

**FAITH IN PUBLIC OFFICE:
THE MEANING, PERSISTENCE AND IMPORTANCE OF OATHS**

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It is, then, peculiarly the place of a magistrate to bear in mind that he represents the state and that it is his duty to uphold its honour and its dignity, to enforce the law, to dispense to all their constitutional rights, and to remember that all this has been committed to him as a sacred trust.¹

But an upright man will, never for a friend's sake do anything in violation of his country's interests or his oath or his sacred honour, not even if he sits as judge in a friend's case; for he lays aside the role of friend when he assumes that of judge.²

INTRODUCTION

Oaths of office are strangely ubiquitous in liberal-democratic regimes. They bind office-holders to their duties of office, but they do so by invoking divine or religious sanction for the performance of those duties. This divine witness to the oath of office appears to stand in as a guarantor of the political order, but also looms large as an authority that is separate from, and in some sense stands above, the political order. This opens up the possibility that this other sovereign may make moral demands that supersede those of the political order and the duties incumbent upon the office holder.³ This is the paradox of the oath of office. It both guarantees the performance of official duties and subjects the content of those duties to external judgement. It is a paradox embedded in the very nature of the oath of office, which captures within its short compass the very large question of the relationship between religious conviction, moral principle and political power. Through a study of the use of oaths in our political systems (including their secular adaptation, the affirmation of office), much light can be shed on the nature of faith in public office.

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¹ Marcus Tullius Cicero, *De Officiis* (Walter Miller trans, William Heinemann Ltd, 1928) 1.124.

² *Ibid* 3.43.

³ See, eg, the exchange between Chief Justice Beverley McLachlin and Professor Jean Bethke Elshtain, 'Freedom of Religion and the Rule of Law: A Canadian Perspective' and 'Response', in Douglas Farrow (ed), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (McGill-Queen's University Press, 2004).

OATHS OF OFFICE

Oaths of office come to us as vestiges of a previous age, or so it seems.⁴ They belong to a time when duty was prior to right and religious sanction was taken for granted. Of an era when the whole of morality turned on the discharge of one's moral duties, and the very foundation of justice was 'truth and fidelity to promises and agreements'.⁵ An age when 'witnessed oaths cement[ed] office-holder[s] to the burdens of responsibility'.⁶

But despite this seeming distance from our own time, oaths and affirmations remain a ubiquitous presence in our public law and government administration. At her coronation ceremony the Queen promised under oath to govern the peoples of the United Kingdom and her overseas possessions according to their respective laws and customs; to cause law and justice, in mercy, to be executed in all her judgements; and to maintain the laws of God and the true profession of the gospel within the United Kingdom.⁷ The Governor-General promised under oath that he would 'be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second' and 'well and truly serve her Majesty ... in the office of Governor-General' and would 'do right to all manner of people after the laws and usages of the Commonwealth of Australia, without fear or favour, affection or ill will'.⁸

All elected members of the Australian Parliament are required to swear or solemnly affirm their allegiance to the Queen,⁹ and the Prime Minister, Ministers and Parliamentary Secretaries take an oath or affirmation of office and the executive counsellor's oath or affirmation.¹⁰ Justices of the High Court of Australia, like the judges of all Australian courts, are required to affirm or swear a similar oath of allegiance and service to the Queen and to promise to 'do right to all manner of people according to law without fear or favour, affection

⁴ 'Oaths are encountered among all peoples and in all cultures. They are a primal symbol of religion.' *The Encyclopedia of Religion*, edited by Lindsey Jones (2nd ed; Detroit: Macmillan Reference USA, 2005) Vol 14, 9639 (sv 'Vows and Oaths').

⁵ Cicero, *De Officiis*, 1.4, 1.23, but see 1.31. Cicero observed (at 1.4): 'For no phase of life, whether public or private, whether in business or in the home, whether one is working on what concerns oneself alone or dealing with another, can be without its moral duty; on the discharge of such duties depends all that is morally right, and on their neglect all that is morally wrong in life.'

⁶ Conal Condren, *Argument and Authority in Early Modern England: The Presupposition of Oaths and Offices* (Cambridge University Press, 2006) 24-25.

⁷ Edward C Ratcliff, *The Coronation Service of Her Majesty Queen Elizabeth II* (Cambridge University Press, 1953).

⁸ Commonwealth of Australia, *Gazette*, 1 April 2014, Governor-General's 'Oath of Allegiance' and 'Oath of Office'.

