.

30. WOLFF, GRUNDRISS DES ÖSTERREICHISCHEN ZIVILPROZESSRECHTS 326 (2d rev. ed. 1947).

31. AUS. Z.P.O. § 377, para. 2.

32. AUS. Z.P.O. §§ 378-79.

33. ROSENBERG, *op. cit. supra* note 19, § 121, at 566.

34. GER. Z.P.O. § 445, para. 1.

35. GER. Z.P.O. § 447. The highly technical complex of rules governing this procedure has been the object of criticism from almost all commentators. ROSENBERG, *op. cit. supra* note 19, § 121, at 564; LENT, *op. cit. supra* note 21, § 56, at 152 (deploring that only one party may be heard upon party motion).

36. GER. Z.P.O. § 448.

37. See ROSENBERG, *op. cit. supra* note 19, § 121, at 564 (collecting authorities).

38. GER. Z.P.O. § 452, para. 1. Though couched in terms of "the court may," this provision is generally interpreted to mean "must." See ROSENBERG, *op. cit. supra* note 19, § 121, at 565; BAUMBACH, ZIVILPROZESSORDNUNG § 452, comment at 764 (24th rev. and supp. ed. Lauterbach 1956) [hereinafter cited as BAUMBACH-LAUTERBACH].

39. See GER. Z.P.O. § 452, para. 2.

40. ROSENBERG, *op. cit. supra* note 19, § 121, at 565.

41. GER. Z.P.O. § 452, para. 1, sentence 2.

administer the oath to the other party after finding that the first oath was inadmissible, but this is beyond the discretion of the trial court.[42] As in Austria, the decision to administer the oath requires a special order.[43]

The Oath of the Accused and the Suspect

In no civil-law country is the oath administered to the accused in a criminal case.[44] When an accused or a person charged is erroneously put on oath, he usually enjoys immunity from prosecution for perjury or false testimony.[45] In France, this immunity is justified on the grounds that only witnesses can be sworn and that no one may be a witness in his own cause.[46]

Abolition of the oath must be considered in context with the established practice of interrogating the accused, as well as the suspect. While several codes provide that, at the investigation stage, the person charged be admonished to tell the truth,[47] disobedience of the admonition lacks a legal sanc-

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42. ROSENBERG, *op. cit. supra* note 19, § 121, at 565-66.

43. GER. Z.P.O. § 452, para. 1; see ROSENBERG, *op. cit. supra* note 19, § 121, at 567.

44. The accused's oath, in all its forms, was abolished in France in 1789 and in Germany in 1877. 1 GARRAUD, TRAITÉ THÉORIQUE ET PRATIQUE D'INSTRUCTION CRIMINELLE ET DE PROCÉDURE PÉNALE 528-29 (1907). It is expressly prohibited in the Spanish Code of Criminal Procedure. LEY DE ENJUICIAMIENTO CRIMINAL [hereinafter cited as SPAN. LEY ENJUIC. CRIM.] art. 387 (Spain 1881), in 1 MAJADA, MANUAL DE FORMULARIOS PENALES 444 (2d ed. 1956).

45. 2 ENCYCLOPÉDIE DALLOZ, RÉPERTOIRE DE DROIT CRIMINEL ET DE PROCÉDURE PÉNALE *Faux Témoignage* No. 11, at 30 (1954).

46. *Ibid.* But such persons are subject to responsibility if, in the course of an interrogation, they use the name of a third person in such a manner as to cause or to be susceptible of causing inscription of the latter's conviction in the criminal record (*casier*). CODE DE PROCÉDURE PÉNALE [hereinafter cited as FR. CODE PROC. PÉNALE] art. 780 (Fr. 1958), Loi No. 57-1426, Dec. 31, 1957, Portant institution d'un code de procédure pénale (titre préliminaire et livre 1er), [1958] Journal Officiel 258, as amended and completed, Ordonnance No. 58-1296, Dec. 23, 1958, Modifiant et complétant le code de procédure pénale, [1958] Journal Officiel 11711 (Fr.). This article corresponds to CODE D'INSTRUCTION CRIMINELLE [hereinafter cited as FR. CODE INSTR. CRIM.] art. 598, as amended, Ordinance of Aug. 13, 1945 (Fr. 50th ed. Dalloz 1958), now repealed. The new Code has added a fine to the former penalty of imprisonment.

47. See, *e.g.*, SPAN. LEY ENJUIC. CRIM. art. 387; ÖSTERREICHISCHE STRAFPROZESSORDNUNG (Code of Criminal Procedure [hereinafter cited as AUS. ST. P.O.]) § 199, para. 1 (Aus. 1945), in ÖSTERREICHISCHES RECHT, *op. cit. supra* note 19, at 252. A person is a *"Beschuldigter"* (person charged) only after a charge (*Anklageschrift*), or a motion for initiation of an investigation (*Voruntersuchung*) has been filed against him. An *"Angeklagter"* (accused) is a person against whom a trial has been ordered. AUS. ST. P.O. § 38. At trial, the presiding judge admonishes the accused to pay "attention" to the accusation and the course of proceedings. AUS. ST. P.O. § 240. At this stage, the accused is no longer being directed to be truthful. The difference is explained by the fact that investigatory proceedings have a limited "inquisitorial character," whereas trial proceedings are fully accusatory. See LOHSING, ÖSTERREICHISCHES STRAFPROZESSRECHT 319-20 (4th ed. rev. & supp. Serini 1952) [hereinafter cited as LOHSING-SERINI].

tion.[48] Thus he may have no "legal duty" to tell the truth.[49] Nevertheless, the admonition may be effective, since, at this stage, he is often without legal advice and unaware of the absence of a legal duty.

Interrogation is avowedly intended only to give the accused an opportunity to refute the accusation.[50] But this "chance to explain" is often quite meaningless.[51] In fact, it is common knowledge that interrogation is actually used to secure confessions or admissions.[52] Subject to this important qualification,

48. AUS. ST. P.O. § 202 prohibits the use of any promises, ruses, or threats to induce the person charged to make "confessions or other definite statements." See LOHSING-SERINI 316 (collecting authorities).

In Germany, even under the old Military Criminal Code of 1872, a soldier-defendant before a military tribunal could lie with impunity, for this was not considered lying to a superior in matters of service. See Adam, *Die Lüge im Recht*, in DIE LÜGE 158, 179 (Lipmann & Plaut ed. 1927). And the accused is not any longer subject to "penalties for lying" (*Lügenstrafen*), which, after abolition of torture, had served as its substitute. VON HIPPEL, DER DEUTSCHE STRAFPROZESS 277 (1941).

49. On the accused's "right to lie," see Silving, *Testing of the Unconscious in Criminal Cases*, 69 HARV. L. REV. 683, 696 n.54 (1956).

50. In Germany, STRAFPROZESSORDNUNG (Code of Criminal Procedure [hereinafter cited as GER. ST. P.O.]) §§ 136, 243, para. 3, Law of Sept. 12, 1950, [1949-1950] B.G. Bl. 631 (Ger. Fed. Rep.), provides for giving "the accused an opportunity of removing the grounds of suspicion which exist against him and of asserting facts which are favorable to him." In France, the repealed FR. CODE INSTR. CRIM. art. 405 provided that "examination" of the accused shall begin immediately after the constitution of the jury, but decisional law and commentators agreed that "*examen*" was not to be synonymous with "*interrogatoire*," and meant rather, generally, the taking of evidence. 2 ENCYCLOPÉDIE DALLOZ, RÉPERTOIRE DE DROIT CRIMINEL ET DE PROCÉDURE PÉNALE *Instruction à l'audience* No. 519, at 196, 226 (1954).

FR. CODE INSTR. CRIM. arts. 319 (1), (3) provided that after the testimony of each witness the judge shall ask the accused whether he wishes to reply to what has been just said against him, and that he may ask him for explanations which are necessary to the ascertainment of the truth. See also FR. CODE INSTR. CRIM. art. 327. The new FR. CODE PROC. PÉNALE art. 328, however, now specifically provides that the president of the court of assizes shall "interrogate (*interroge*) the accused and receive his statements." See also FR. CODE PROC. PÉNALE art. 442. There is no provision corresponding to the former FR. CODE INSTR. CRIM. art. 319, para. 1, for asking the accused whether he wishes to reply to what has been just said against him. Nor has the provision of FR. CODE INSTR. CRIM. art. 319, para 2, which authorized the accused or his counsel to state "against the witness as well as against his testimony everything that might be useful for the defense of the accused," been adopted. At present, the accused or his counsel may merely put questions to the witness through the medium of the president, FR. CODE PROC. PÉNALE art. 332, but neither the accused nor his counsel has a right to comment on the answers, see Chapar, *Les modifications apportées par le code de procédure pénale au fonctionnement des cours d'assises*, [1959] RECUEIL DALLOZ (HEBDOMADAIRE)—CHRONIQUE 35, 38.

51. See Garçon, *Faut-il modifier les lois sur l'instruction contradictoire?*, 52 REVUE PÉNITENTIAIRE ET DE DROIT PÉNAL 137, 142 (1928) (report made at the meeting of the Société Générale des Prisons et de Législation Criminelle on July 6, 1928).

52. And in France, judgment based on improper evidence is not necessarily void. The defect "may be cured where the judge declares that, apart from such evidence, other items of evidence produced were sufficient to enable him to arrive at the finding." Case of d'Agostin, Cour de Cassation (Ch. crim.), Dec. 12, 1951, [1952] D. 157, 161 (Fr.).

however, the civil law undoubtedly affords the accused a privilege to meet the judge's interrogation with silence or even lies.[53] The fact that the accused is not permitted to be put on oath relieves him of the dilemma of perjury or confession. In this sense, he is undoubtedly "freer" than is the accused in Anglo-American jurisprudence.

In addition to the "accused"—the person against whom trial proceedings have been ordered opened—and the "person charged"—one against whom a public complaint has been filed [54]—Austria, Germany, as well as other civil-law jurisdictions, bar the mere "suspect" from taking the oath.[55] In general, "suspect" is a broad concept. It is not regarded as limited to the statutory notion of complicity, and one may be "suspected" of any part of "the entire historical event within which the *actus reus* [before the court] was materialized . . . ,"[56] as well as of the very offense being adjudicated. In the Austrian provision, the "suspect" is mentioned together with the "person proven" to have been guilty of the offense under investigation; and in the German provision, the "suspect" is mentioned together with the person "already sentenced" for such conduct.[57] The context of these oath prohibitions seems to indicate a legislative intent to protect the declarant not only against the danger of criminal prosecution for perjury, but also against being required

53. This "right" to silence is of questionable value. See Seibert, *Der Adamsprozess und wir*, 10 NEUE JURISTISCHE WOCHENSCHRIFT [hereinafter cited as N.J.W.] 779 (1957). Commenting on the English trial of Dr. John Bodkin Adams, Seibert noticed with amazement that during seventeen days of his trial before a jury the accused opened his mouth only once, saying "I plead not guilty." Seibert added: "In this country [Germany] the accused is not bound either to make a statement. But absolute silence is not advisable, for it may be taken as basis for an inference of animosity against the law or even of a consciousness of guilt [GER. ST. P.O. § 261 (free evaluation of the evidence)]."

54. See GER. ST. P.O. § 157. Compare AUS. ST. P.O. § 38.

55. AUS. ST. P.O. § 170, No. 1, enumerates among the persons who "must not be sworn under sanction of nullity of the oath," those "who are themselves . . . under suspicion of having committed or participated in the criminal act with regard to which they are being questioned." GER. ST. P.O. § 60, No. 3, prohibits the swearing of persons "who are suspected . . . of [committing] the act which is the subject of investigation or of participation therein."

56. Decision of Dec. 3, 1957, Bayerisches Oberstes Landesgericht, 11 N.J.W. 231 (Ger. Fed. Rep.). The court added: "It is essential that the witness participated in a criminal manner in the act under investigation in the same direction as the accused."

In Austria, a witness "is not suspected of having committed the act by the mere fact that a suspicion has been voiced against him; he becomes a suspect only when the court, in its discretionary evaluation of the circumstances of the concrete case, declares the suspicion to be well founded." LOHSING-SERINI 292.

In Germany, the Bundesgerichtshof held that a person is not a suspect until the prosecuting agency has opened proceedings against him. Decision of Oct. 18, 1956, Bundesgerichtshof (IV. Strafsenat), 10 N.J.W. 230 (Ger. Fed. Rep.). This holding is inconsistent with rulings in other cases, including that of the same Senate, in which a witness in a traffic case was treated as a "suspect."

See notes 59-61 *infra* and accompanying text.

57. AUS. ST. P.O. § 170, No. 1; GER. ST. P.O. § 60, No. 3.

to relate "events in which he played a more or less odious role."[58] Recent German decisions, however, stress other reasons for this rule. Thus, the Great Criminal Senate of the Bundesgerichtshof, in 1958, stated that an oath may not be administered to a witness suspected of having committed a crime in issue, although not accused of it, because of the impediments likely to be placed on the finding of truth by his sworn testimony.[59] The Bundesgerichtshof (Fourth Criminal Senate) noted in 1957 that the legislature intended to bar oath taking when it "does not increase the credibility of testimony of a suspected witness and cannot remove his bias."[60] In this case, involving a traffic violation, the court astutely pointed out that in such crimes it is often a matter of chance whether a person becomes an accused or a witness. The court further remarked that the accused might "find it difficult to understand if he were to be convicted on the basis of the sworn testimony of the person whom he regards as guilty and whose possible guilt was not clearly denied by the court."[61]

The Oath of the Witness in Criminal and Civil Cases

Although the oath practices of those legal systems which have retained the oath of the witness are not uniform, certain generalizations are valid. Most show the traditional preference for sworn testimony by classifying witnesses

58. SCHMIDT, LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG UND ZUM GERICHTSVERFASSUNGSGESETZ pt. 2, § 60, comment 16, at 144 (1952).

59. Decision of Jan. 21, 1958, Bundesgerichtshof (Grosser Strafsenat), 11 N.J.W. 557 (Ger. Fed. Rep.).

In German law the decision as to administration of the oath is made by the presiding judge and, in the event of challenge, by the entire court. It is regarded as falling within the scope of truth finding rather than merely procedural direction. See SCHMIDT, *op. cit. supra* note 58, pt. 2, at 140.

60. Decision of Jan. 9, 1957, Bundesgerichtshof (IV. Strafsenat), 10 N.J.W. 431 (Ger. Fed. Rep.) The court relied on a statement of legislative policy as well as the following court decisions of the Reichsgericht and the Bundesgerichtshof: Judgment of Dec. 7, 1882, Reichsgericht (I. Strafsenat), 8 Entscheidungen des Reichsgerichts in Strafsachen [hereinafter cited as R.G. St.] 331, 332 (Ger.) (concerning persons suspected of participation in the act charged); Judgment of Sept. 24, 1953, Bundesgerichtshof (III. Strafsenat), 4 Entscheidungen des Bundesgerichtshofs in Strafsachen [hereinafter cited as B.G.H. St.] 368, 371 (Ger. Fed. Rep.). 10 N.J.W. at 431, 432.

61. The court also pointed out that the witness "cannot be expected—if only in view of the damage suit normally following in such cases—to be impartial toward the accused in such cases." *Id.* at 432. The new FR. CODE PROC. PÉNALE art. 105 also affords a broad protection to any persons suspected of crime. It expressly prohibits judge-investigators and police officers, under sanction of nullity, "to hear as witnesses persons against whom there are grave and consistent (*grave et concordantes*) indications of guilt, if such hearing would result in evasion of the safeguards of the defense." This provision, in the version of the 1957 legislation, referred to "serious indications of guilt." FR. CODE PROC. PÉNALE art. 104, in addition, grants witnesses a limited privilege against "self-incrimination." When a complaint has been filed against the witness, the judge-investigator is required to draw his attention to this fact and to advise him of his right to refuse official testimony.

into those who are required or permitted to be sworn and those who are not admitted to oath,[62] a classification based in part on a distrust of those who comprise the latter group.[63] Further, witnesses usually must be sworn under sanction of nullity of their testimony,[64] and exemptions are restrictively interpreted.[65] Even when the court is accorded discretion to forego swearing a witness, in certain cases unsworn testimony may not support a judgment.[66]

But some jurisdictions present significant departures from the traditional cath pattern. The introduction of the crime of unsworn false testimony, discretionary rather than obligatory swearing, and administration of the oath after, rather than prior to, the testimony are all basic innovations meriting attention. The latter two procedures are intended to reduce the number of oaths, particularly in minor cases, and thus enhance the significance of the oath in the eyes of the public.[67] The "posttestimonial oath" (*Nacheid*) functions as a significant aid to proper exercise of the discretion to forego administration of the oath, as well as affording a witness an opportunity to alter his testimony without forcing him to admit perjury by retracting a sworn statement.[68] While the legislative reforms mentioned here do not in them-

62. Persons not admitted to oath in French law are listed in CODE PÉNAL arts. 34, No. 3; 42, No. 8 (Fr. 55th ed. Dalloz 1958) [hereinafter cited FR. CODE PÉNAL]; FR. CODE PROC. PÉNALE arts. 108, 335, 447, 448. In German law, see GER. ST. P.O. § 60; GER. Z.P.O. § 393. See also FR. CODE PROC. PÉNALE art. 330; FR. CODE PROC. CIV. art. 262.