⁹ Australian Constitution, s 42, Schedule.

¹⁰ Eg, 'Swearing-in of Mr Kevin Rudd as Prime Minister of the Commonwealth of Australia, 3 December 2007', *Governor-General of the Commonwealth of Australia*, <https://www.gg.gov.au/media-release/swearing-mr-kevin-rudd-mp-prime-minister-commonwealth-australia>.

or ill-will'.¹¹ Witnesses in Australian courts are required to give evidence under oath or affirmation that the evidence they will give will be the truth, the whole truth and nothing but the truth,¹² and jurors are required to swear or affirm that they will give a true verdict according to the evidence.¹³

Contemporary Australian law allows for affirmations instead of oaths, and statutory declarations instead of sworn affidavits in most circumstances,¹⁴ and oaths can now be taken in a manner consistent with the oath-taker's religion.¹⁵ Although these developments suggest a kind of 'secularisation' of Australian law and politics, it seems that the policy issues that arise today are more about accommodating religious diversity than they are about removing religion from public life.¹⁶ The exact terms of the minister's oath of office have been changed five times in recent years: under Prime Ministers Paul Keating, John Howard, Kevin Rudd, Julia Gillard and Tony Abbott; and the executive councillor's oath or affirmation was also changed under Prime Ministers Malcolm Fraser and Paul Keating.¹⁷ The main points of difference between these oaths and affirmation concerned whether the relevant promises were made to the 'Queen', to the 'Commonwealth of Australia', or to the 'people of Australia'. If Australia had become a republic following the referendum in 1999, a new oath or affirmation would have been expected of the President and members of Parliament, requiring them to swear loyalty to the Commonwealth and to the people.¹⁸

The language of oaths is sometimes quite unusual to modern ears. In colonial New South Wales, each Justice of the Peace swore to 'do equal right to the poor and the rich after my cunning, wit and power, and after the laws and customs of the realm and statutes made thereof'.¹⁹ This reflected the language of an oath required by Henry VIII in the 35th year of his reign which called upon the swearer to promise with all of his 'Body, Cunning, Wit, and uttermost ... Power', and 'without Guile, Fraud, or other undue Mean', that he would

¹¹ High Court of Australia Act 1979 (Cth), s 11, Schedule.

¹² *Evidence Act 1995* (Cth) s 21, Schedule.

¹³ *Jury Act 1977* (NSW) s 72A; *Jury Act 1995* (Qld) s 50.

¹⁴ Eg, *Evidence Act 1995* (Cth), ss 21-23; *Oaths Act 1867* (Qld), ss 5-6, 13-14, 17-19, 37.

¹⁵ *Omychund v Barker* (1744) 125 Eng Rep 1310; *Evidence Act 1995* (Cth), s 24, Schedule; *Oaths Act 1867* (Qld), ss 33, 39.

¹⁶ See Victorian Parliament Law Reform Committee, *Inquiry into Oaths and Affirmations with reference to the Multicultural Community* (Melbourne: Government Printer, 2002).

¹⁷ Deirdre McKeown, *Oaths and Affirmations Made by the Executive and Members of Federal Parliament since 1901*, Parliamentary Library Research Paper 2013-14 (Department of Parliamentary Services, Parliament of Australia, 2013) 16-23.

¹⁸ Constitution Alteration (Establishment of Republic) Bill 1999, Schedule 1, Parts 1 and 2.

¹⁹ Enid Campbell, 'Oaths and Affirmations of Public Office' (1999) 25 *Monash University Law Review* 132, 141.

‘observe, keep, maintain, and defend all of the King’s Majesty’s Stiles, Titles and Rights’, with ‘the whole Effects and Contents of the Acts provided for the same, and all other Acts and Statutes made, or to be made, with this Realm’, together with ‘the Derogation, Extirpation and Extinguishment of the usurped and pretended Authority, Power, and Jurisdiction of the See and Bishop of Rome, and all other Foreign Potentates’.²⁰

Although they seem archaic throwbacks to a bygone era, oaths of office clearly matter. A person is not able to enter into public office and exercise official power until an appropriate oath or affirmation is duly made.