63. See, *e.g.*, the statement of the German Bundesgerichtshof in Decision of Jan. 9, 1957, Bundesgerichtshof (IV. Strafsenat), 10 N.J.W. 431 (Ger. Fed. Rep.).

64. See GER. ST. P.O. §§ 59, 61. But see GER. Z.P.O. § 391. For the relevant French provisions, see FR. CODE PROC. PÉNALE arts. 103, 331(2); FR. CODE PROC. CIV. art. 262.

65. See text at notes 142-46 *infra*.

66. A passage from a recent decision of the Great Senate in Criminal Matters of the German Bundesgerichtshof, Decision of Jan. 21, 1958, Bundesgerichtshof (Grosser Strafsenat), 11 N.J.W. 557 (Ger. Fed. Rep.), is most enlightening:

> According to [GER. ST. P.O. § 261 (free evaluation of the evidence)], the finding of truth is made by way of free evaluation of the evidence in the course of which the evidentiary value of the testimony of witnesses is examined. Rules of proof and exclusion of witnesses are foreign to the prevailing law of criminal procedure (compare [GER. ST. P.O.] § 244 (3) [stating in pertinent part that a motion for admission of proof is to be denied if the evidence is inadmissible, but that apart from this, such motion may be denied only if ". . . (among other instances,) this evidence is wholly inadequate"]). The danger which the testimony of suspected witnesses presents for the finding of truth is met by the provisions prohibiting the administration of an oath to witnesses who are suspected of having committed the crime or who are related to the accused ([GER. ST. P.O.] §§ 60, No. 3; 61, No. 2).

In the instances referred to by the court, the witness can be heard and his statement may be used in the process of proof. But clearly, under the above authoritative judicial interpretation, it is not proof of the same degree as a sworn testimony.

67. See VON HIPPEL, *op. cit. supra* note 48, at 402-04.

68. The "posttestimonial oath" has also existed in Danish law (*Nach-Ed*) since 1919. Danish CODE OF PROC., Act No. 90, April 11, 1916, effective Oct. 1, 1919. Section 186 of this act, as amended by Act No. 300, June 30, 1922, § 18, provides for testimony

selves indicate that an abandonment of the oath institution is in the offing, future practice may show a gradual disuse, as judges avail themselves of their "discretion" to forego swearing a witness, and acquire skill in securing reliable testimony without resort to the oath.

Traditional Procedures and Modern Innovations:

In France, the requirement of a testimonial oath or affirmation is rigidly enforced, in accordance with the principle that the oath "makes a person a witness," for only after swearing is one subject to the sanctions imposed upon false testimony.[69] In Italy, with a few exceptions, "witnesses before the judge-investigator do not swear," but are reminded by him of the penalties for false testimony.[70] Yet, upon trial, "all witnesses, even informers, complainants or civil parties," must, under sanction of nullity, take an oath,[71] although, as under the French code, the nullity may be cured by failure to raise it on appeal.[72] The requirement of the oath at the trial, as contrasted with its express rejection during the investigation stage, must be evaluated in context with the imposition of a uniform penalty upon "false testimony"—sworn or unsworn.[73] Since the oath does not serve as a legal deterrent to lying, the

of witnesses to be supported by oath, or other solemn affirmation (§ 187), if demanded by any of the parties, or if the court finds it necessary. The writer owes this information to Mr. Adam Vestberg, Secretary to the Danish Ministry of Justice, Graduate Fellow at the Yale Law School 1958-1959.

69. FR. CODE PÉNAL arts. 361-66; see 2 VIDAL, COURS DE DROIT CRIMINEL ET DE SCIENCE PÉNITENTIARE No. 730, at 1058 (9th ed. Magnol 1949) [hereinafter cited as VIDAL-MAGNOL].

Even before the judge-investigator, witnesses must take an oath, FR. CODE PROC. PÉNALE art. 103, although that oath is not "sacramental" and does not subject the perjurious witness to penalties for "false testimony," 2 ENCYCLOPÉDIE DALLOZ, RÉPERTOIRE DE DROIT CRIMINEL ET DE PROCÉDURE PÉNALE *Témoin* No. 89, at 891, 896 (1954). In France the crime of "false testimony" corresponds to "perjury" in other legal systems; there is no crime of unsworn false testimony. Significantly, the new FR. CODE PROC. PÉNALE arts. 103, 109 has preserved the oath requirement at the investigation stage. The oath requirement also obtains in civil cases. FR. CODE PROC. CIV. art. 263, para. 2, as amended, Decret No. 58-1289, Dec. 22, 1958, [1958] Journal Officiel 11608, which reads in pertinent part: "Every witness, before being heard . . . shall take an oath to tell the truth." The phrase, "all this under sanction of nullity," of the former version has been omitted. See also FR. CODE PROC. CIV. art. 278. The parties cannot, by common consent, relieve a witness from the oath requirement, but the defect of omitting the oath is cured by failure to object. 2 ENCYCLOPÉDIE DALLOZ, RÉPERTOIRE DE PROCÉDURE CIVILE ET COMMERCIALE *Témoin* No. 21, at 950, 952 (1956).

70. CODICE DI PROCEDURA PENALE art. 357 (Italy Franchi & Feroci ed. 1949) [hereinafter cited as ITAL. CODICE PROC. PENALE].

71. ITAL. CODICE PROC. PENALE arts. 448, para. 4; 449, para. 1.

72. See 2 ANDRIOLI, COMMENTO AL CODICE DI PROCEDURA CIVILE 207, comment 2 (3d rev. ed. 1957). The nullity sanction imposed upon omission of the oath is inferred from the provision which equates refusal to swear with refusal to testify.

73. CODICE PENALE art. 372. (Italy Franchi & Feroci ed. 1949) [hereinafter cited as ITAL. CODICE PENALE]; see VANNINI, MANUALE DI DIRITTO PENALE ITALIANO—PARTE

appeal of the oath is clearly moral and religious. Thus, it is used exclusively at trial, so that its import is not sullied by too frequent employment.

The most extreme contrast to the French and, to a lesser extent, the Italian pattern is presented by the Swiss Federal Code of Criminal Procedure,[74] which grants the court, in all cases, discretionary authority to require an oath (or a "hand-vow") after all testimony has been taken.[75] The court may impose the oath or vow on its own motion or on the motion of a party. Prior to the taking of testimony, the judge is required to remind the witness that he may be later asked to take an oath.[76] The Swiss Federal Penal Code imposes a penalty upon false testimony, sworn and unsworn,[77] but the fact that false testimony was supported by oath constitutes an aggravating factor.[78]

Austrian and German law occupy a middle ground between the French and Swiss positions. In Austrian criminal procedure, witnesses may be sworn during the investigation stage in exceptional cases only.[79] At the trial, witnesses called by the parties are in principle required to be sworn, under sanction of nullity, in advance of their testimony on the merits. The oath may be omitted [80] with the express consent of both the prosecutor and the accused,[81] however, if the court considers it unnecessary. A witness called by the presiding judge may be sworn, at the discretion of the court, after the testimony is taken.[82] The parties must be given an opportunity to be

SPECIALE 101 (rev. & enlarged ed. 1951). In contrast to the old code, which in art. 214 provided for mitigation in case the testimony was unsworn, the present code in art. 372 does not mention the oath, although it deals with various aggrevating factors. See 2 IL CODICE PENALE ILLUSTRATO ARTICOLO PER ARTICOLO No. 564 (Ugo Conti ed. 1934) (comment to art. 372 of the Code).

74. Bundesgesetz über die Bundesstrafrechtspflege vom 15. Juni 1934 (Swit. Federal Law of Criminal Procedure [hereinafter cited as SWIT. B. STR. P.]), in BUNDESRECHTSPFLEGE 75 (Bundeskanzlei 1953).

75. SWIT. B. STR. P. art. 86.

76. SWIT. B. STR. P. art. 82.

77. SCHWEIZERISCHES STRAFGESETZBUCH (Swit. Federal Penal Code [hereinafter cited as SWIT. ST. G.B.]) art. 307 (1937).

78. The Swiss practice has been described as "most subtle and . . . most logical." GORPHE, L'APPRÉCIATION DES PREUVES EN JUSTICE 375 n.2 (1947).

79. AUS. ST. P.O. § 169, which provides:

> In investigation proceedings, witnesses must not be sworn unless there is apprehension that, because of illness, protracted absence, lack of a definite place of abode, or for other reasons, the witness will be unable to be present at the trial; or unless the prosecutor, or the person charged, moves on important grounds that the witness be sworn; or unless the judge-investigator believes that only by requiring a confirmation of the testimony by oath will he be able to learn the full truth.

80. It may also be postponed until after the testimony is taken.

81. AUS. ST. P.O. § 247. A mere failure to object is not sufficient. See LOHSING-SERINI 297 (collecting authorities).

82. AUS. ST. P.O. § 254. Para. 1 permits the presiding judge to call a witness or expert, although there has been no motion to that effect by either the prosecutor or the accused, if the judge expects from such witness or expert information concerning substantial facts.

heard on the question of whether a witness should be sworn, but the refusal of a party to make a statement on the point does not prevent decision, nor does failure to require an oath from such a witness constitute a ground for nullifying his testimony.[83] Whether testimony is sworn or unsworn is not of great importance in fixing punishment for the crime of false testimony.[84]

In civil cases, an Austrian court is permitted, but not required, to dispense with the oath if both parties waive the swearing of a given witness.[85] As a rule, the oath is administered prior to the testimony, but the court may reserve decision regarding imposition of the oath until after the testimony has been taken,[86] omitting the oath if, in view of "the irrelevance of the testimony or because of the slight measure of credibility attributable to it," swearing appears inappropriate.[87] The decision to dispense with the oath is not reviewable.[88] The penalties for perjury and false testimony are identical in civil and criminal cases, and these penalties only apply if the witness is testifying before a "court."[89]

In Germany, the Code of Criminal Procedure expressly provides that the oath must be taken after the testimony.[90] Administration of the oath prior to the testimony is interpreted by some commentators as equivalent to a failure to administer the oath, which would lead to reversal of a judgment based on such testimony.[91] For a short time the court was authorized by law to decide, in its reasonable discretion whether to require an oath,[92] but legislation in 1950 made the oath obligatory in most cases. However, the legislation did provide for certain exceptions.[93] Particularly noteworthy is the provision that in minor criminal cases, those which can be initiated only by private complaint, witnesses are generally not sworn. They are sworn only if the court considers this "necessary because of the decisive significance of the

83. LOHSING-SERINI 298.

84. See STRAFGESETZ (Aus. Penal Code [hereinafter cited as AUS. ST. G.]) §§ 199a, 202, 204, derived from Penal Code of 1852, now AMTLICHE SAMMLUNG No. 2 (1945); LOHSING-SERINI 297. *But see* 2 RITTLER, LEHRBUCH DES ÖSTERREICHISCHEN STRAFRECHTS 299 (1938) (maintaining that in cases of perjury the punishment is always aggravated).

85. AUS. Z.P.O. § 336, para. 1.

86. AUS. Z.P.O. § 337. However, for the clarification of his personal circumstances, a witness may be questioned prior to being sworn regarding admissibility of his oath or of his being heard as a witness, as well as regarding the question of whether his statement can serve to determine the facts in issue.

87. AUS. Z.P.O. § 338, para. 2.

88. AUS. Z.P.O. § 349, para. 2.

89. Arbitral tribunals are not "courts" within the meaning of AUS. ST. G. § 199a. Nor is a notary public a "court" for purposes of this section. 2 RITTLER, *op. cit. supra* note 84, at 290.

90. GER. ST. P.O. § 59.

91. SCHMIDT, *op. cit. supra* note 58, pt. 2, § 59, comments 3-4, at 137-39. For the contrary view of Schwartz, as noted by Schmidt, see *ibid.*

92. From 1943, Regulation of May 29, 1943, [1943] 1 R.G. Bl. 341 (Ger.), to 1950, Law of Sept. 12, 1950, [1950] B.G. Bl. 629 (Ger. Fed. Rep.).

93. See, *e.g.*, GER. ST. P.O. §§ 60, 63; SCHMIDT, *op. cit. supra* note 58, pt. 2, at 134.

testimony or in order to bring about truthful testimony." The oath may be administered during the preliminary investigation only after a determination that the particular witness' "sworn testimony" will be lost by the time of trial, or that only the oath will bring about a truthful statement on an important issue.[94] Administration of the oath during trial is left to the discretion of the court if the witness at the time of the hearing is over sixteen but under eighteen years of age, or if the witness is the victim of the crime, or a person so related to the accused as to be entitled to refuse to testify.[95] Finally, when "the court attributes no substantial significance to the testimony and, in its opinion, even under oath no substantial testimony is to be expected," the oath may be omitted.[96]

The impact of modern German legislation on oath administration is reflected in the interpretation of this last provision. The meaning of the phrase "substantial significance" (*wesentliche Bedeutung*)[97] is highly controversial.[98] The Bundesgerichtshof has held that the term "is closely related to relevance,"[99] and is not related to credibility at all, so that even obviously incredible testimony must be sworn to, if it has a sufficient bearing on the outcome.[100] "Substantial statements, as regards their meaning as bases of judgment," have been held to "occupy the middle ground between irrelevant testimony and testimony of decisive significance."[101] Whatever the theoretical definition, it seems clear that "any court which leaves testimony unsworn must find it difficult to rely on such testimony in the grounds of decision."[102]

Since intellectual immaturity resulting in a lack of understanding of the oath's significance constitutes an absolute oath impediment,[103] discretion to forego imposing the oath upon youthful witnesses between the ages of sixteen and eighteen is thought to require the judge to consider "the total mental and moral personality" of the young witness.[104] Mere incredibility of testi-

94. See *id.* pt. 2, § 65, comment at 154.

95. GER. ST. P.O. § 61. The last mentioned persons are enumerated in § 52, given in full in note 183 *infra*.

96. GER. ST. P.O. § 61, No. 3.

97. *Ibid.*

98. For a summary of the controversy among commentators, see SCHMIDT, *op. cit. supra* note 58, pt. 2, at 148-51.

99. Judgment of Oct. 4, 1951, Bundesgerichtshof (III. Strafsenat), 5 N.J.W. 74, 75 (Ger. Fed. Rep.).

100. Some commentators, of course, assert that testimony that is not credible cannot be relevant. For citations see SCHMIDT, *op. cit. supra* note 58, pt. 2, at 148.

101. Judgment of Jan. 23, 1951, Bundesgerichtshof (Strafsenat), 1 B.G.H. St. 8, 11 (Ger. Fed. Rep.).

102. Statement of rapporteur of the legislation to the German Parliament, cited in SCHMIDT, *op. cit. supra* note 58, pt. 2, at 149. Even in minor cases, in which testimony, in principle, is to remain unsworn, the grounds of *not* administering the oath, rather than those of administering it, must be stated in the trial record. Decision of Feb. 7, 1957, Bundesgerichtshof (IV. Strafsenat), 10 N.J.W. 550 (Ger. Fed. Rep.).

103. GER. ST. P.O. § 60, No. 1; see text at notes 152-53 *infra*.

104. Judgment of Nov. 15, 1935, Reichsgericht (I. Strafsenat), 70 R.G. St. 20, 23 (Ger.).

mony is not in itself decisive, since it may be based on error; but when incredibility appears to result from a moral defect, the oath should generally be omitted. Friendship between the witness and the accused has been particularly mentioned as a ground for foregoing the oath.[105]

The German Code of Civil Procedure provides that a witness to whom no oath impediment[106] applies "is to be sworn, if the court considers this desirable (*geboten*) in view of the significance of the testimony or in order to bring about a truthful testimony and the parties do not renounce administration of the oath."[107] This provision has been hailed as a mark of significant progress, eliminating "one of the last formal rules of proof."[108] Upon close analysis the innovation appears less sweeping than might have been expected. For, although a witness is not generally to be sworn,[109] courts have been cautioned that they must not "as so often happens in practice, . . . believe blindly every witness upon his mere say so."[110] Some importance is also attached to the fact that the Code of Civil Procedure *first* states that the witness "is to be sworn,"[111] in contrast to the provision of the Labor Courts Act[112] which furnished the pattern for the Code's rules on the oath. Accordingly, it would seem that courts must use restraint in omitting the oath.

It is permissible to require the witness to swear only to parts of his testimony, and it is said to be desirable to limit the oath to essential points.[113] The oath must not be administered prior to the testimony,[114] the requirement of a *Nacheid* being similar to that in criminal cases.[115] The appellate court may require an oath from a witness who was not sworn below.[116] Review extends of course to any abuse of discretion.[117]

Perhaps the most important provision of the German Code of Civil Procedure in this context is that allowing waiver of a testimonial oath by

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105. See SCHMIDT, *op. cit. supra* note 58, pt. 2, § 61, comment 4, at 147 (collecting authorities).

106. The law concerning oath impediments is found in GER. Z.P.O. § 393.

107. GER. Z.P.O. § 391.

108. 1 STEIN & JONAS, KOMMENTAR ZUR ZIVILPROZESSORDNUNG § 391, comment I, 1 (18th rev. ed. Schönke 1953) [hereinafter cited STEIN-JONAS].

109. BAUMBACH-LAUTERBACH § 391, comment 1, at 709.

110. *Ibid.* One commentator feels that consideration should be given to the question of whether "in fairness to the party to whom the testimony is adverse, he may be expected to submit to such testimony without oath. See 1 STEIN-JONAS § 391, comment I, 2.