ACTS OF RELIGION

An oath is an act of religion. Thomas Aquinas said that oaths were an act of *latria* or worship, the special reverence that is due to God alone.²¹ John Calvin called oaths a ‘species of divine worship’, an act of ‘religious veneration’.²² For the *Torah* had thundered: ‘Thou shalt fear the LORD thy God, and serve him, and shalt swear by his name’.²³ And, as the book of *Hebrews* puts it, ‘men swear by one *greater* than themselves, and with them an oath given as confirmation is an end of every dispute’.²⁴ The Qur’an warns: ‘those who exchange the covenant of Allah and their oaths for a small price will have no share in the Hereafter, and Allah will not speak to them or look at them on the Day of Resurrection, nor will He purify them; and they will have a painful punishment’.²⁵ But Jesus Christ seemed to counter all this—or, at least, the abuse of oaths—when he said: ‘do not swear at all ... but let your “Yes” be “Yes,” and your “No,” “No.”’²⁶ Relying on this saying, the Quakers refused to take oaths at all, and there is a wonderful statement by Voltaire to the effect that the compact entered into by William Penn with his ‘American neighbours’ was the only such treaty ‘that was *not*

²⁰ *The History of Publick and Solemn State Oaths* (Bettesworth & Browne, 1716) 25.

²¹ Aquinas, *Summa Theologiae*, II-II, Q89.4.

²² Calvin, *Institutes*, 2.8.23.

²³ *Deuteronomy* 6:13 (AV). See also *Deuteronomy* 10:20.

²⁴ *Hebrews* 6:16 (NAS).

²⁵ *Sura* 3:77 (SIT).

²⁶ *Matthew* 5:33-37 (NKJV). See also *Hosea* 10:4; *Ecclesiastes* 9:2; *James* 5:12. Several church fathers, such as Justyn Martyr, Tertullian, and Clement of Alexandria, seem to have understood this to be an outright rejection of oaths, although others, like Augustine, noted that the use of oaths might still be legitimate in appropriate circumstances, relying on texts such as *Hebrews* 6:13, 17; *Revelation* 10:5-6; *Matthew* 26:63; *Romans* 1:9; *II Corinthians* 1:23; *I Thessalonians* 2:10.

ratified by oath, and was *never* infringed'.²⁷ Even the refusal of an oath was for the Quakers an act of religion.

Thomas Hobbes argued that an oath adds nothing to obligations that already exist: a covenant, if lawful, binds the conscience with or without an oath; whereas an unlawful covenant is not binding even if confirmed by oath.²⁸ Moses Mendelssohn, the great German philosopher of the Jewish Enlightenment, agreed that an oath adds nothing to the obligations that already exist, namely the duty to tell the truth and to keep one's promises. The taking of an oath, he maintained, 'serves neither for a conscientious man, nor for a determined profligate'. The former already knows that God is a witness of everything he says and does; the latter has no conscience and will readily swear a false oath and lie. All that the oath does, he said, is to fortify the 'irresolute and wavering'—those who have principles, but do not always live up to them.²⁹ Immanuel Kant said something similar. The oath, he argued, presumes that a man who is not disposed to tell the truth will nonetheless be persuaded to do so by calling divine punishment down upon himself, 'just as though it rested upon him whether or not to render account to this supreme tribunal'.³⁰ The oath is a kind of 'spiritual torture', Kant said, which might be justified pragmatically, but that is all.³¹ It would be better if we told the truth because it is simply the right thing to do. For such a people, no oath is needed.

Certainly, the abuse of oaths can be very great. Under the Weimar Constitution of 1919, members of the German military swore loyalty to the Reich Constitution and pledged obedience to the Reichspräsident. After Adolf Hitler's appointment as Chancellor in 1933, however, the oath of loyalty was reframed so that it was addressed to the People and the Fatherland (*Volk und Vaterland*), and when the offices of Chancellor and President were merged in 1934, it was further transformed into an oath of personal loyalty to Adolf Hitler himself—as Leader of the German Empire and People (*Führer des Deutschen Reiches und*

²⁷ Voltaire, 'Letter IV – On the Quakers', in *Letters on the English* (New York: P.F. Collier & Son Company, 1909–14) (emphasis added). A beautiful tapestry recording the event is displayed in the library of George Fox University in Newberg, Oregon.

²⁸ Thomas Hobbes, *Leviathan* (Clarendon Press, 1929) 1.14 (p 109).