111. *Ibid.*

112. In labor court cases, ARBEITSGERICHTSGESETZ §§ 58, 64 (Ger. Depene & Hans ed. 1932), an oath is administered to witnesses only if the tribunal considers it necessary to induce a truthful statement.

113. 1 STEIN-JONAS § 391, comment I, 5.

114. GER. Z.P.O. § 392.

115. See 1 STEIN-JONAS § 391, comment 1.

116. A witness may be heard at the appellate level.

117. See 1 STEIN-JONAS § 391, comment I, 3(d).

party agreement. In Germany, in contrast to Austria, the court cannot require the oath if both parties waive its imposition.[118]

Oath Impediments

All civil-law countries forbid administration of the oath to certain classes of persons. In some, these oath prohibitions parallel testimonial disabilities, while in others incapacity to testify under oath is distinct from capacity as a witness.

There are two classes of oath disabilities: those based on lack of sufficient perception and understanding, and those reflecting moral distrust.[119] The first exemption is reflected in the rule, prevailing in all civil-law countries, which bars placing children on oath.[120] The moral distrust rationale has been used to disqualify relatives of an accused or a party, for such persons are presumed to be biased, and thus inclined towards perjury.[121] To these two groups may be added what, at first blush, appears to be but a subdivision of the moral distrust classification: it is the disability which attaches to those convicted of certain criminal offenses. In most countries, however, this disability, conceived of as a "collateral punishment," and not as a social defense measure,[122] is incurred although the crime in issue does not necessarily evince the accused's proneness to lying.[123] In order to understand this irrational oath impediment fully, it is necessary to digress briefly into its history.

After substituting, in most cases, deprivations of freedom for the death penalties of medieval law, post-Revolutionary legislators felt that a sudden transition from a death sentence to life imprisonment was too abrupt. To remedy this inadequacy, the French introduced the penalty of "civic death," conceived of as a halfway house between life imprisonment and natural death.[124]

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118. GER. Z.P.O. § 391.

119. See 2 ENCYCLOPÉDIE DALLOZ, RÉPERTOIRE DE DROIT CRIMINEL ET DE PROCÉDURE PÉNALE *Témoin*, at 891, 892 n.17 (1954).

120. See, *e.g.*, text at notes 132, 171 *infra*.

121. In Decision of Jan. 9, 1957, Bundesgerichtshof (IV. Strafsenat), 10 N.J.W. 431 (Ger. Fed. Rep.), the Fourth Criminal Senate stated that putting a witness on oath is intended to induce him to tell the truth. For this reason the legislature held it desirable to prohibit the taking of an oath when this does not increase the credibility of the testimony of a suspected witness and cannot remove his bias.

122. For Swiss law, see note 172 *infra*. In France, the disability is listed among "penalties" in the Penal Code and in legal literature. See, *e.g.*, VOUIN, DROIT PÉNAL ET CRIMINOLOGIE 584-87 (1956).

123. See Debates on the Swiss Penal Code cited *infra* note 173.

124. See Pfenninger, *Die Strafen an der Rechtsfähigkeit*, 61 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT (Neue Folge) 235, 236 (1920).

"Civic death" was a survival of the ancient Germanic "peacelessness" (*Friedlosigkeit*) or its medieval modification, "outlawry" (*Echtlosigkeit, exlex, Acht*). Its avowed pattern, however, was the Roman *"capitis deminutio maxima,"* though, unlike the latter, civic death did not reduce the convict from a person to a thing.

One sentenced to civic death retained his rights of personal integrity, but his legal capacity was that of a dead person.[125] Vigorous opposition to this institution, on the ground of its fictive nature, its incompatibility with the reformative function of punishment, its immorality, and the injustice which it perpetrated on innocent relatives of the convict,[126] led to its abolition.[127]

The postconviction oath disability, however, remains as a vestige of this concept of civic death.[128] But in some countries there is a tendency to limit the disability to conviction for crime which may rationally bear on truthfulness, and thus to treat it as a social defense measure rather than as punishment.

The rules on oath impediments constitute the area of widest divergence in the oath laws of various civil-law countries.

France. "[I]n order to be a witness, a person must be capable of supporting his declaration by his oath."[129] Persons disqualified from taking an oath may nonetheless be heard by virtue of the discretionary power of the president of the court of assizes, but only "by way of simple information" (*à titre de simple renseignment*).[130] Authority to hear, without oath, certain witnesses who are barred from swearing has been recently accorded to courts of lower rank.[131]

In France, the grounds for not admitting a person to oath reflect the lack

125. *Id.* at 237.

126. These objections were raised particularly by Feuerbach. See *id.* at 137.

127. France abolished it by law of May 31, 1854. In Prussia it was abolished by the Constitution of 1850. See *id.* at 238.

The phenomenon of forfeiture of oath capacity as part of civic death has been traced to the status of being a witness in early Rome, where the giving of testimony was considered a privilege accorded only to a citizen. This privilege was accordingly lost by *infamia.* See ROHR, DIE EINSTELLUNG IN DER BÜRGERLICHEN EHRENFÄHIGKEIT IM SCHWEIZERISCHEN STRAFRECHT 17 (1940). The forfeiture of oath capacity attaching to conviction for larceny is traceable to medieval German law, in which dishonorable actions (*ehrlose Handlungen*), particularly robbery and larceny, and generally, any act evincing a "base attitude" (*gemeine Gesinnung*), rendered the culprit "dishonored" (*ehrlos*), which disqualified him from taking the oath of purgation, so that an ordeal was the only remedy left to him. See Pfenniger, *supra* note 124, at 243. In the Canton of Graubünden the expression of a man being "put out of honor and weapon" still exists, PENAL CODE § 14 (1851), meaning that he is deprived of the right to carry arms and to testify under oath—an expression reflecting the historical conception of the weapon and the oath as symbols of civic honor. ROHR, *op. cit. supra* at 30.

128. In France, this is particularly indicated by the name of the institution, "civil degradation," and by the nature of the disabilities it entails. See FR. CODE PÉNALE art. 34, No. 4º.

129. 2 ENCYCLOPÉDIE DALLOZ, RÉPERTOIRE DE DROIT CRIMINEL ET DE PROCÉDURE PÉNALE *Témoin* No. 12, at 892 (1954).

130. See FR. CODE PROC. PÉNALE arts. 330, para. 3; 336, para. 2. Formerly this discretion was not expressly granted by the Code, but was generally accepted as conferred upon the president. See 2 VIDAL-MAGNOL 1053.

131. See FR. CODE PROC. PÉNALE arts. 449 (tribunal correctionnel), 536 (tribunal de police).

of perception or moral distrust theories. Youth constitutes an oath impediment, and the minimum age for taking oaths has been raised by the new Code of Criminal Procedure from fifteen to sixteen years.[132] *"Reprochables"* are persons who are suspected of partiality and, therefore, barred from testifying under oath if their testimony is objected to by the prosecution, the accused, or a civil party. Even in the absence of objection, however, the court may refuse to hear, under oath, witnesses within this category.[133] For example, close relatives of the accused are *reprochables*.[134] Most meritorious is the exclusion in French law of certain types of informers. The paid informer (*celui dont la dénonciation est récompensée pécuniairement par la loi*) may not be heard under oath if a party or the prosecution objects.[135] And in the instance of the paid informer, in contrast to other oath impediments, the law does not mention the alternative of hearing him without oath. A "person who, acting by virtue of a legal obligation, or on his own initiative, brought the facts charged to the attention of authorities" may be a witness, but the president is required to call the attention of the court to the fact that the witness is an informer.[136] Equally noteworthy is the prohibition against administering an oath to a witness whose name has not been, or has been irregularly, communicated to the parties. If the court finds a party's objection well founded, it may hear the witness by way of "simple information" through the president's discretionary power.[137]

The institution of "civil degradation" has recently been reaffirmed in French law. Such degradation, now attaching to punishment for a major crime,[138] imports various incapacities,[139] among which is inability "to testify in court

132. FR. CODE PROC. PÉNALE arts. 108, 335, No. 7°, 447. Compare FR. CODE INSTR. CRIM. art. 79.

133. Bulletin Criminal, No. 3, Jan. 7, 1915, cited in 2 ENCYCLOPÉDIE DALLOZ, *op. cit. supra* note 129, at 893. FR. CODE PROC. PÉNALE art. 336, para. 1, however, provides that examination of such witnesses under oath does not render the testimony void.

134. FR. CODE PROC. PÉNALE art. 335 (procedure before the Cour d'assises) provides:

> The testimony of the following persons must not be received under oath:
>
> 1. The father, the mother or of any other ascendant of the accused or of any of the accused persons who are present and subject to the same trial;
> 2. The son, daughter or any other decendant;
> 3. The brothers and sisters;
> 4. In-laws of the same degree;
> 5. The husband or wife; this prohibition applies even after divorce;
>
> . . . .

FR. CODE PROC. PÉNALE art. 448 (procedure before a tribunal correctionnel) provides that testimony from these persons "shall be received" without oath. This provision is incorporated by reference in art. 536 (procedure before a tribunal de police).

135. FR. CODE PROC. PÉNALE arts. 337, para. 2; 451, para. 2.

136. FR. CODE PROC. PÉNALE arts. 337, para. 1; 451; para. 1.

137. FR. CODE PROC. PÉNALE arts. 329, 330.

138. FR. CODE PÉNAL art. 28, as amended, Law of November 20, 1957.

139. For example, loss of political rights, inability to be a member of a family council.

otherwise than by giving simple information."[140] In cases of conviction for certain minor crimes, including false testimony in a matter involving a minor crime, the court has discretion to impose a similar prohibition on testimony under oath.[141]

The Cour de Cassation has repeatedly interpreted oath incapacities as being limited to those provided for by law, on the ground that they are exceptions to the general principle of testimony under oath.[142] In line with this principle, the Cour de Cassation has reversed a death sentence because the nephew of the accused was heard without being sworn;[143] reversed a sentence based on the unsworn testimony of two former sons-in-law whose successive marriages to the accused's daughter had been dissolved by divorce;[144] set aside a larceny conviction dependent upon the unsworn testimony of the accused's mistress;[145] and reversed a conviction founded upon the testimony of a witness who had not been sworn because, contrary to law, she had been present at the trial prior to her testimony.[146]

In French civil cases, witnesses play a subordinate role, since, in suits involving transactions exceeding a certain value, proof by testimony is generally excluded, the parties being required to secure documentary evidence.[147] Oath impediments are similar to those contained in the criminal law.[148]

Germany. Oath prohibitions are strictly enforced in Germany. If an oath is erroneously administered to a person who is subject to an oath impediment, the testimony is admissible only as "unsworn" in the court's discretion.[149]

140. FR. CODE PÉNAL art. 34, No. 3.

141. FR. CODE PÉNAL art. 42, No. 8; art. 362, para. 4.

142. *E.g.*, Case of Buttely, Cour de Cassation (Ch. crim.), Feb. 28, 1946, [1946] D. 186 (Fr.).

143. Tripier v. Min. public, Cour de Cassation (Ch. crim.), March 14, 1935, [1935] Dalloz Hebdomadare 255 (Fr.).

144. Case of Ahmed Saïd Arab ben Rababh, Cour de Cassation (Ch. crim.). Feb. 4, 1954, [1954] D. 365 (Fr.).

145. Case of Fauvet, Cour de Cassation (Ch. crim.), Feb. 25, 1958, [1958] D. 516 (Fr.).

146. Case of Buttely, Cour de Cassation (Ch. crim.), Feb. 28, 1946, [1946] D. 186 (Fr.). The court held that violation of FR. CODE INSTR. CRIM. art. 316 (now FR. CODE PROC. PÉNALE art. 325), which forbids witnesses to be in the courtroom when they are not testifying, did not nullify her testimony. Nevertheless, it was that violation which caused the lower court to refuse to admit her to oath, and FR. CODE INSTR. CRIM. art. 317 (now FR. CODE PROC. PÉNALE art. 331, para. 4), providing that witnesses shall be sworn, carries the sanction of nullity.

147. FR. CODE CIVIL art. 1341. See also ITAL. CODICE CIVILE art. 2721.

148. Except as regards questions of status and matters of separation and divorce, the testimony of relatives and in-laws of a party in direct line, or of his spouse, even divorced, is not admissible. FR. CODE PROC. CIV. art. 262, paras. 1, 2, as amended, Decree No. 58-1289, Dec. 22, 1958, [1958] Journal Officiel 11608. Persons under the age of fifteen may be heard without oath. FR. CODE PROC. CIV. art. 262, para. 3. Those under disability due to conviction for crime are not admitted to oath and must not be heard except by way of information. FR. CODE PROC. CIV. art. 262, para. 4.

149. The court must advise the parties that it will treat the testimony as unsworn. The purpose of this requirement is to give the accused an opportunity to make further

And unless the grounds of decision show that the court expressly treated the testimony as unsworn, the judgment may be reversed on the theory that the lower court may have erroneously given the testimony the weight of a sworn statement.[150]

Two groups of oath prohibitions are common to criminal and civil procedure: those based on mental incapacity and those based on conviction. A third group relating to the crime at bar, of course, is limited to criminal cases.[151]

The German oath impediment based on mental incapacity differs from a corresponding impediment in Swiss law,[152] which is predicated upon defects of perception or judgment generally. The German law defines the impediment as a flaw affecting the witness' understanding of the nature and significance of the oath.[153] Emphasis is thus placed on the solemnity of the oath itself.

General incapacity based on conviction for crime attaches in German law only to the testimonial crimes, *i.e.*, false testimony and perjury.[154] While this apparently strict limitation would seem commendable, note the many species of crimes within these genera, for example, perjury by omission, attempted perjury, and unsuccessful instigation of perjury.[155] The German law of

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suggestions as to proof. Judgment of May 23, 1938, Reichsgericht (II. Strafsenat), 72 R.G. St. 219, 220 (Ger).

150. Judgment of May 13, 1921, Reichsgericht (IV. Strafsenat), 56 R.G. St. 94 (Ger.).

151. GER. ST. P.O. § 60 reads as follows:

> The oath must not be administered
>
> 1. To persons who, at the time of questioning, have not attained the age of sixteen years or who, due to a lack of mental maturity or to mental disability, have no sufficient conception of the nature and significance of the oath;
>
> 2. To persons who, according to provisions of criminal statutes, have no capacity of being heard as witnesses under oath;
>
> 3. To persons who are suspected of, or were convicted for, commission of the act which is the subject of the investigation, or participation therein, harboring [accessorship after the fact] or receiving.

GER. Z.P.O. § 393, except for a slight linguistic modification of the first sentence, is identical; No. 3, of course, is omitted.

152. See note 169 *infra*.

153. See note 151 *supra*.

154. The "provisions of criminal statutes" to which GER. ST. P.O. § 60, No. 2, and GER. Z.P.O. § 393, No. 2, refer are those comprised in GER. ST. G.B. § 161, which reads thus:

> (1) In the case of every conviction for perjury, except in cases under §§ 157 and 158 [perjury in a state of necessity and active repentence], the sentence must declare forfeiture of civic rights of honor and besides permanent incapacity of the convicted person to be heard under oath as a witness or expert.
>
> (2) In cases under §§ 153, 156 to 159 [unsworn false testimony, affirmation in lieu of an oath, perjury in a state of necessity, perjury with active repentence, unsuccessful instigation of unsworn false testimony or affirmation in lieu of an oath] the sentence may declare, besides the punishment of imprisonment, forfeiture of civic rights of honor.

155. See text at notes 245-59 *infra*.

perjury indicates that the oath itself is protected.[156] Thus, a conviction for perjury, except where a reduction of punishment is granted on the ground of "necessity"[157] or "active repentence,"[158] carries a mandatory forfeiture of capacity to testify under oath, whereas, in cases of conviction for false testimony, forfeiture is discretionary.[159] Nevertheless, the forfeiture of oath capacity in German law has been held to be a social defense measure rather than a penalty. Consistently with this conception, the forfeiture is permanent.[160]

Austria. Austria has long been a leader in progressive oath policy. In 1787 Austrian law made unsworn false testimony a punishable offense.[161] This has given an entirely new imprint to Austrian oath legislation. When a witness subject to an impediment is heard under oath, only the oath is null and void; the testimony remains effective as an unsworn statement.[162]

Oath impediments are of two kinds: absolute ones, those which operate against any accused or party, and relative ones, those which operate only with regard to certain persons or in specified situations. Absolute oath impediments are either temporary or permanent. Conviction for crime affixes a permanent absolute oath impediment in criminal as well as in civil cases only when the crime in issue bears on credibility.[163] The impediment ceases to operate only when the conviction is struck from the criminal record, which is not necessarily contemporaneous with the end of the conviction's other consequences.[164] Conviction or investigation for other major crimes generally constitutes a temporary absolute impediment, lasting until termination of the punishment or the close of the proceedings.[165]

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156. See 2 KOHLRAUSCH, STRAFGESETZBUCH § 152, comment III, 2-3, at 330, 331 (41st ed. Lange 1956).

157. GER. ST. G.B. § 157.

158. GER. ST. G.B. § 158.

159. GER. ST. G.B. § 161.

Forfeiture of oath capacity is mandatory even in convictions for the unsuccessful instigation of perjury. Decision of Aug. 29, 1956, Bundesgerichtshof (III. Strafsenat), 9 N.J.W. 168 (Ger. Fed. Rep.).