²⁹ Moses Mendelssohn, *Jerusalem: A Treatise on Ecclesiastical Authority and Judaism* (Moses Samuels trans, Longman, Orme, Brown and Longmans, 1838) 51–54. Compare Cicero, *De Officiis*, 3.44: 'But when he comes to pronounce the verdict under oath, he should remember that he has God as his witness — that is, as I understand it, his own conscience, than which God himself has bestowed upon man nothing more divine.'

³⁰ Immanuel Kant, *Religion Within the Boundaries of Mere Reason* (Cambridge University Press, 1998) 6.159 (p 157) (note). See also Jeremy Bentham, *Swear not at all* (London: St Paul's Churchyard, 1817) 3–5.

³¹ Immanuel Kant, 'On the Miscarriage of All Philosophical Trials in Theodicy', in *Religion Within the Boundaries of Mere Reason and Other Writings* 8.269 (p 28); *Metaphysics of Morals*, in *Practical Philosophy* (Cambridge) §40, 6.303–4 (p 448).

Volkes).³² This personal oath of loyalty to the Führer was required of civil servants and government officials, including university professors and church pastors. Karl Barth, the famous Professor of Theology, then at the University of Bonn, refused to take the oath unless it was clearly understood to be subject to his prior responsibilities to God ‘as an Evangelical Christian’. Without this qualification, he argued, a promise of unlimited obedience would treat Hitler as if he were some kind of ‘a god incarnate’.³³ Under the extreme pressure of the time, however, the Confessing Church issued a statement that because an oath involves an acknowledgment of God as divine witness, it necessarily excludes ‘any actions which would be contrary to God’s command attested in Holy Scripture’. On this understanding, Barth decided he could take the oath, but he was nevertheless dismissed from his post at the university for raising the issue in the first place and was soon forced to leave the country.³⁴ From his native Switzerland, he continued to question the loyalty oath as purporting to displace the unqualified loyalty owed by a Christian to the Lord Jesus Christ.

Dietrich Bonhoeffer, who was later killed for his courageous opposition to Nazism and his role in the attempt to assassinate Hitler, was not required to take the oath because he was already deemed an ‘illegal’ pastor, but he attempted to convince his fellow pastors not to do so.³⁵ For Bonhoeffer, ‘no earthly obligation is absolutely binding’, and it was therefore illegitimate to take any oath which made an ‘unconditional demand’ after the style of the Hitler oath.³⁶ Adolf Eichmann, an infamous SS Officer found guilty of crimes against humanity, war crimes and crimes against the Jewish people for his role in the organisation of the Holocaust, had no such scruples. At his trial, he infamously excused his behaviour as the carrying out of orders. ‘I am guilty of having been obedient’, he said, of ‘having subordinated myself to my official duties and the obligations of war service and my oath of allegiance and my oath of office’.³⁷ Hannah Arendt controversially perceived a ‘banality of evil’ in Eichmann’s wooden and obtuse responses to questioning, but Bettina Stangneth has recently

³² John Perry, ‘Not Pledging as Liturgy: Lessons from Karl Barth and American Mennonites on Refusing National Oaths’ (2002) 76 *Mennonite Quarterly Review* 431 [text to note 18].

³³ Ibid [text to note 27].

³⁴ Ibid [text to notes 18-25]. From Switzerland, Barth continued to raise concerns about the oath.

³⁵ Ferdinand Schlingensiepen, *Dietrich Bonhoeffer 1906-1945: Martyr, Thinker, Man of Resistance* (London: T&T International/Continuum, 2010) 212-3.

³⁶ Dietrich Bonhoeffer, *The Cost of Discipleship*, 138.

³⁷ The Trial of Adolf Eichmann, Session 120, *The Nizkor Project* <<http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-120-03.html>>.

argued that Eichmann was far from a mindless functionary, hardly ‘a small cog in Adolf Hitler’s extermination machine’ as he had maintained.³⁸

Dark oaths can also be conspiratorial and subversive. Tacitus records the promises extracted from the Batavian chiefs by the one-eyed Gaius Julius Civilis, who collected them ‘at a sacred grove under the pretext of giving a banquet’, persuaded them to join his revolt, and then ‘bound the them all by their national forms of oath and barbarous rites’.³⁹ Rembrandt depicts the scene memorably in his dark, grotesque and mordant *Conspiracy of Claudius Civilis* (1661-2).⁴⁰ Members of the city council of Amsterdam, who had commissioned the painting to celebrate the construction of their new town hall, seem not to have been amused.