Forfeiture does not deprive the offender of capacity to testify as a civil party under oath or to take an oath of insolvency. SCHÖNKE, STRAFGESETZBUCH: KOMMENTAR § 161, comment II(2), at 626 (8th rev. ed. Schröder 1957).

160. Judgment of March 10, 1953, Bundesgerichtshof (I. Strafsenat), 4 B.G.H. St. 158 (Ger. Fed. Rep.); Judgment of Oct. 19, 1959, Bundesgerichtshof (II. Strafsenat), 6 B.G.H. St. 373, 375 (Ger. Fed. Rep.). See also 2 KOHLRAUSCH, *op. cit. supra* note 156, § 163, comment IV, at 351.

161. See 2 RITTLER, LEHRBUCH DES ÖSTERREICHISCHEN STRAFRECHTS 289 (1938).

162. See LOHSING-SERINI 290.

163. The statutes refer specifically to false testimony and false oaths. AUS. ST. P.O. § 170, No. 3; AUS. Z.P.O. § 336, No. 1; see LOHSING-SERINI 290.

164. LOHSING-SERINI 291.

165. AUS. ST. P.O. § 170, No. 2. "Investigation" comprises both the proceedings initiated by the raising of the charge, and meant to establish whether trial proceedings

Persons with a relative oath impediment, in addition to "suspects,"[166] are those who bear enmity toward the accused, provided, however, that this sentiment is not merely evidence of a hostile feeling, but rather conviction of some duration.[167] The court must inquire into whether, considering the circumstances and the personality of the witness, the enmity is of a nature as would affect his credibility. A final relatively disqualified class includes persons who, when questioned, made false material statements, unless they can prove, to the satisfaction of the court, that their untruthfulness was the result of honest error. And silence may constitute a falsehood.[168]

Switzerland. The Swiss Federal Criminal Procedure Act places broad prohibitions on the use of the oath and vow.[169] It disqualifiies all persons who have a right to refuse testimony.[170] In addition, minors under the age of eighteen years cannot be sworn.[171] This provision is commendable in that it affords young witnesses protection against prosecution for perjury. In contrast, the Swiss oath impediment based on conviction is open to objection. It extends to persons "who, by a criminal sentence, have been declared to have forfeited their political rights." "Suspension of civic capacity" is a punitive measure,[172] mandatory when conviction results in imprisonment in a

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are to be opened, AUS. ST. P.O. § 91, and the trial proceedings up to final termination, LOHSING-SERINI 291.

In contrast to its Italian counterpart, see ITAL. CODICE PROC. PENALE art. 159, para. 2, the Austrian impediment does not apply during stay in a compulsory labor institution or during police supervision, see LOHSING-SERINI 291.

Oath incapacity also results from defects of perception and memory, AUS. ST. P.O. § 170, No. 5, and youth (the minimum oath age is 14 years), AUS. ST. P.O. § 170, No. 4.

166. AUS. ST. P.O. § 170, No. 6.

167. AUS. ST. P.O. § 170, No. 6.

168. AUS. ST. P.O. § 170, No. 7; LOHSING-SERINI 293.

169. SWIT. B. STR. P. art. 86, para. 4:

> Neither an oath nor a hand vow must be imposed upon
>
> 1. Persons who have a right to refuse testimony,
> 2. Persons of less than eighteen years,
> 3. Persons who lack judgment capacity and those with disabilities of memory or perception.
> 4. Persons who, by virtue of a criminal sentence, have been declared to have forfeited their political rights.

170. SWIT. B. STR. P. art. 75:

> The following persons are entitled to refuse testimony:
>
> The relatives and relatives by marriage of the accused in direct line,
>
> The brothers and sisters, the brother-in-law and the sister-in-law, the spouse even if divorced, and the fiance of the accused,
>
> His adoptive parents and adoptive children.

171. The minimum age for taking an oath in France is sixteen in criminal cases, text at note 132 *supra*, and fifteen in civil cases, note 148 *supra*; in Austria, fourteeen in criminal matters, note 165 *supra*; in Germany, sixteen in both civil and criminal cases, note 151 *supra*.

172. This is evidenced by the marginal title—"Collateral Penalties" (*Nebenstrafen*)—in the official version of the code. SWIT. ST. G.B. art. 5. Additional support for this

penitentiary, and discretionary in cases of lesser imprisonment if the act evinces a "dishonorable attitude" (*ehrlose Gesinnung*). Suspension is never permanent but always limited in time, which is a commendable aspect of regarding it as a punishment rather than as a security measure.[173] In addition, a mandatory suspension is prescribed in certain other cases, such as pandering [174] or living on the earnings of a prostitute,[175] and a discretionary suspension is provided for in certain bankruptcy cases,[176] and generally in cases of "crimes against the popular will."[177] But a person deprived of civic capacity may, upon his petition, be restored to such capacity by a judicial act.[178]

Privileges Against Oath Compulsion

Recognition of a right to refuse to swear or to affirm, as distinct from a right to refuse to testify, is rare. No such right exists, for instance, in Austria.[179] Legal systems, such as the French, which predicate the status of being a witness upon oath taking,[180] of course exclude an independent right not to be sworn.[181]

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view may be gathered from the provision's legislative history. See ROHR, *op. cit. supra* note 127, at 85-88.

173. The maintenance of the institution of civic incapacity was strongly influenced by Franz von Liszt, who believed that it was necessary to maintain the distinction between imprisonment in a penitentiary and simple imprisonment, by imprinting a mark of dishonor upon the former. See von Liszt, *Kriminalpolitische Aufgaben*, 10 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 51, 62-63 (1890).

The theory behind this impediment was manifested in the long deliberations which ultimately led to enactment of the Swiss Federal Criminal Code. Two opposing views were represented: one view, which was ultimately successful, proceeded on the assumption that a released penitentiary inmate should be barred from public activities for a certain time on grounds of simple decency (Rapporteur Seiler); the other view (Logoz), pointed to the fact that many a serious crime punishable by imprisonment in the penitentiary does not evince a base attitude. Finally, Häberlin asserted that the decisive factor is not the baseness of the criminal's attitude but rather the fact that every major crime evinces opposition to the state. See ROHR, *op. cit. supra* note 127, at 86.

174. SWIT. ST. G.B. art. 199.

175. SWIT. ST. G.B. art. 201.

176. SWIT. ST. G.B. art. 171.

177. SWIT. ST. G.B. art. 284 (election crimes).

178. SWIT. ST. G.B. art. 76 provides that "when the actor has been suspended in his civic capacity and at least two years have passed since the judgment was executed, the judge may, upon the actor's petition, restore him in his civic capacity, if this is justified by his conduct."

179. See LOHSING-SERINI 290 (persons who have a right to refuse testimony may be required to take an oath if they choose to testify).

180. See text at note 129 *supra*.

181. The traditional duty of witnesses in French law is to "appear, take the oath and testify." FR. CODE INSTR. CRIM. art. 80 required him, under the penalty of a fine, "to appear and satisfy the citation," which covered the three obligations. The 1957 legislation provided in FR. CODE PROC. PÉNALE art. 109, para. 1, that the witness is bound to "appear,

In Germany, however, there are instances in which persons generally entitled to refuse testimony may choose to testify in a criminal case and yet refuse to swear or to affirm.[182] Such privilege is granted to persons close to the accused or the person charged,[183] but not to those entitled to refuse testimony on other grounds (clergymen, attorneys, journalists, publishers, or government officials).[184] The court is required to inform witnesses entitled to refuse taking the oath of this right. Failure to do so constitutes reversible error.[185] In German civil cases it is uncertain whether a witness who has a right to refuse testimony may, after testifying, still refuse to take an oath.[186] The wording of the relevant provision[187] has been interpreted as assuming the existence of such a right of refusal.[188] As to the meaning to be drawn from refusal, it has been held that, while "it would be wrong to evaluate refusal to take the oath so as to deny any evidentiary value to the testimony, . . . under the circumstances of the concrete case, this inference may be drawn."[189]

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take the oath and testify," but para. 2 of the same article provided that a fine was imposed "if the witness does not appear." The legislative history shows the ommission of a fine in cases of failure to swear or testify to have been intentional. One of the reasons advanced for this course of action was that commendable scruples may prevent a witness from testifying, for example, against a friend, so that the witness shows sufficient good faith by appearing. The Ordinance of December 23, 1958, added, however, a third subdivision to art. 109, subjecting refusal to take the oath and to testify to a fine. See Aberkane, *Les Sanctions relatives au témoignage*, 14 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ (nouvelle série) 1, 11-13 (1959).

182. "[T]he relatives of the accused named in § 52, subdiv. 1, have the right to refuse supporting the testimony by oath . . . ." GER. ST. P.O. § 63.

183. GER. ST. P.O. § 52 provides:

(1) The following persons are entitled to refuse testimony:

1. the fiance of the person charged;
2. the spouse of the person charged, even where the marriage no longer exists;
3. one related to the person charged in direct line by blood, marriage, or adoption; or collaterally by blood up to the third degree; or by marriage up to the second degree, even where the marriage upon which the in-law relationship is based no longer exists.

184. GER. ST. P.O. § 53 deals with protection of confidential communications. But attorneys and physicians have no right to refuse testimony after they are released of their duty of secrecy. GER. ST. P.O. §§ 53, para. 2, 54 deal with special provisions applicable to public officials.

185. SCHMIDT, LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG UND ZUM GERICHTSVERFASSUNGSGESETZ pt. 2, § 63, comment III, at 153.

186. GER. Z.P.O. § 383 enumerates persons related to a party similar to the provisions of GER. ST. P.O. § 52, para. 1, and adds various persons having a professional or official duty of secrecy.

187. GER. Z.P.O. § 393.

188. See authorities cited in 1 STEIN-JONAS § 393, comment III.

189. F. v. M., Oberster Gerichtshof (II. Zivilsenat), Nov. 4, 1948, 1 Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Zivilsachen 226, 227 (Ger.), cited in 1 STEIN-JONAS § 392, comment III n.4.

THE OATH IN COMMON LAW COUNTRIES: COMPARATIVE CONTEMPORARY LAW

The most astonishing feature of both English and American practice is utilization of the oath in trifling matters and in a form which conveys no sense of its importance and solemnity. A foreign observer may be particularly struck by the daily American scene of swearing before a drug store attendant, who, acting in the capacity of a notary public, administers the oath in the interim period between selling soap and serving Coca-Cola. In contrast, in most continental countries there is a trend toward limiting oath-taking and avoiding its indiscriminate use.

In civil-law countries, efforts are made to avoid situations that are conducive to perjury. These efforts are manifested by rules, for example, that permit only one party to be sworn, or that prohibit persons with a strong motivation to lie from swearing. In common-law countries, on the other hand, oaths are constantly administered to persons whose interests are clearly adverse, so that there is a certain degree of advance probability that one of them will commit perjury.

Neither the discretionary nor the posttestimonial oath, both recent civil-law innovations designed to avoid unnecessary oaths and perjury, is employed by the common law. Of course, it might be rather difficult to fit the posttestimonial oath into the prevailing system of examination by question. The German *Nacheid* is partly predicated upon the civil-law method of permitting the witness to relate his story in narrative form.[190]

The common-law jurisdictions mouth the requirement that "the witness must understand the nature and obligation of an oath before he will be allowed to testify, and much effort has been expended in contesting whether or not given witnesses were or were not able to understand the import of an oath."[191] Seldom, however, is the witness challenged as to his belief in the retribution he presumably risks by taking a false religious oath. The burden is on the

190. GER. ST. P.O. § 69, para. 1; GER. Z.P.O. § 396, para. 1 provide that "the witness shall state in narrative [literally, in comprehensive, connected] form what he knows of the subject of the examination."

France specifically prohibits interrupting the narrative of the witness. FR. CODE PROC. PÉNALE art. 331, para. 4. See also FR. CODE PROC. PÉNALE art. 332, para. 1, providing that the president may put questions to the witness "after each testimony." Similarly, FR. CODE PROC. PÉNALE art. 454, para. 1; FR. CODE PROC. CIV. art. 265, as amended, prohibit parties, under sanction of exclusion and fine, to "interrupt the witness in his testimony." This method of interrogating the witness has the advantage of enabling him to reconstruct the events spontaneously and without the inhibitory effects of the "question." See Olinick, *Questioning and Pain, Truth and Negation*, 5 J. AM. PSYCHOANALYTIC ASS'N 302 (1957) ("paradoxically, the question not infrequently is utilized to bar access to what might become known"). Questioning following the narrative deposition then serves to elucidate doubtful points and to call the attention of the witness to any statements that he might wish to rectify.

191. GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 360 (1952).

witness to object to the religious form, something a nonbeliever is unlikely to do for fear of placing the credit of his testimony in jeopardy.[192] While affirmation as a substitute for the oath is generally available, some statutes permit its use only upon a showing of strong sentiment, religious or non-religious,[193] against swearing.

Despite the present level of insight into child psychology, common-law jurisdictions continue the anachronistic practice of having children of tender years sworn.[194] And administering an oath to a criminal defendant is equally paradoxical, since it often offers a choice between self-incrimination and perjury. Moreover, the American practice of invoking the assistance of religion in those numerous and manifold transactions of everyday life in which the oath is used contrasts strangely with hesitation on constitutional grounds to render assistance to religion, by so much as transporting students to parochial schools.[195]

LEGAL SYSTEMS WITHOUT AN OATH

Chinese Law[196]

The argument that, in the absence of the oath, declarants are not sufficiently appraised of the significance of statements made for official purposes is adequately met in Chinese law. To call the witness' attention to the special significance of "testimony," this law utilizes the same method which is used in private law to emphasize the binding force of an act: the written form.

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192. Sorensen, *The Effectiveness of the Oath To Obtain a Witness' True Personal Opinion*, 47 J. CRIM. L., C. & P.S. 284, 287 (1956).

193. See the English Oaths Act, 1888, 51 & 52 Vict. c. 46, § 5, in BOLAND & SAYRE, OATHS AND AFFIRMATIONS 57-58 (1953). Under this act, "it is vital before a person can be allowed to affirm that he objects on one of the grounds specified [that he has no religious belief, or that the taking of an oath is contrary to his religious belief] to being sworn." *Id.* at 25. In a recent English case it was held error to permit affirmation by a Sikh who did not object to being sworn, but could not be sworn in accordance with the rites of his religion because no copy of the Granth, the holy book of the Sikhs, was available. Regina v. Pritam Singh, [1958] 1 All E.R. 199 (Leeds Assizes 1957), 74 L.Q. REV. 179 (1958). This case involved an interpretation of the Perjury Act, 1911, 1 & 2 Geo. 5, c. 6, § 15(2), providing that "the expression 'oath' in the case of persons for the time being allowed by law to affirm . . . includes affirmation." Apparently only three copies of the Granth are known to exist in England. 74 L.Q. REV. 179 (1958).

See 67 C.J.S. *Oaths & Affirmations* § 6, at 9 n.11 (1950) (collecting American authorities).

194. See Silving, *The Oath: I*, 68 YALE L.J. 1329, 1373-75 (1959).

195. *E.g.*, McVey v. Hawkins, 364 Mo. 44, 258 S.W.2d 927 (1953); Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938) (overruled by a New York constitutional amendment, N.Y. CONST. art. XI, § 4). *But see* Everson v. Board of Educ., 330 U.S. 1 (1947).

196. The author owes the following information on Chinese law to Mr. Li Chun, Associate Professor of Law, Soochow University, Taipai, Taiwan; graduate Fellow, Yale Law School, 1958-1959.

For example, a witness in a criminal trial is usually required, following long-standing Chinese tradition, to sign a "bond to tell the truth," or a "recognizance."[197] Such bond or recognizance is executed in court by the witness placing his signature, a cross, a chop (official stamp), or a fingerprint upon the bond.[198] Before signing the bond, he is instructed regarding the obligations it entails and the punishment imposed upon false testimony.[199] The bond must state that the testimony to be given is based on actual facts, without concealment, qualification, addition, or modification.[200] While the bond is usually executed prior to the testimony, it may be signed after examination.[201] A witness who refuses to sign without good reason is liable to a small fine.[202] Although secular and rationalistic in character, the bond performs the same functions attributed to the civil-law oath. The law grants to certain witnesses exemptions based on age, mental disability, or relationship to the accused.[203] The penalty for a false statement under bond is very heavy: penal servitude for a period of not more than seven years.[204]

197. CHINA CODE CRIM. PROC. art. 173, § I (1935).
198. CHINA CODE CRIM. PROC. art. 176, § III (1935).
199. CHINA CODE CRIM. PROC. art. 174, § I (1935).
200. CHINA CODE CRIM. PROC. art. 176, § I (1935).
201. CHINA CODE CRIM. PROC. art. 175 (1935).
202. Not more than 50 Yuen ($50). CHINA CODE CRIM. PROC. art. 180, § I (1935).
203. CHINA CODE CRIM. PROC. art. 173, § I (1935):

> A witness shall be ordered to sign a bond to tell the truth, provided, however, that if any one of the following circumstances is present, he shall not be so ordered:
>
> (1) A person under the age of 16;
>
> (2) A person who, because of mental disability, is incapable of understanding the meaning and effect of a bond to tell the truth;
>
> (3) A person who is connected with, or is suspected of being involved in, the case as a co-offender, or who is suspected of concealing an offender, destroying or falsifying evidence or of receiving stolen property;
>
> (4) A person who comes within the circumstances specified in Section (I) of Article 167 or Art. 168 and who does not refuse to testify.

The provisions referred to in No. 4 read as follows:

> Article 167, Section (I). A witness may refuse to testify under any of the following circumstances:
>
> (1) Where the witness is or has been the spouse, blood relative within the fifth degree, relative by marriage within the third degree, head of the family or a member of the family of the accused or private complainant;
>
> (2) Where the witness has entered into a contract of betrothal with the accused or private complainant, or
>
> (3) Where the witness is or has been the statutory agent of the accused or private complainant or where the accused or private complainant is or has been his (the witness') statutory agent.
>
> Article 168. A witness may refuse to testify when his testimony may subject him or others specified in Section (I) of the last article to criminal prosecution or punishment.

204. CHINA PENAL CODE art. 168 (1935).

Slavic Law: U.S.S.R. and Poland

Slavic tradition, rather than Communist ideology, has supported the abolition of the oath in the Soviet Union and Poland. A political rationale is, of course, put forth. Peculiarly enough, this rationale is based on neither atheism nor secularism, but on the oath's incompatibility with an allegedly unique Soviet doctrine of "intimate conviction."[205]

In Poland, the "promise to tell the truth" has replaced the oath.[206] The existence of the "promise" may be due, at least in part, to the fact that, while less strong than in other countries, the oath tradition in Poland seems to have been somewhat stronger than in Russia. The "promise," like the oath,

205. Thus, exclusion of the oath in the Soviet Republics was enunciated in the provision granting the judge freedom to evaluate the evidence. R.S.F.S.R. CODE CRIM. PROC. art. 57 (1923) (U.S.S.R.) declared: "The court is not limited to any formal means of proof and it is in the court's discretion whether, under the circumstances of the case, it wishes to admit evidence or demand its production by third persons, upon whom such demand is binding. The oath is inadmissible in evidence." KODEKS R.S.F.S.R.—UGOLOVNO-PROTSESSUAL'NYI, Feb. 15, 1923, No. 7, ch. 106, art. 57, in UGOLOVNO PROTSESSUAL'NOE ZAKONODATELSTVO S.S.S.R. I SOIUZNYKH RESPUBLIK (Karev ed. 1957); see VISHINSKY, TEORIA, SUDEBNYKH DOKAZATELSTV V SOVETSKOM PRAVE 165-66 (Gosiurizdat 1950) ("According to Soviet law, any circumstance, regardless of its inherent contents or value, may be evidence in the matter. Only the oath is not admissible as evidence, which is quite natural, since 'evidence' of this kind is directly opposed to the principle of intimate conviction, prevailing in Soviet Law.").

The recent Declaration of the Basic Principles of Criminal Procedure of the S.S.S.R. and Federated Republics does not incorporate the above provision. Zakon ob utverzhdenii osnov ugolovnogo sudoproizvodstva Soiuza S.S.R. i Soiuznykh Respublik ch. 15, arts. 16-17, Dec. 25, 1958, 22 Vedomosti Verkhovnogo Soveta, Jan. 1, 1959, No. 1(933), at 66. It states that "any factual data" on the basis of which law officers establish "the presence or absence of the socially dangerous act, the guilt of the person concerned . . . and other circumstances which are relevant to the proper determination of the matter . . . are evidence." Art. 16, subdiv. 1. It further enumerates types of such data, such as testimony of witnesses, of the victim, documents. Art. 16, subdiv. 2. It finally provides that all law officers are to evaluate the evidence "in accordance with their intimate conviction, based on a comprehensive, full and objective consideration of all circumstances of the acts in their totality, being guided by law and socialist legal conscience," and that "no evidence has . . . a [probative] force established in advance." Art. 17, subdivs. 1, 2. While the oath is not mentioned, it may be assumed that since it was expressly declared "inadmissible in evidence" in the previous law, failure to enumerate it in the present law among the types of data that may serve as evidence, combined with the doctrinal position taken by commentators, precludes its admission.

206. KODEKS POSTEPOWANIA KARNEGO (Code of Criminal Procedure [hereinafter cited as POL. K.P.K.]) art. 98 (Pol. 1950), [1950] Dziennik Ustaw Rzeczypospolitej Polskiej [hereinafter cited as Dz. U.] No. 40, ch. 364, at 496 (Pol.), provides that "during trial, unless the parties release the witness from the promise and unless the court does not find the promise to be necessary, the court shall take from the witness a promise in accordance with a prescribed formula." It is the court, however, and not the parties which ultimately decides whether a promise is necessary. See KALINOWSKI, PRZEBIEG PROCESU KARNEGO 212 (1957).

KODEKS POSTEPOWANIA CYWILNEGO (Code of Civil Procedure [hereinafter cited as POL. K.P.C.]) art. 283 (POL. 1950), [1950] Dz. U. No. 43, ch. 394, at 549 (Pol.), provides

is apparently felt to be not fully consistent with free evaluation of the evidence, for the Polish Code of Civil Procedure specifically provides that "the court shall evaluate the testimony of the parties, *even though made under a promise,* in accordance with its persuasion, on the basis of a complete consideration of the collected material."[207] Certain persons are exempt from the requirement to make a promise, in exact analogy to traditional civil-law oath disqualifications.[208] And care is taken that civil parties are not permitted to promise, if their statements are inconsistent with each other.[209]

Both Russian and Polish abandonment of the oath as evidence is claimed to be but a logical consequence of the doctrine of free evaluation of the evidence. Since all civil-law countries regard this doctrine, widely known under the French name of "intimate conviction" (*intime conviction*), as a legal truism, one might assume that the Communist oath abolition, based on free evaluation of the evidence, has no political character. Soviet writers, however, emphatically reject any such assumption. According to them, "intimate conviction," as all legal institutions, is ultimately determined by the prevailing economic structure.[210] Hence, Communist "intimate conviction" is said to have a different meaning than its capitalistic namesake.

In capitalistic countries—according to Communist writers—the process of reaching an "intimate conviction" is regarded as a "spontaneous, vitalistic," or emotional process. This conception necessarily flows from the idealistic, subjectivistic epistemology, allegedly dominant in capitalistic countries, according to which the reality of the outside world—the "thing-in-itself"—is not accessible to human knowledge. Capitalist legal scholars must, therefore,

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that "witnesses may, with consent of the parties, be released by the court from making a promise."

The Polish "promise" formula is: "Aware of the significance of my words and of responsibility under the law, I solemnly promise that I will state the honest truth, not concealing anything that is known to me." POL. K.P.K. art. 100. POL. K.P.C. art. 282 is the corresponding civil provision. In addition, civil parties who are heard only if other evidence is insufficient or lacking are warned before being questioned that they may be required to make a promise. POL. K.P.C. art. 311.

207. POL. K.P.C. art. 316. (Emphasis added.)

208. POL. K.P.K. art. 99 provides that the following persons shall not make a promise: "(a) a minor up to 14 years of age; (b) persons who, because of mental disease or another disturbance of mental activity, do not realize the significance of the promise; (c) persons suspected of participation in the act which is the subject of the proceedings or of criminal activity closely connected with the accused." POL. K.P.C. art. 283 prohibits the taking of a promise from minors under the age of 14 and from persons convicted by final judgment for false testimony.

209. POL. K.P.C. art. 314 provides that if questioning of the parties has not clarified a given controversial fact, the court may interrogate under promise one of the parties previously questioned without a promise regarding that fact, but this does not exclude another party being similarly questioned under a promise as to another controversial fact.

The court may also confine the questioning under promise to part of the previous testimony made without a promise. POL. K.P.C. art. 315.

210. The following summary of Communist views is based on SCHAFF, PROCES KARNY POLSKI LUDOWEJ 363-72 (1953), who mainly follows VISHINSKY, *op. cit. supra* note 205.

assume that reality may be known only approximately, in terms of probability or "moral certainty," not of actual certainty. Since absolute certainty cannot be attained, some acceptable lesser criterion of reality must be assumed. That standard, in capitalist countries, is the abstractly conceived "reasonable man." Communist writers further maintain that the capitalist "moral certainty" is merely a disguise for class justice administered by bourgeois courts and an advance dispensation for judicial mistakes—mistakes "most opportune as instruments whereby, with the aid of the administration of justice, revenge can be taken against people who are dangerous to a given regime." " 'The reasonable man' "—cries Vishinsky—"who on the basis of his intimate 'conviction' or in conformance with his 'conscience' sends the unemployed to the guillotine or to prison—is always the same 'reasonable bourgeois.' "[211] Intimate conviction, the Communists claim, is quite different in the Communist economic and social structure.

Under the prevailing Communist philosophy, reality is objective, and accessible to knowledge. "Intimate conviction" is admittedly politically determined.[212] It is the conviction of a judge conditioned by the socialist society in which he lives.[213] The judge thus conditioned is not merely an umpire, but is an active agent "directing the course of procedure in a manner that would best serve the discovery of truth."[214] Thus, the judge may use all types of evidence. For some reason the oath is the one exception.

But it is quite evident that this theory adds nothing to what has been said in France and other civil law countries regarding the inconsistency of the oath with the system of intimate conviction. The generally accepted meaning of "intimate conviction" is that it excludes binding rules of proof. In this sense, it refers to evaluation, and not to admissibility. To the extent that the oath is deemed by law to add to the value of testimony, it is, of course, incompatible with this meaning of "intimate conviction." Sometimes "intimate conviction" is also taken to mean that all evidence is admissible, regardless of the degree of its probative force.[215] Under this alternative meaning, no reason appears

211. SCHAFF, *op. cit. supra* note 210, at 364 (citing VISHINSKY, *op. cit. supra* note 205, in a Polish edition).

212. The Communist view of "intimate conviction" is not new, for in 1907 Garraud emphasized that the process of "intimate conviction"—even by jury—is not a purely emotional process. See Silving, *The Oath: I*, 68 YALE L.J. 1329, 1360 n.210 (1959). See also FR. CODE PROC. PÉNALE arts. 485, 543, providing that every judgment must contain "grounds of decision" which "constitute the basis of decision."

The Communist claim that the reality of facts varies depending on the economic and social background of the fact finder is really an implied concession to the subjectivist view. See SCHAFF, *op. cit. supra* note 210, at 389; KEMPISTY, METODYKA PRACY SEDZIEGO W SPRAWACH KARNYCH 118 (1955).

213. SCHAFF, *op. cit. supra* note 210, at 369-70, points out that the very first ordinances of Soviet authority in Russia, concerning court organization and administration of justice, used terms such as "revolutionary conscience and revolutionary legal consciousness."

214. R.S.F.S.R. CODE CRIM. PROC. art. 257 (1923) (U.S.S.R.).

215. See, *e.g.*, FR. CODE PROC. PÉNALE art. 427 (procedure before a tribunal correctional). In Switzerland, to the extent that federal law provides that the court must

for singling out the oath as incompatible with intimate conviction, while admitting any other evidence that the judge may choose to admit.[216] Thus, whichever meaning of "intimate conviction" is adopted, Communist doctrine offers no added reason for abolishing the oath on this ground. The assertion that the oath's abolition is specifically dictated by Soviet jurisprudence is fallacious, and the basic reason for abolition must be the weak Slavic oath tradition.[217]

Swiss Law

As shown in the first part of this Article, in several Swiss cantons the testimonial oath has practically disappeared by way of desuetude.[218] The trend toward abandonment of the oath, thus developed by custom, has been accelerated by legislation which has reduced the oath practice to a minimum. The Swiss Federal Law of Criminal Procedure has reduced oath taking to the status of an exceptional measure.[219] The Swiss Federal Law of Civil Procedure does not mention oaths at all, merely instructing the judge to admonish the witness regarding his duty to tell the truth and criminal responsibility imposed by the Penal Code upon false testimony.[220]

Abandonment of the oath in the several Swiss jurisdictions is avowedly traceable to tradition and absence of pragmatic need for such a device. It is probably an outgrowth of Swiss judicial proceedings, which are realistic, plain, and averse to dramatic effects.[221]

CONTEMPORARY LEGISLATION ON PERJURY AND FALSE TESTIMONY

Civil Law Jurisdictions

Religious, social, and governmental views of perjury and false testimony are reflected in varying degrees in the modern civil law.

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decide in accordance with the principle of free evaluation, it has been said that evidence must not be barred on the ground that it is presumptively useless within cantonal law. GULDENER, BEWEISWÜRDIGUNG UND BEWEISLAST NACH SCHWEIZERISCHEM ZIVILPROZESSRECHT 4 (1955). However, in civil-law countries "free evaluation of the evidence" has not been considered a ground of justification for the admission of evidence obtained by unethical means. See KLEINKNECHT, MULLER & REITBERGER, KOMMENTAR ZUR STRAFPROZESSORDNUNG UND ZUM GERICHTSVERFASSUNGSGESETZ 220 (3d ed. 1954).

216. See R.S.F.S.R. CODE CRIM. PROC. art. 57 (1923) (U.S.S.R.).

217. See Silving, *The Oath: I*, 68 YALE L.J. 1329, 1376-78 (1959).

218. See *id.* at 1378-80.

219. See note 74 *supra*.

220. Bundesgesetz über den Bundeszivilprozess (Federal Civil Procedure Law) art. 45, para. 2 (Swit. 1947), in BUNDESRECHTSPFLEGE 53 (Bundeskanzlei 1953). The penalty provision is SWIT. ST. G.B. art. 307.

221. "The Swiss judge is a representative of the people—a people which has the reputation of being sober and practical." FRITZSCHE, WIE MAN IN DER SCHWEIZ RECHT SPRICHT 77 (1948). In Switzerland, the judicial robe is unknown. Court room rhetorics, flourishing in other civil law countries (particularly in France), are conspicuously absent. On the simplicity of Swiss procedure, see *id.* at 77-80.

The religious concept generally characterizes perjury as a crime against religion, an instance of blasphemy, punishable without regard to its consequences, the capacity in which the oath has been taken (witness or a party), or the authority before whom it was taken (court or any other agency). Since the crime is purely formal, relevancy of the statement is not required. Moreover, false testimony is merged with perjury.[222] The contemporary public administration concept of perjury protects the administration of justice, by enforcing the state's claim to "truth."[223] The social view of perjury presents that crime as an instance of *falsum* and is, therefore, predicated upon harm done or jeopardy created by the false statement. And it follows that perjury sanctions vary with the damage caused.

French law adopts the *falsum* notion of perjury, as developed by the Italians.[224] To constitute false testimony, there must be a statement made under oath before a judicial authority,[225] containing an alteration of truth for the purpose of misleading the authority as to a relevant matter, and apt to cause harm to individuals or society.[226] The punishment varies depending

222. See KUTTNER, DIE JURISTISCHE NATUR DER FALSCHEN BEWEISAUSSAGE 37-38 (1931).

Another version of the religious concept is the one, in accordance with Roman tradition, which leaves the punishment of perjury to divine retribution, exempting it from legal sanction. See ROUSSEAU DE LA COMBE, TRAITÉ DES MATIÈRES CRIMINELLES (1780). Thus, the French Penal Code of 1791 did not impose any punishment upon perjury. On the other hand, one might well describe as "religious" the position which imposes punishment only upon perjury, leaving false unsworn testimony completely immune. Such position is expressed in the present French rule. See GOYET, DROIT PÉNAL SPÉCIAL § 665, at 439 (7th rev. ed. Rousselet & Patin 1958).

223. The State's right to "truth" is generally discussed in context with the collateral problem of the right to refuse testimony. Some writers assert that the latter right, as outgrowth of freedom of thought, constitutes the general rule and that the duty to testify is but an exception to this rule. VETTER, PROBLEME DES ZEUGNISVERWEIGERUNGSRECHTES 24 (1954). For discussion of the history of the controversy in criminal cases see Pfenninger, *Die Wahrheitspflicht des Beschuldigten im schweizerischen Strafverfahren* (pts. 1-2), 53 SCHWEIZERISCHE JURISTEN-ZEITUNG 129, 145 (1957). See also Schultz, *Falsche Anschuldigung, Irreführung der Rechtspflege und falsches Zeugnis*, 73 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 213, 220-23 (1958); Walder, *Das Verhör mit dem Angeschuldigten*, in STRAFPROZESS UND RECHTSSTAAT 181-92 (1956).

224. See Silving, *The Oath: I*, 68 YALE L.J. 1329, 1385 (1959).

225. Although the *Code pénal* does not expressly state the oath requirement in the articles dealing with *"faux témoignage,"* FR. CODE PÉNAL arts. 361-65, 367, it is not disputed that the oath is an essential of the crime, GOYET, *op. cit. supra* note 222, § 365, at 439. The name *"faux témoignage"* is used, *"faux serment"* being reserved, as in the Roman, older Canon, and Italian law, for the false party oath. By recent amendment, the perjury sanction was also imposed upon false swearing before an administrative agency. FR. CODE PÉNAL art. 32, as amended, Ordonnance No. 58-1298, [1958] Journal Officiel 11761. Previously, such sanction was imposed by special laws on false swearing before parliamentary commissions and workmen's compensation agencies. GOYET, *op. cit. supra* note 222, § 665.