Life and death. Judgement of the body in this life and the soul in the hereafter. It is difficult to overestimate the significance of the oath. Was Jacques Derrida exaggerating when he said that the oath makes a promise that human language cannot undo?⁴¹ In the *Merchant of Venice*, Shylock regarded himself as bound by his oath to perform his promise to extract a proverbial pound of flesh from Antonio upon default of that infamous loan. Commenting on the binding power of the oath, Derrida wrote: ‘The oath, the sworn faith, the act of swearing is transcendence itself, the experience of passing beyond man, the origin of the divine or, if one prefers, the divine origin of the oath.’⁴²

Carl Schmitt is famous for the claim that all of the important ideas in our modern liberal politics are secularised theological concepts.⁴³ Schmidt had the idea of sovereignty especially in mind, but he might just as easily have been talking about the oath and the solemn affirmation. Derrida suggested just this when he observed that even when God ‘is not named’, that is, even ‘in the most “secular” <laïque> pledge of commitment’, His Presence is nonetheless implicitly invoked.⁴⁴ Charles Barbour, following Derrida, locates within our language and communication a whole array of theological concepts that haunt our ostensibly

³⁸ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin, [1963] 2006); Bettina Stangneth, *Eichmann before Jerusalem: The Unexamined Life of a Mass Murderer* (Ruth Martin trans, Alfred A. Knopf, 2014).

³⁹ Tacitus, *Histories*, trans C.H. Moore (Harvard University Press, 1925-1937), 4.14-15.

⁴⁰ <https://www.rijksmuseum.nl/en/press/press-releases/rembrandts-claudius-civilis-temporarily-on-view-at-the-rijksmuseum>.

⁴¹ Derrida, ‘What Is a “Relevant” Translation’, 362.

⁴² Derrida, ‘What Is a “Relevant” Translation’, 363.

⁴³ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans, University of Chicago Press, [1922] 2005).

⁴⁴ Jacques Derrida, *Acts of Religion* (Routledge, 2002) 65.

secular modernity.⁴⁵ All social, political and legal relations, he argues, are structured by something like an oath—a mutual promise to trust each other’s word.⁴⁶ The problem that the oath addresses concerns what he calls ‘the opacity of the other’—the mundane fact that we cannot know what another is thinking and must therefore accept their promises ‘on trust’.⁴⁷ Our reliance on oaths and solemn affirmations is testimony to the faith that we must invest in each other, especially those who rule over us.

It is not necessary to venture too deeply into the labyrinth of post-modern philosophy to see the point. An implied promise of fidelity is presupposed by human communication. Oaths of office propose to externalise and formalise this act of faith. And in so doing, they purport to domesticate what has been called ‘that wild or vast notion of what in every man’s conception is just or unjust’.⁴⁸

LOCATIONS OF SOVEREIGNTY

Oaths and affirmations of office track the ebb and flow of ultimate authority and binding power within societies and cultures. They simultaneously reveal the location of our highest religious commitments and the grounds upon which the coercive powers of government are exercised.

The ancient civilisations of the Mediterranean basin—Babylon, Egypt, Assyria, Greece, Rome and many others—related to each other through treaty-covenants sworn before their respective gods. Many of these treaty-covenants, were not agreements among equals, but were rather the terms of a hegemonic relationship between suzerain and vassal. As scholars such as Peter Karavites and Moshe Weinfeld have shown, although the specific terms and rituals differed from one culture to another, the structural similarities point to a common origin and a shared set of understandings about the role of oaths in binding kings and nations to their obligations.⁴⁹ Under conditions of polytheism, the gods of all the relevant nations

⁴⁵ Charles Barbour, 'The Hazard of Truth: Perjury and Oath in Derrida’s Later Work' (2013) *Law, Culture and the Humanities* [2].

⁴⁶ Ibid [4].

⁴⁷ Ibid [6]-[7]. Against the interpretation of John Caputo, *The Prayers and Tears of Jacques Derrida: Religion without Religion* (Indiana University Press, 1997), Barbour rejects any suggestion of a ‘weak’ or ‘post-metaphysical’ theism in Derrida.

⁴⁸ Commissary-General Henry Ireton, in A S P Woodhouse (ed), *Puritanism and Liberty: Being the Army Debates (1647-9) from the Clarke Manuscripts with Supplementary Documents* (University of Chicago Press, 1951) 26-7.

⁴⁹ Paul Karavites, *Promise-Giving and Treaty-Making: Homer and the near East* (Brill, 1992); Moshe Weinfeld, 'Covenant Terminology in the Ancient near East and Its Influence on the West' (1973) 93 *Journal of the American Oriental Society* 190. See also Alan H Sommerstein and Isabelle C Torrance, *Oaths and Swearing in Ancient Greece* (De Gruyter, 2014).

were invoked as witnesses to the treaties. The practice of confirming international treaties with an oath continued after the Christianisation of the Roman Empire, but on the basis of a shared monotheism.⁵⁰ It was not until some point after the Enlightenment that this practice came to an end. As Allen Hertz has pointed out, thereafter the binding force of international treaties had to depend upon a natural law obligation to keep one's promises, or else the geopolitical self-interest of states and the threat of military intervention.

The Germanic peoples of Europe placed a great deal of emphasis on the oath. A person charged with wrongdoing could rebut the charge by swearing an oath of innocence. It might also be determined that a person charged with a debt must prove his innocence with the assistance of twelve or more oath-helpers (compurgators) who would swear to their belief in the defendant's oath.⁵¹ The reasons for the decline in this practice—called canonical purgation in ecclesiastical courts and wager of law in the common law courts—are complicated and obscure. It made some sense in local communities where personal reputation was a real constraint on behaviour, as well as a means by which the secret sexual sins of clergy and accusations of adultery might be addressed within ecclesiastical law, but these considerations did not apply to the common law administered by the royal courts at Westminster.⁵² Over time, compurgation was displaced by trial by jury and the testimonial oath, which had been institutionalised in Roman jurisprudence as early as Emperor Constantine, who [erroneously] believed he was following Christian practice by requiring witnesses statements to be sworn on oath.⁵³

Oaths were certainly a mainstay of medieval civilisation. One only has to list them: oaths of homage and allegiance, oaths of chivalry, oaths of fraternity, vows of pilgrimage, chastity or celibacy, oaths of jurors and office-holders.⁵⁴ The emergent towns and cities of medieval Europe, Harold Berman observes, were 'religious associations in the sense that each was held together by religious values and rituals, including religious oaths'. The charters by which the cities were established were 'confirmed by religious oaths, and the oaths, which were renewed with successive installations of officers, included, above all, vows to uphold

⁵⁰ Allen Hertz, 'Medieval Treaty Obligation' (1991) 6 *Connecticut Journal of International Law* 425, 431.

⁵¹ Frederic William Maitland, *The Constitutional History of England* (Cambridge University Press, 1908) 115-19.

⁵² R H Helmholz, 'The Law of Compurgation', in *The Ius Commune in England: Four Studies* (Oxford University Press, 2001) ch 2.

⁵³ Constitution of Naissus (334); Justinian Code 4.20.9, cited in Helen Silving, 'The Oath: I' (1959) 68 *Yale Law Journal* 1329, 1337

⁵⁴ John Spurr, 'A Profane History of Early Modern Oaths' (2001) 11 *Transactions of the Royal Historical Society* 37, 58.

the municipal laws'.⁵⁵ The *Eidgenossenschaft* or 'oath-bound confederation' was a common institution of medieval Europe which has survived, it seems, only in the traditional name for the Swiss confederation.⁵⁶ The rise of social contract theory—the idea that state authority is based on an agreement among the people—cannot be understood apart from this context.⁵⁷ However, it was oaths of a rather different kind—oaths of fealty, allegiance and abjuration—which came into their own as tools of European statecraft during the tumultuous sixteenth and seventeenth centuries.⁵⁸

To conceive of a ruler succeeding to the throne on the basis of a solemn oath was very consistent with the Reformation insistence on the importance of secular vocations, through which every layman was called directly into the service of God. But in the hands of Henry VIII, the oath of allegiance functioned as a potent means of maintaining control over his subjects.⁵⁹ As Thea Cervone has pointed out: '[r]ather than describing fealty to the monarch, Henry VIII wished for the Oaths of Supremacy and Succession to describe fealty to *him*.'⁶⁰ And as David Jones further observed: 'the Tudor state had succeeded to the church's role as arbiter of the individual conscience and then set about investing loyalty oaths with obligations arising from conscience'.⁶¹ A whole 'plethora' of oaths and subscriptions were used by Henry VIII to secure his new divorce, the succession of the throne and his supremacy over the English church.⁶² One only has to mention the oaths associated with Henry VIII's *Act of Succession* (1534) and Elizabeth I's later *Act of Supremacy* (1558/9), and James I's *Popish Recusants Act* (1605/6) to recognise the significance of the oath in Tudor and Stuart statecraft. Elizabeth I's supremacy oath was required of 'every archbishop, bishop, and all and every other ecclesiastical person' and 'every temporal judge, justice, mayor, and other lay or temporal officer and minister'.