226. *Id.* at 440. The fact that the witness lied to avoid self-incrimination is no excuse. Moreover, intention to mislead justice is inferred from knowledge of the falsehood. *Ibid.*

on whether the perjury is committed in a criminal or a civil proceeding, and, in the case of the former, on whether the testimony was rendered against or in support of the accused, and on the punishment imposed upon the accused.[227]

The *falsum* concept is clearly the foundation of the Austrian provisions on perjury and false testimony. The Austrian Penal Code of 1852[228] mentions the false party oath and false testimony before a court as occasions whereby "fraud becomes a major crime by virtue of the very manner of its commission."[229] But this classification of perjury and false testimony is no longer fully valid. False testimony and perjury now constitute independent crimes, the *actus reus* of which need not be supplemented by elements of fraud.[230] When, however, the false testimony or oath occurs in the context of fraud, an intent to cause damage to property or other rights is essential. In addition, whenever the false testimony or oath concurs with fraud, the latter is ipso facto transformed from a minor to a major offense.

Efforts to adjust Austrian legislation to the more modern theory of perjury as a crime against the administration of justice were met with the difficulty of reconciling this theory with the *falsum* requirement of intent to cause harm. This philosophical dilemma was resolved by reasoning that since the court has a claim to truthfulness, any intent to mislead the court by false testimony or perjury is sufficient evidence of intent to interfere with the administration of justice.[231] One writer has pointed out, however, that this interpretation does

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227. In cases involving major crimes, false testimony is basically punishable by imprisonment, but if the accused was convicted to a heavier punishment, the false witness who testified against him is subject to the same punishment. FR. CODE PÉNAL art. 361. In cases involving minor crimes, the basic punishment imposed upon the false witness is imprisonment from two to five years and a fine of 50,000 to 750,000 francs. If the accused was convicted and sentenced to over five years of imprisonment, however, the witness who falsely testified against him is subject to the same punishment. In matters of contravention (minor criminal prosecutions initiated by private complaint), the false witness is subject to a basic punishment of one year to three years and to a fine of 50,000 to 180,000 francs. In addition, the false witness in the last two instances may be subject to a loss of civic rights. FR. CODE PÉNAL art. 362, as amended, Law of December 29, 1956, art. 7. In major-crime cases, such forfeiture is mandatory.

The punishment is aggravated only where the witness testified falsely *against* the accused and not where he testified in his favor. Clearly, these provisions have been influenced by the Bible.

228. Now AUS. STR. G.; see KANIAK, DAS ÖSTERREICHISCHE STRAFGESETZ (4th ed. 1956).

229. Section 199 provides:

> Fraud becomes a major crime by virtue of the very manner of its commission: a) where a person offers to swear a false oath or actually swears a false oath in his own cause, or where a person tries to induce a false testimony to be given in court, or offers or takes a false testimony in court, even if the latter does not at the same time comprise the offer or the taking of an oath. . . .

230. 2 RITTLER, LEHRBUCH DES ÖSTERREICHISCHEN STRAFRECHTS 288 (1938).

231. See Judgment of May 27, 1946, Oberster Gerichtshof, 19 Entscheidungen des Obersten Gerichtshofes in Strafsachen [hereinafter cited as O.G.H. St.] No. 8 (Aus.), cited in KANIAK, *op. cit. supra* note 228, § 199, at 421 n.6.

not accord with the general notion of fraud, which is a crime of specific intent, so that the intent must reach beyond the *actus reus*. In his view, because the crimes concerned are not offenses against the court's claim to truth, but offenses against the administration of justice, the intent of the witness must be directed to bringing about a court decision which would be different from that which the court might presumably render but for the testimony.[232] Accordingly, the witness who lies in order not to incur a loss of prestige, in the belief that his statement will not affect the decision, is not punishable. The Austrian Supreme Court, however, has reaffirmed the view of false testimony as a formal crime against the administration of justice.[233]

The Italian Penal Code classifies the false party oath and false testimony together under "crimes against the administration of justice."[234] While the idea of *falsum* has been abandoned, actual jeopardy of the object of protection, *i.e.*, the administration of justice, is nonetheless required. Such jeopardy is assumed to be present only when there is a possibility that the false statement may influence the decision.[235] While false testimony is punishable although there is no possibility of damage to a party, potential damage to the other party is necessary for punishment of a false party oath.[236] Thus, as Austria, proceeding from a statutory *falsum* theory of false testimony, is in practice applying the protection of public administration concept, so Italy, proceeding from the latter position, tends to introduce *falsum* elements into practice.

In Swiss and German law, the dominant perjury and false testimony pattern is that described as "governmental thinking," illlustrated by the phrase: "sacredness of the oath [now also unsworn testimony] in the service of the State."[237] In the Swiss Federal Penal Code, the crimes of "false evidentiary statement of a party" in a civil case, and of "false testimony," are clearly viewed as "Major and Minor Crimes against the Administration of Justice."[238] Both crimes are purely formal; they are consummated as soon as the statement is made. It is unnecessary that "any consequence in the ex-

232. 2 RITTLER, *op. cit. supra* note 230, at 294.

233. See Judgment of May 27, 1946, Oberster Gerichtshof, 19 O.G.H. St. No. 8 (Aus.).

Austria was a leader in introducing the crime of false unsworn testimony, see Criminal Code of Joseph II of 1787 [*Josephina*]. The oath, however, has particular significance in the case of parties in a civil case. Their false statements are punishable only if made under oath. This limitation was necessary in order to resolve the difficult problem of drawing a line between a mere party allegation and an evidentiary party statement. See 2 RITTLER, *op. cit. supra* note 230, at 297.

234. ITAL. CODICE PENALE arts. 371 (false oath of a party), 372 (false testimony).

235. See Judgment of Nov. 22, 1955, Corte di Cassazione (Sezione III), 61 GIUSTIZIA PENALE pt. 2, at 715 (Italy).

236. See KUTTNER, *op. cit. supra* note 222, at 57, 60.

237. See *id.* at 40.

238. See SWIT. ST. G.B. arts. 306-07; Schultz, *supra* note 223, at 225. Other offenses included as crimes against the administration of justice are "false accusation" of another, SWIT. ST. G.B. art. 303, "misleading of the administration of justice by false self-accusation," SWIT. ST. G.B. art. 304. See also ITAL. CODICE PENALE art. 369.

ternal world, distinct from the conduct of the actor, be effected."[239] Rectification of the false statement by the actor sua sponte before a legal disadvantage to another person has occurred may, however, be considered by the judge, in his discretion, as a ground for reducing or foregoing punishment.[240] Consistently with "governmental thinking," the Swiss law punishes irrelevant false statements, although the penalty is considerably smaller than that which would have been imposed had the statements been relevant.[241]

In Germany, the "governmental thinking" concept has been steadily gaining ground. The last vestige of the *falsum* concept of perjury was abandoned when the provision for increase of punishment for perjury when the testimony resulted in a detriment to the accused was repealed.[242] Thus, "the good old view that false testimony is punished not only because it misleads the authority but also because and to the extent that it *causes damage to another*"[243] came to an end. The present German position was thus expressed by the Great Senate in Criminal Matters of the Bundesgerichtshof: "The threats of punishment imposed on all crimes of false testimony serve the protection of the administration of justice; the wrongfulness of false testimony consists in jeopardy of the administration of justice."[244] Germany, like Switzerland, punishes false testimony regardless of its relevancy.[245] Since this reaches beyond actual governmental interest, it has been suggested that the law is plainly "moralizing."[246] This "moralizing" tendency has been said also to be expressed in the peculiar result that unsuccessful instigation of another to commit perjury is punished more severely than consciously causing an erroneous decision.[247] Indeed, this feature of German law is reminiscent of the old view of the Italian school, derived from the canon law, holding the instigator who commits "murder of the soul" more blameworthy than the principal actor.[248] While the above cited Great Senate decision has been

239. Schultz, *supra* note 223, at 225, 226. See also Guinand v. Procureur général du Canton de Neuchâtel, Bundesgericht, Dec. 3, 1943, 69(IV.) Entscheidungen des Schweizerischen Bundesgerichts [hereinafter cited as S.B.G.] 211, 216 (Swit.).

240. SWIT. ST. G.B. art. 308, para. 1.

241. *Compare* SWIT. ST. G.B. art. 307, para. 1 (five years maximum imprisonment for relevant statements), *with* SWIT. ST. G.B. art. 307, para. 3 (six months imprisonment for irrelevant statements).

242. The provision was repealed by a Regulation of January 20, 1944, [1944] 1 R.G. Bl. 44 (Ger.). The present provision, GER. ST. G.B. § 154, now reads: "A person who before a court or before another agency competent to administer oaths intentionally swears falsely shall be punished by imprisonment in a penitentiary. Where there are mitigating circumstances, the punishment shall be imprisonment for not less than six months."

243. 2 KOHLRAUSCH, STRAFGESETZBUCH § 152, comment I, 3(d), at 329 (41st ed. Lange 1956). (Emphasis added.)

244. Judgment of Oct. 24, 1955, Bundesgerichtshof (Grosser Strafsenat), 8 B.G.H. St. 301 (Ger. Fed. Rep.).

245. 2 KOHLRAUSCH, *op. cit. supra* note 243, § 152, comment II, 2.

246. *Ibid.*

247. *Compare* GER. ST. G.B. § 159 *with* GER. ST. G.B. §§ 49a, 160.

248. See VON LISZT, DIE FALSCHE AUSSAGE 168 (1877).

hailed as having put an end to the "religious" view treating perjury and false testimony as distinctive crimes,[249] the opinion of the court does not seem to carry such secular implications.[250] The German law extends protection of the state from false testimony indiscriminately to all agencies competent to hear witnesses, or experts, or to administer oaths.[251] In contrast to the Swiss law, which insists that intent in the crime of false testimony must be unqualified,[252] German law is satisfied with the so-called *dolus eventualis*.[253] Finally, the German law, unlike the Swiss,[254] includes a provision for the punishment of negligent perjury.[255] Both the Swiss and the German law follow the "objectivist" approach, according to which statements which are objectively true but subjectively false are not subject to punishment for perjury or false testimony.[256] In the converse situation, of course, punishment is excluded (except, in Germany, in the case of negligent perjury) because there is no intent. But since both Switzerland and Germany follow the subjectivist theory

249. For the older view, see Judgment of Oct. 25, 1951, Bundesgerichtshof (IV. Strafsenat), 1 B.G.H. St. 380 (Ger. Fed. Rep.).

250. While emphasizing that "the unsworn false testimony of GER. ST. G.B. § 153 is the basic crime" and "the affirmation on oath . . . but an aggravating feature," and that "the element that justifies punishment is . . . the false statement," the court also pointed out that "the oath, to the extent that it invokes God, has a sacral character, although not all those who take oaths today are aware of that fact."

This case was construed narrowly in the Decision of March 22, 1957, Bundesgerichtshof (I. Strafsenat), 10 N.J.W. 1886 (Ger. Fed. Rep.), and was practically disregarded in Decision of Feb. 28, 1956, Bundesgerichtshof (I. Strafsenat), 9 N.J.W. 1038 (Ger. Fed. Rep.).

251. GER. ST. G.B. §§ 153 (false testimony), 154 (perjury).

252. Staatsanwaltschaft des Kantons Aangau v. Morganthaler, Bundesgericht, Dec. 1, 1950, 76(IV.) S.B.G. 243 (Swit.).

253. See 2 KOHLRAUSCH, *op. cit. supra* note 243, § 154, comment V, at 340. There is *dolus eventualis* when the actor does not intend the *actus reus* (here the falsehood) but would approve of it should it be present. Decision of Dec. 20, 1937, Reichsgericht (II. Strafsenat), 72 R.G. St. 36, 43 (Ger.).

254. Swiss legislators specifically rejected an attempt to punish negligent false testimony, in view of the variety of psychological factors which condition testimony. See Schultz, *supra* note 223, at 220.

255. GER. ST. G.B. § 163. There is no provision for negligent unsworn false testimony, as defined in GER. ST. G.B. § 153.

German decisional law has permitted conviction for negligent false swearing without clear proof of whether the accused had committed the crime intentionally or negligently. Judgment of Sept. 22, 1953, Bundesgerichtshof (V. Strafsenat), 4 B.G.H. St. 320 (Ger. Fed. Rep.). This ruling shows a particular zeal in enforcing perjury sanctions, for it departs from the general rule that conviction on "alternative facts" (*Wahlfeststellung*) is permissible only when the alternative acts charged are "legally-ethically and psychologically comparable." Decision of May 2, 1934, Reichsgericht (Vereinigte Strafsenate), 68 R.G. St. 257 (Ger.). The 1953 decision was subsequently criticized in Decision of Oct. 15, 1956, Bundesgerichtshof (Grosser Strafsenat), 9 B.G.H. St. 390, 393 (Ger. Fed. Rep.).

256. See Schultz, *supra* note 223, at 223-24, 252-54 (Swiss law; collecting authorities); 2 KOHLRAUSCH, *op. cit. supra* note 243 § 153 comment at 336 (German law; collecting authorities).

of attempt,[257] the declarant who believes his statement to be false although in fact it is true would seem to be subject to punishment for *attempted* false testimony. The Swiss Federal Tribunal has held, however, that no crime of attempted false testimony exists because the policy of the law is to encourage the witness to correct falsehoods by granting him immunity until the crime is consummated.[258] In Germany, recent legislation abolished the offense of attempted false testimony, but not that of attempted perjury.[259] Since the oath is taken after the testimony is rendered, beginning to take the oath constitutes commencement of the execution.[260]

After 1935, the German Reichsgericht took the position that complicity in perjury may be committed by intentional failure to frustrate the perjury of another.[261] As in other instances of crime by omission, the existence of a duty to act was assumed to be essential. While such duty was in principle held to apply to an attorney of a party in a civil case, to civil parties, and to a criminally accused,[262] no clarity existed regarding the nature of the conditions giving rise to a duty to intervene. At no time has it been denied that "there is no general duty imposed on all citizens to expose a false testimony of a witness, which the person concerned knows to be false."[263] The view that mere participation in a lawsuit, as a party or as counsel, gives rise to such a duty under the rule requiring parties to cooperate in truth finding[264]—a view resulting in the rather unrealistic position that an attorney must expose false testimony favorable to his client[265]—was soon abandoned. It was held that the duty to act is predicated upon prior conduct which was somehow instrumental in creating the danger of perjury.[266] But once the duty is established, the person concerned was held not to be released merely because compliance would result in his own exposure to prosecution or dishonor; he must "accept the punishment for wrong he had committed rather than suffer new wrong to be done which he had himself originally promoted."[267]

In evaluating these decisions, it is significant to note the time of their issuance. They clearly show the impact of the Nazi subordination of individual

257. See Ryu, *Contemporary Problems of Criminal Attempts*, 32 N.Y.U.L. REV. 1170, 1187-89 (1957).

258. Mathys v. Staatsanwaltschaft des Kantons Solothurn, Bundesgericht, June 25, 1954, 80(IV.) S.B.G. 123 (Swit.).

259. Law of August 4, 1953, [1953] 1 B.G. Bl. 735 (Ger. Fed. Rep.).

260. See Judgment of Jan. 3, 1957, Bundesgerichtshof (IV. Strafsenat), 10 B.G.H. St. 126 (Ger. Fed. Rep.).

261. See BOCKELMANN, STRAFRECHTLICHE UNTERSUCHUNGEN 126-34 (1957).

262. See cases cited in *id.* at 129-34.

263. Decision of March 26, 1943, Reichsgericht (IV. Strafsenat), 13 DEUTSCHES RECHT 748 (Ger.).

264. See GER. Z.P.O. § 138.

265. Judgment of Jan. 13, 1936, Reichsgericht (II. Strafsenat), 70 R.G. St. 82, 84 (Ger.).

266. See BOCKELMANN, *op. cit. supra* note 261, at 127-28.

267. Judgment of Nov. 30, 1937, Reichsgericht (I. Strafsenat), 72 R.G. St. 20, 23 (Ger.).

interest to community duty. While stress of the latter still dominates certain postwar decisions,[268] later decisions of the Bundesgerichtshof have increasingly narrowed the concept of perjury by omission. The Bundesgerichtshof particularly refused to impute a duty to intervene to an attorney. Such a duty does not exist unless the accused, by his prior conduct, had placed the witness in "a special danger of perjury, in excess of the danger flowing from the [normal] course of procedure," such as the normal danger in calling a witness who has an economic interest in the outcome of the case.[269]

Protection of the individual when his interests conflict with those of the community has been reflected in civil-law countries by the privileged treatment of perjury and false testimony when these crimes are committed in a state of necessity. The phenomenon of "perjury in a state of necessity" is rather peculiar, since it occurs precisely in those systems in which legally, ethically, and philosophically it might be least expected.

Italy, which grants a witness no privilege to refuse to give self-incriminating testimony,[270] affords him complete immunity when he lies "under compulsion of necessity of saving himself or a near relative from a grave and inevitable damage to freedom or honor."[271] The Corte di Cassazione has even applied this immunity to a witness who had brought about the prosecution of her brother by informing against him, and then falsely retracted her previous statement upon his trial.[272] This holding extended immunity beyond the scope of ordinary rules of "necessity," which cannot usually be invoked when the necessity is self-induced.[273] In another case the same court said in obiter that a "necessity" lie is not merely excused but, indeed, justified, so that the act is not illegal.[274] For the immunity provision is deemed "to reflect the morality of the majority of the citizens who in an identical situation would have acted in the same manner as did the person concerned."[275] The view prevails in

268. See BOCKELMANN, *op. cit. supra* note 261, at 127-28.

269. Judgment of Aug. 20, 1953, Bundesgerichtshof (I. Strafsenat), 4 B.G.H. St. 327 (Ger.).

270. But Italy grants a privilege to refuse to testify in cases involving certain close relatives. See ITAL. CODICE PROC. PENALE art. 350 (incorporating ITAL. CODICE PENALE art. 307, para. 3).

271. ITAL. CODICE PENALE art. 384.

272. Decision of June 3, 1957, Corte di cassazione (Sezione III), 63 GIUSTIZIA PENALE pt. 2, at 19-23.

273. The Corte di cassazione pointed out that the court below had erroneously invoked the general provision on the "state of necessity," ITAL. CODICE PENALE art. 54, which provides that the danger which excuses the "necessary" action must not be one voluntarily created by the actor, "since art. 384, Penal Code, constitutes a special form of the state of necessity."

274. Decision of May 2, 1957, Corte di Cassazione (Sezione III), 62 GIUSTIZIA PENALE pt. 2, at 513-14. This was a case of false "self-accusation" (*autocalumnia*), within ITAL. CODICE PENALE art. 369, to which art. 384 is also applicable.

275. In the court's view, this situation is distinguishable from those instances where only punishment is withheld, *e.g.*, retraction of false party oaths or false testimony, ITAL. CODICE PENALE art. 376, where a "violation of the relation of penal obedience, that is, a fundamental inconsistency with the ends of the criminal legal order, remains active."

legal literature that the Italian provision concerning necessity lying extends to cases where a witness could refuse testimony and is duly advised of his privilege of not testifying.[276]

Although less far-reaching than the Italian rule, the German provision governing necessity lying[277] is more striking, since it contrasts with both the dominant Kantian conception of a lie as man's denial of his own dignity and identity,[278] and the German idea that the perjury sanction serves to protect the state.[279] Necessity here excludes or diminishes culpability—not illegality; for this rule does not afford mandatory immunity, or even mitigation, but authorizes the judge, in his reasonable discretion, to reduce or forego punishment.[280] When, however, the conditions of necessity perjury are present, the accused does not forfeit his civic rights.[281] Indeed, he cannot thereafter be denied capacity to take an oath, even though the punishment was not mitigated.[282] As in the general law of necessity, the interest to be saved by necessity lying need not be weightier than the interest sacrificed.[283] But a person

276. Boascarelli, *Sulle scriminanti previste dall'articolo 384 c.p. in rapporto alla falsa testimonianza*, 57 GIUSTIZIA PENALE pt. 2, at 965 (1952); 2 ANTOLISEI, MANUALE DI DIRITTO PENALE 736 (1954). *But see* Decision of June 30, 1951, Corte di Cassazione (Sezione III) (holding that ITAL. CODICE PENALE art. 384 does not apply where the testimony was voluntary).

277. GER. ST. G.B. § 157, para. 1:

> Where a witness or an expert has been guilty of perjury, or a false statement in lieu of an oath or a false unsworn testimony, the judge may, in his reasonable discretion, mitigate the punishment and in the case of an unsworn testimony forego the punishment entirely, if the actor has stated the untruth in order to avert from a relative or from himself the danger of a judicial punishment.

278. The definition of a lie requires no statement that it damages another. For it always damages mankind generally, since it shatters the belief in statements and thereby renders the legal source useless. A lie, *"aliud lingua promptum, aliud pectore inclusum gerere,"* is the greatest violation of the duty of man to himself, considered merely as an ethical being (humanity in his own person). *"Mendacium, externum—internum"*; by the latter even more than by the former man makes himself an object of contempt in his own eyes and violates the dignity of mankind in his own person. The damage (as a consequence of the lie) is not in issue, otherwise the consideration would be an instance of the maxim of wisdom not of morality. A liar has less value than a thing (that is, not even a price). Language is the natural capacity for communication of ideas; a lie is thus contrary to nature. Nevertheless, falsehood seems to be rooted in human nature.

Summary of Kant's view made by Gorland, *Der Begriff der Lüge im System der Ethiker von Spinoza bis zur Gegenwart*, in DIE LÜGE 154 (Lipmann & Plaut ed. 1927).

279. See text at note 226 *supra*.

280. See 2 KOHLRAUSCH, *op. cit. supra* note 243, § 157, comment VII, at 346.

281. GER. ST. G.B. § 161.

282. Judgment of Feb. 5, 1957, Bundesgerichtshof (V. Strafsenat), 10 N.J.W. 550 (Ger. Fed. Rep.).

283. In the case of so-called "extra-statutory necessity" the interest saved must be greater than that sacrificed. See Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350, 357 n.28 (1954).

And general necessity rules are independently applicable to perjury. See Judgment of Nov. 11, 1932, Reichsgericht (I. Strafsenat), 66 R.G. St. 397 (Ger.).

may rely on a situation of danger which he had knowingly brought about himself. Here, the Bundesgerichtshof has relied on the analogous rule of self-defense, according to which it is irrelevant if the actor had brought about the assault.[284] And, "on the one hand, persons entitled to refuse testimony who choose to testify may, nevertheless, rely on § 157, while, on the other hand, the privilege is not open to the taker of the insolvent debtor's oath, although he undoubtedly testifies under compulsion."[285]

In general, the distinctive institution of "perjury in a state of necessity" stems from medieval theological doctrine which takes account of man's instinct of self-preservation. Of course, it also fits into the modern theory that the gravity of the crime depends on its context. Finally, it corresponds to psychological findings that voluntariness of human action is not an absolute but a relative matter—a view that has superseded the legalistic notion of stringent separation of voluntary and compulsory action.[286]

Common Law Jurisdictions

A comparative study of perjury in common-law countries must take into account the distinctive rules governing the oath, as contrasted with those prevailing in civil-law countries. Perjury, as distinguished from crimes founded on life events not necessarily related to law,[287] is an offense committed with official

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284. See Judgment of Oct. 24, 1955, Bundesgerichtshof (Grosser Strafsenat), 8 B.G.H. St. 301, 318 (Ger. Fed. Rep.).

285. MAURACH, DEUTSCHES STRAFRECHT—BESONDERER TEIL 519 (1953).

Until 1947, GER. ST. G.B. § 157 was applicable only if statement of the truth would objectively produce the danger of the witness' criminal prosecution for crime, without regard to his awareness of the danger. After amendment of the rule by an Ordinance of May 29, 1947, however, "the condition of the application of § 157 is the intention of the witness, by stating the untruth, to avert from a relative or from himself the danger of a judicial punishment." See Judgment of Oct. 24, 1955, Bundesgerichtshof (Grosser Strafsenat), *supra* note 284, at 318. The provision is also applicable if the witness erroneously assumes the existence of such danger. Judgment of Feb. 19, 1926, Reichsgericht (I. Strafsenat), 60 R.G. St. 101 (Ger.). And the intention to avert the danger need not be the only motive for stating the untruth. *Ibid.* See also Judgment of Oct. 24, 1955, Bundesgerichtshof (Grosser Strafsenat), *supra* note 284, at 317.

286. The policy that gave rise to the concept of "necessity lying" is the same as that which produced the immunity based on "necessity" generally. This policy was expressed by the Reichsgericht thus:

> [T]he realization that there is, besides the complete lack of free will caused by a mental state within the meaning of GER. ST. G.B. § 51, [insanity], which by its very nature has the effect of excluding guilt, also an extraordinary impairment of free will, caused by external circumstances, as usual psychological pressure, which, considering the instinct of self-preservation and the related drive to preserve the life of near relatives, makes conduct in accordance with law appear as "not to be expected" (*nicht zumutbar*) and hence the legal violation as "excusable"....

Judgment of Nov. 11, 1932, Reichsgericht (I. Strafsenat), 66 R.G. St. 397 (Ger.).

287. Murder furnishes a ready example.

cooperation. This "official cooperation" factor is particularly conspicuous when a person is indicted for perjury committed in his own trial for crime. Although technically perjury may not be the "fruit" of the indictment or trial in such cases, it is certainly the product of the questionable "privilege" of testifying under oath in one's own case. This dubious "choice" of testifying leads to such bizarre situations as that presented in *United States v. Remington*,[288] which upheld defendant's conviction for what amounted to testifying falsely under oath that he had testified truthfully before. True, on the assumption that the crime of perjury is not the "result" of the trial, there is no technical "entrapment," but as pointed out by Judge Learned Hand, the first indictment is "as direct a provocation of the perjury" for which the accused is now being prosecuted "as the persuasion of agents or officials of the prosecution would have been, had they 'incited' or 'instigated' him to perjure himself."[289] The inequity so eloquently described by Judge Hand is not actually distinguishable from that obtaining in any other case in which a person is prosecuted for perjury committed by him in his own trial for crime. Where failure to take the stand is "equivalent to a plea of guilty,"[290] perjury is "provoked," if not "incited" or "instigated." For this reason, as well as the heavy conflict of conscience produced in the accused's mind, civil-law countries have prohibited administration of the oath to the accused in a criminal case, and grant total or partial impunity to persons who perjure themselves when the choice is between perjury and grave harm to the perjurer or persons close to him.

Another dubious feature of common-law perjury legislation is a development in the direction of a "public administration concept" of perjury, and toward the type of "governmental thinking," that characterizes contemporary Swiss and German law. In the *Remington* case the false statement under oath was material to another perjury, but not to any crime directly harmful to any individual or the community, demonstrating that the interest protected by the punishment of perjury is integrity of the administration of justice per se. While there can be no quarrel with the policy of protecting judicial administration, regardless of its functioning, in view of the abstract nature of the interest involved, there is no justification for making harmless perjury a felony.[291] Perjury was not a felony at common law, even though it was

288. 208 F.2d 567 (2d Cir. 1953), *cert. denied*, 347 U.S. 913 (1954). Defendant, convicted in a previous trial of perjuring himself before a grand jury, had obtained a reversal on the ground of error in the judge's charge to the jury. United States v. Remington, 191 F.2d 246 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952). In the second case the government alleged that the defendant had perjured himself in the first trial. His conviction for that perjury was affirmed.

289. 208 F.2d at 575 (dissent).

290. *Ibid.*

291. Perjury is generally treated as a felony in the United States. PERKINS, CRIMINAL LAW 383 (1957). The sanctions attaching to perjury are generally quite severe. Indeed, Michigan, MICH. STAT. ANN. § 28.664 (1954), imposes life imprisonment.

conceived as a crime against religion.[292] Apparently, the state, using the Name of God to symbolize its own "sovereignty," has developed perjury into a tool of theologically tainted "governmental thinking," more comprehensive than religious thinking ever was.

In contrast to French law,[293] the common law, subject to certain exceptions, draws no distinction between a man whose false testimony puts his own father to death and a man whose false testimony convicts a neighboring householder of laying rubbish on the highway.[294] Failure to vary the punishment for perjury "according to the nature of the mischief"[295] permits an indictment and conviction for "perjury in the alternative"—deliberately taking oath to contradictory statements—since one statement may work harm, while the other may not.[296] Perjury conviction in the alternative precludes consideration of special circumstances under which a particular false statement may have been made. The uniformity and rigidity of the perjury concept in our law bar introduction of "perjury in a state of necessity," as known in civil-law countries.[297] Failure to give consideration to situations of profound ethical conflict and psychological stress is strangely inconsistent with our pragmatic and utilitarian culture.

Disregard of the "mischief" actually or potentially produced is evident in recent trends to eliminate the requirement of perjury's materiality, to introduce punishment for attempted perjury, and to emphasize the subjective character of perjury. The requirement of materiality has been losing its efficacy as a limiting factor since the narrow concept of materiality as a "logical" relationship between the false statement and the ultimate proposition to be proven began to yield to a broad interpretation of "material" as anything which in the light of experience may have a bearing, however remote, on the ultimate proposition.[298] Such a bearing is called "pertinency"; and "material,"

292. Perjury was a misdemeanor, although it carried the brand of infamy. PERKINS, *op. cit. surpa* note 291, at 382. Contrary to Perkins' view, *id.* at 382 n.1, it is likely that at one time perjury of witnesses was not punishable at common law, for this was true of all early, religiously inspired law which assumed that perjury is subject to direct Divine retribution. On the development of the crime of perjury, see MODEL PENAL CODE 101-02 (Tent. Draft No. 6, 1957).

293. See text at note 227 *supra.*

294. 1 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 366-67 (1827).

295. See *ibid.*

296. See Whitman, *A Proposed Solution to the Problem of Perjury in Our Courts,* 59 DICK. L. REV. 127, 128-29 (1955) (collecting statutes). *But see* United States v. Buckner, 118 F.2d 468, 470 (2d Cir. 1941) ("It is strange that in the federal courts an indictment for perjury may not yet be drawn in the alternative, and that there may not be a conviction for deliberately making oath to contradictory statements, unless the prosecutor shows which of the statements was false.").

In Germany, conviction on alternative finding is permissible. See Judgment of Oct. 15, 1956, Bundesgerichtshof (Grosser Strafsenat), 9 B.G.H. St. 390 (Ger. Fed. Rep.); Judgment of May 2, 1934, Reichsgericht (Vereinigte Strafsenate), 68 R.G. St. 257 (Ger.).

297. Compare text at notes 270-86 *supra.*

298. See United States v. Cameron, 282 Fed. 684 (D. Ariz. 1922), in which the defendant was accused of falsely testifying as to the amount of political contributions

as distinct from "pertinent," must mean "not only pertinent but also important in some substantial degree."[299] "Important" would seem to mean that the probability of harm must be great. But this test, implying an objective probability relationship, apparently was not applied in *Robinson v. United States*,[300] where a perjury conviction was upheld for making false statements in an application for a marriage license, regardless of whether the declarant was objectively entitled to a license. The test the court advanced was "whether such statements had a natural tendency to influence the clerk in his investigation of the facts, in the exercise of his official discretion, and in the administration of the law."[301] A breakdown of the objective "materiality" test was avoided by assuming that the purpose of the licensing statute was to promote investigation, exercise of discretion, and recording rather than to secure issuance of licenses when marriage impediments do not in fact exist.[302] In the New York case of *People v. Clemente*,[303] "material" seems to have been interpreted to mean anything that might psychologically sway the decision maker. The avowedly psychological nature of materiality was, in fact, advanced as ground for assigning determination of materiality to the jury rather than to the court. The net effect of such assignment is increased protection for the accused, since a jury "may indulge tender mercies even to the point of acquitting the plainly guilty,"[304] while the court retains the power of withholding the issue from the jury because of insufficient evidence. The genuine reason for such generosity, however, would seem to be recognition of the insufficiency of conventional perjury legislation, evidenced by the Law Revision Commission's finding of "the high incidence of perjury and the low incidence of convictions."[305] But instead of limiting punishment for false testimony to cases of actual harm and varying it in accordance with the degree

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he had received in support of his candidacy for office. The testimony had occurred in a prosecution for campaign expenditures beyond the statutory amount. The legal question involved in the perjury action as to whether a statement concerning receipts was "material" to a determination of expenditures. If "material" is construed to denote a narrow logical relationship, then receipts may not be material to questions of expenditures; the two may be unrelated. But if "materiality" is tested by empirical probability—here that political contributions will be spent—one could conclude that a lie concerning receipts is material to a determination of expenditures. The court reversed the defendant's conviction.

299. It is one thing to say that if a committee were authorized to investigate pneumonia, the life-long clinical history of a man believed to have had pneumonia might be pertinent to the inquiry. It would be quite another thing to say that if he testified he had six colds in one winter ten years ago, whereas in fact he had only five, he could be indicted and punished for perjury.

United States v. Lattimore, 215 F.2d 847, 867 (D.C. Cir. 1954) (dissenting opinion).

300. 114 F.2d 475 (D.C. Cir. 1940).

301. *Id.* at 476.

302. *Ibid.*

303. 285 App. Div. 258, 136 N.Y.S.2d 202 (1954), *aff'd*, 309 N.Y. 890, 131 N.E.2d 294 (1955).

304. 285 App. Div. at 264, 136 N.Y.S.2d at 207.

305. *Id.* at 261, 136 N.Y.S.2d at 205.

of harm, the New York Law Revision Commission's recommendation obviously aims at facilitating convictions, by introducing the concept of second degree perjury not requiring materiality.[306] The question remains wherein lies the social harm of an "immaterial lie." An alternative method of punishing perjury, when either materiality or jurisdiction is lacking, is recognition of attempted perjury as an offense. Such step was taken in *State v. Latiolais*,[307] a most unfortunate decision, since it was unmindful of the significant social function of "jurisdiction" as a device of individual protection against abuse of power. A third approach is the "subjective theory," whereby the falsehood of an allegedly perjurious statement is tested against the declarant's belief rather than against objective reality.[308] Since *mens rea* is essential, so that the subjective belief of the accused in the falsehood of his statement must be shown within this context, the only situation in which adoption of the subjective theory is practically significant is that where the statement of the declarent is objectively true though he believes it to be false.[309] As pointed out by the commentators on the Model Penal Code, "not much good and some harm might come from applying the criminal law" to "one who has, objectively, told the truth . . . . Encouraging the police to inquire as to subjective dishonesty behind the objective truth would not only waste their time, but opens substantial possibility of abuse."[310] But is not the same criticism applicable to immaterial falsehoods, attempted perjury, harmless falsehoods?

CONCLUSION

History shows that today's oath is closely related to the self-curse of ancient times. Undoubtedly, the religious oath in our contemporary culture reflects the Biblical oath pattern. And the veiled language of the Bible indicates that even in the pre-Law era, earlier experiences bearing on the contents of the self-curse had already partly been repressed.[311] Thus, the modern

306. See N.Y. PENAL LAW § 1620-b.

307. 225 La. 878, 74 So. 2d 148 (1954); see Mann, *Attempted Perjury—The Rules of "Legal" and "Factual" Impossibility as Applied to the Law of Criminal Attempts*, 33 N.C.L. REV. 641 (1955).

308. *But see* MODEL PENAL CODE § 208.20, comment at 116-18 (Tent. Draft No. 6, 1957) (severely critical of this approach).

309. This rule was adopted in the first *Remington* case, United States v. Remington, 191 F.2d 246, 248 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952), in which the court held that where the indictment charged Remington did not believe his denial of membership in the Communist Party, the allegation "that he had in fact been a member of the Party was surplusage...."

310. MODEL PENAL CODE § 208.20, comment at 118 (Tent. Draft No. 6, 1957).

311. See GUNKEL, GENESIS 250-51 (3d rev. ed. 1910), suggesting that the Biblical oath contains remnants of the custom which considered "the genitals as the divine in man." Gunkel goes on to say: "Here, in Genesis 24, this view itself was long since lost; the mores had become so bashful that only a remote hint at this custom is permissible; but the custom —as is often the case—continues. . . ."

Freud has shown that traces of archaic thinking can be detected in seemingly rational customs and institutions of today. FREUD, *Totem und Tabu*, in 9 GESAMMELTE WERKE 190 (1940).

judicial oath may include remnants of the primitive self-curses of pagan, prereligious and, indeed, preanimistic ages, and of obscure, anxiety-inspiring experiences which are hinted at in Biblical passages. These archaic remnants of the early oath seem to have affected the pre-Law Biblical man so deeply that he dared not give clear expression to the nature of the oath's sanction. They are bound to affect the unconscious of the contemporary oath taker. The anxiety—"*pahad*"—they evoke is likely to disturb the spontaneity of his testimony and his conscious efforts to reconstruct a past observation correctly. For these reasons, abolition of the oath should be given serious consideration.

The desirability of abolition is corroborated by a modern reevaluation of the rules of self-incrimination and confession, to which the oath is closely related.[312] Essentially a self-curse, the oath is an anticipatory self-condemnation or self-incrimination, carrying a promise of confession. Thus, many of the arguments against compulsory self-incrimination and confession seem applicable to a compulsory oath. The inadequacy of our law of these phenomena, evidenced by the contradictions involved in the privilege against self-incrimination,[313] as well as the inconsistent approaches of law and religion to the confession problem,[314] and the puzzling aspects of many false confessions, may stem from law's roots in a misconception of man's nature. Our law presupposes man to be a perfectly rational being, who weighs profit against loss with the precision of a calculating machine and, at the same time, is the most lenient judge of his own sins. Law presumes that man will always wish to testify in his own behalf when he is innocent and that he will never, except on rational grounds, or under external coercion, make a false confession. Therefore, we bar coerced confessions and compulsory self-accusation, while

312. On the need for such reevaluation, see Judge Frank's dissenting opinion in United States v. Grunewald, 233 F.2d 556, 571, 592 (2d Cir. 1956), *rev'd*, 353 U.S. 391 (1957). See also Appendixes I, II, 233 F.2d at 582, 587.

313. Notice particularly the elaborate scheme of affording an immunity from testimony while at the same time requiring the witness to waive it, see Regan v. New York, 349 U.S. 58 (1955); the obvious inadequacy of stating to the jury that the accused's silence must not be taken as a basis for an inference of guilt—a statement which in itself draws attention to the possibility of such inference, see State v. Bovender, 233 N.C. 683, 65 S.E.2d 323 (1951); and the conflict between the requirement of showing "possible danger of incrimination," and the incrimination inherent in such showing, see Note, *The Privilege Against Self-Incrimination in the Federal Courts*, 70 HARV. L. REV. 1454 (1957).

314. While the law refuses to require a confession, many religions teach that confession, private and public, is both a duty and a virtue. See REIK, RITUAL, PSYCHO-ANALYTIC STUDIES 167-219 (1931). An advanced view of confession is expressed in the Talmud which ignores a confession made in court *during* judicial proceedings but regards confession made *after* conviction as part of atonement. See Fairfield, *The Problem of Confessions: Presidential Address*, 25 MEDICO-LEGAL J. 142 (1957).

In primitive society, in which law and religion are not differentiated, the confession is often one of the chief means of social control, performing a function "similar to that of our criminal law." See Cantor, *Law and Order in Primitive Society*, in ENCYCLOPEDIA OF CRIMINOLOGY 339, 342 (Branham & Kutash ed. 1949).

according "voluntary" confessions and declarations against interest high probative value. Psychoanalysis has shown, however, that man is not an entirely rational being, and that his sense of guilt does not operate in an unambiguous fashion. The sense of guilt is not an isolated psychic state related to a single occurrence. Rather, it is a complex product of human development, dating from childhood. In addition to the constructive and rational aspects of conscience, there remains in adult man an irrational sense of guilt, which is related to his unconscious desires and childhood "sins." These irrational guilt feelings may, in some cases, attach themselves by association to crimes which the individual has never committed. He may expressly, or by implication, "adjudge" himself guilty of the crime of which he stands accused, and which he did not commit, in order to atone for an entirely different crime, a "crime" of childhood.[315] And because this sense of guilt is often intense, he may be the severest judge of his present acts.[316] Thus, far from invariably justifying his action as the reasonable man is believed to do, man sometimes tends to incriminate himself.[317]

Psychoanalytic research has also pointed out the compulsive element in confession.[318] That element is sublimated in religious confession, which is "rational" because it affords absolution. Since legal confession, however "voluntary," generally carries no absolution or mitigation in law, it becomes only a ritualistic performance, an admission of repressed guilt feelings, unrelated to the crime confessed. So viewed, all confessions and self-incriminatory statements may be "involuntary."[319]

The compulsive elements of apparently voluntary self-incrimination and confession are also present in the oath. Theodor Reik has shown that the oath is closely connected with the confession ritual. Like confession, he found that "swearing, oaths and denials are the central point of all complicated compulsive actions and thoughts and reflections which . . . neurotics feel as obsessive."[320] The oath is a "social . . . [device] used to blackmail hidden mental mechanisms," utilizing "repressed, unconscious contents in which hidden . . . deep

315. FREUD, *Psycho-analysis and the Ascertaining of Truth in Courts of Law*, in 2 COLLECTED PAPERS OF SIGMUND FREUD 13 (Riviere transl. 1924).

316. "In the case of many persons no worldly judge could reach the severity of the superego." REIK, *Geständniszwang und Strafbedürfnis*, in PROBLEME DER PSYCHOANALYSE UND DER KRIMINOLOGIE 118 (1925).

317. On the manner in which accusation techniques may induce false confessions see Bonnard, *The Metapsychology of the Russian Trials Confessions*, 35 INT'L J. PSYCHO-ANALYSIS 208 (1954). Variations in strength of guilt feelings and the relative severity of accusations and trial techniques may combine in such a manner as to cause a normal person to accuse himself falsely. And after all, for the most normal individual, a criminal charge is a trying experience.

318. See REIK, *op. cit. supra* note 314, at 213-15.

319. Compulsive acts are "involuntary" in the sense that they are committed because of an inner need, not consciously understandable, to do what the individual consciously knows to be irrational.

320. REIK, *op. cit. supra* note 314, at 195.

unconscious feelings of guilt . . . sinful thoughts from infancy" are expressed.[321] Thus, any reassessment of the legal rules that differentiate between "voluntary" and "involuntary" self-incrimination and confession must include an inquiry into the nature and justification of modern oath practices. Indeed, the reassessment should begin with the latter inquiry. For, while the compulsive elements in self-incrimination and confession are incidental to their presumed logical *modus operandi*, these elements are the very reason for the oath's existence. The oath *is* a ritual, whereas self-incrimination and confession merely contain ritualistic components.

An even weightier argument against the oath is the indignity which it inflicts upon the taker. Compulsory self-incrimination will again serve as an analogy. Its indignity has been said to lie in the "essential and inherent cruelty of compelling a man to expose his own guilt," which is contrary to "the spirit of individual liberty."[322]

But the indignity of compulsory self-incrimination, whether "compulsory" in an external, traditional sense, or in a psychological sense, lies not only in its cruelty, but in the fact that self-incrimination involves, beyond the conscious guilt of the declarant, his unconscious compulsive "guilt." Respect for the dignity of man throws a cloak of privilege around man's innermost personality sphere.[323] He should not be compelled—either directly or by grant of a waivable privilege—to reveal his unconscious by self-incrimination or con-

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321. Meerloo, *Thought Control and Confession Compulsion*, in EXPLORATIONS IN PSYCHOANALYSIS 33-36 (Linder ed. 1953).

322. Brown v. Walker, 161 U.S. 591, 637 (1896). In civil-law countries references may also be found to "the humiliation of self-denouncement." See BELING, DIE BEWEISVERBOTE ALS GRENZEN DER WAHRHEITSFORSCHUNG IM STRAFPROZESS 13 (1913). But these views do not answer the primary question as to why it should be deemed detrimental or humiliating for a man to be made a judge in his own case or an informer against himself, rather than a mere object of judgment or accusation. Surely, it is nobler and more dignified to be judged by one's own conscience than by the fiat of other men. Such self-judgment undoubtedly is an incident of self-determination. In fact, the historical evaluation of the phenomenon of self-judgment or self-accusation has been singularly inconsistent. At times it has been considered the utmost of justice, at other times the extreme of injustice. Thus, MUYART DE VOUGLANS, INSTITUTES DU DROIT CRIMINEL 73-81, cited in ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 373 (1913), spoke of "the peculiar advantage the accused finds in its [torture] rendering him the judge of his own cause. . . ." BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 47 (Gould transl. 1809), praised the jury system as realization of self-government in the administration of justice, a system in which "the criminal seemed to condemn himself." *But see, e.g.*, Memmius, cited in Silving, *The Oath: I*, 68 YALE L.J. 1329, 1345-47 (1959). The exact starting date of the ascendancy of the contrary view has not been determined. As pointed out by VON LISZT, DIE FALSCHE AUSSAGE 131-38 (1877), the privilege against self-incrimination has survived by way of custom, although not supported by a clear and conscious justification. Of course, the very fact that it has thus survived shows that it corresponds to a profound human need, which transcends verbalization.

323. The privilege against self-incrimination is a right of privacy, closely related to the privilege against search and seizure. Brown v. Walker, *supra* note 322.

fession.[324] A similar phenomenon is present in the oath. Because of the compulsive elements of the oath, its administration is an appeal to the taker to expose usually controlled and hidden wells of his mind. It thus invades his privacy. The target of this probing is an area of the oath-taker's mind over which he has no control and of which he has, indeed, no "knowledge." He is being treated as an "object" and not as a "subject," as part of the world of "thinghood" and not as a rational man.[325] Administration of the oath thus violates man's dignity.

The law of the oath should be reassessed in the light of the contemporary concept of man and of his dignity. Every legal system is geared to a concept of man which that particular system visualizes as both the subject and the object of prescription.[326] The dignity of man varies with the image of man prevailing in different cultures. For example, human dignity in Judaeo-Christian ethics differs from the dignity of the *"homo economicus"*—the shrewdly calculating egoist of eighteenth and nineteenth century tradition.[327] The conception of dignity that corresponds to our present age of science and psychology, though closer to the Judaeo-Christian ideal, is more complex than either of these. In the face of atomic annihilation, men have come to realize the futility of individual self-interest. Increasing self-knowledge has also led to a realization of the impact of the environment upon our individual development. Our individual reality is intensely social, and *"sacro egoismo"* no longer serves even our very selfish ends. Awareness of the irrational components of mind has reduced the "rational man" of past centuries to a fiction. But rationality, though no longer believed to operate inevitably and mechanically, has remained the ideal towards which men must individually and collectively strive. In pursuing this goal, the first step is acquisition of self-knowledge, upon which knowledge of the external world is predicated. Self-knowledge, however, is not a guarantee of rationality. Man must also rid himself of his atavistic and ritualistic traits. Only in this manner can he achieve his best personal efficiency and thereby also enhance his usefulness to society. This is the contemporary image of man, and human dignity today is meaningful only as an attribute of this image. Initial awareness of the potentialities of atomic destruction and of the role of irrational components even in man's creative accomplishments has tended to reduce man's self-esteem. Yet, as his efforts to reach rationality and control of life events meets with success, his self-

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324. This interpretation would explain the common-law limitation of the privilege to *personal* incrimination.

325. See KANT, *Die Metaphysik der Sitten*, in 7 WERKE 246 (Cassirer ed. 1916); Silving, *Testing of the Unconscious in Criminal Cases*, 69 HARV. L. REV. 683, 693-94 (1956).

326. See JESCHECK, DAS MENSCHENBILD UNSERER ZEIT UND DIE STRAFRECHTSREFORM (Recht und Staat Nos. 198-99, 1957); RADBRUCH, DER MENSCH IM RECHT (Recht und Staat No. 46, 1927).

327. But the latter is also a product of religious ideology. See WEBER, *Die protestantische Ethik und der Geist des Kapitalismus*, in I GESAMMELTE AUFSÄTZE ZUR RELIGIONSSOZIOLOGIE (1922).

respect grows. The dignity assigned to him by law must take account of this growing self-respect. Recognizing his growing stature, the law must objectively treat him as a "rational man" in a new sense.[328] The modern conception of man's dignity implies freedom from required participation in rituals which impede modern man in his strivings toward rationality. He should not be required to take an oath as an accused, as a civil party, or as a witness.

Moreover, the image of man prevailing in any given culture is reflected in the image of the state. Like man himself, man's state today ought to have a conscience[329] and dignity.[330] Such dignity precludes administration of an oath. In order to uphold both its own dignity and the dignity of its citizens, the state should not participate in oath-taking at all. Thus the state should refuse an individual's request to be officially sworn, although there can be no legal objection to a spontaneous oath in court.

When the oath tradition is deeply rooted in culture, a sudden abolition of the oath practice may cause a serious disruption of legal procedures. Gradual reduction of oath taking by confining its use to important matters, and to cases where other means of truth finding are unavailable, would seem a more desirable course. Several civil-law systems have adopted such a policy of limiting the oath practice. This policy is expressed in a number of devices: total exclusion of oaths in certain legal areas, discretionary power of judges (and of parties) to impose or forego imposing an oath, and use of the "posttestimonial oath." The latter device would hardly fit the scene of a jury trial. However, the first mentioned methods might be imitated to advantage.

In no event should the "oath of the accused" be tolerated even during the interim period. Administration of such an oath is an open invitation to perjury, in addition to being a "*tortura spiritualis*" of the accused. Nor should an accused be subjected to a questioning as is customary in civil-law countries. The legislation now in force in Georgia permitting the accused to make a statement of his choice affords the most commendable solution.[331]

Reassessment of the law of oaths should include reevaluation of perjury legislation. The present tendency to increase perjury penalties and relax the materiality requirement has resulted from the policy of "governmental thinking." This policy is based on the assumption that the state has an abstract right to man's "truth"—a right that is not dependent on any concrete social interest calling for protection. This assumption militates against the basic

328. Dignity is thus a dynamic and not a static concept. Moreover, changing concepts of human dignity require parallel changes in the scope of "due process"—which should reflect modern notions of individual self-respect.

329. See RADBRUCH, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT 132 (9th ed. Zweigert 1952) (emphasizing the element of "conscience" in law).

330. See Sorrells v. United States, 287 U.S. 435, 453 (1932) (Roberts, J., concurring); Olmstead v. United States, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting).

331. See GA. CODE ANN. § 38-415 (1938); Prater v. State, 160 Ga. 138, 143-45, 127 S.E. 296, 298-99 (1925).

democratic tenet that the state is not the keeper of its subjects' consciences. Unless a clear social interest can be shown to exist, the state should not punish a man for abstract lying. And the punishment for lying should be proportionate to the social harm it produces.

Finally, consideration should be given to introduction into American law of the institution of "perjury in a state of necessity." Among philosophers, only the most formalistic moralists have advocated strict adherence to truth at any price.[332] Failure to differentiate between the circumstances in which the false statement is made is incompatible with the demands of exponents of enlightened penal philosophy for punishment in accordance with the seriousness of the individual's particular antisocial act. The privilege against self-incrimination grew out of the right of an accused to take a purgative oath, rather than the oath *de veritate dicenda* (to tell the truth).[333] He was thus afforded an exemption from the oath that had become a tool of a charismatic, authoritarian state, which claimed control over man's totality of being. The democratic state must limit its claim to man's truth to instances of clear superior interest, and it must yield that claim in cases where disclosure of truth cannot be expected from the individual. Such cases include all those involving the accused or the suspect, as well as all persons closely connected with them. With or without oath, no man should be bound by law to make disclosures which would cause him or persons close to him substantial harm. Man should be held by law to average law abidance, not to the utmost self-sacrifice.

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332. See 8 KANT, GRUNDLEGUNG DER METAPHYSIK DER SITTEN 282-86 (Rosenkranz ed. 1838).

333. See Silving, *The Oath: I*, 68 YALE L.J. 1329, 1365-68 (1959).