⁵⁵ Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) 362.

⁵⁶ Max Weber, *The City* (Martindale and Neuwirth ed and trans, New York, 1958) 104-110; Frederick K Lister, *The Early Security Confederations: From the Ancient Greeks to the United Colonies of New England* (Greenwood Press, 1999) ch 3.

⁵⁷ Antony Black, 'The Juristic Origins of Social Contract Theory' (1993) 14(1) *History of Political Thought* 57.

⁵⁸ Caroline Robbins, 'Selden's Pills: State Oaths in England, 1558-1714' (1972) 35(4) *Huntington Library Quarterly* 303.

⁵⁹ A similar observation has been made about the 'upstart kingdoms of the Hellenistic world', which 'badly needed to assure themselves the loyalty of their heterogeneous subjects and soldiers': Sommerstein and Torrance, above n 49, 393.

⁶⁰ Thea Cervone, *Sworn Bond in Tudor England: Oaths, Vows and Covenants in Civil Life and Literature* (McFarland & Company, 2011) 7.

⁶¹ D M Jones, *Conscience and Allegiance in Seventeenth-Century England – The Political Significance of Oaths and Engagements* (Rochester, New Jersey, 1988), cited in Spurr, above n 54, 59.

⁶² Jonathan Gray, *Oaths and the English Reformation* (Cambridge University Press, 2012) 51.

Under the oath, the promisor was required to declare that the queen was ‘the only supreme governor’ over the realm and over all her majesty’s overseas dominions, not only in temporal affairs, but also in all spiritual or ecclesiastical matters. The oath-taker was also required to swear that ‘no foreign prince, person, prelate, state or potentate has, or ought to have’ any jurisdiction within the realm, and had to ‘utterly renounce and forsake all foreign jurisdictions, powers, superiorities, and authorities’.⁶³ James I’s oath of allegiance further required the swearer to deny the power of the pope to depose the king or authorise armed rebellion against him, and to deny any such effect to any sentence of excommunication of the king. Sir Thomas More and Bishop John Fisher were executed precisely because they refused to take Henry VIII’s oath of succession, particularly as it required the oath-taker to abjure ‘any foreign potentate’, which was to impugn the authority of the pope in favour of the king.⁶⁴

‘The oath’ thus became, says John Spurr, ‘an irresistibly attractive tool of the authorities. For it is a powerful, infrangible, obligation which can bind the individual to the big political entities, the nation and the national church’.⁶⁵ William Shakespeare well recognised this, as the pivotal role of oaths, vows and conscriptions in his many plays attests.⁶⁶ ‘Now oaths are so frequent’, said John Selden in the mid-seventeenth century, ‘they should be taken like pills, swallowed whole: if you chew them you will find them bitter: if you think of what you swear, ’twill hardly go down’.⁶⁷ The *ex officio* oath—which required defendants to swear to answer questions even if their answers might incriminate them—was a particularly useful tool in the hands of the Star Chamber and High Commission. Brian Cummings has explained its usefulness in the following terms:

It was a procedure whereby a charge of heresy could be pursued even where there were no independent witnesses, when the defendant was accused instead by *clamosa insinuatō*, that is by ‘public scandal.’ In such a case the judge or ordinary was empowered to act *ex officio* (on the authority of his office), and to ask the accused to take an oath to answer truthfully and absolutely any question that was asked of him. There was thus no specific bill of charges, no indictment providing the limits of allowable questioning. There was also no legal counsel for the accused. The judge effectively took the part also of prosecution and even (more or less disingenuously) of defense. The odds against the accused in such circumstances were catastrophic. Unless he was himself expert in theology, he was virtually certain to convict himself of some heresy or other under such open rules of examination.⁶⁸

⁶³ *Supremacy Act* (1558) cap XIX.

⁶⁴ Gray, above n 62, 119-125.

⁶⁵ Spurr, above n 54, 60.

⁶⁶ John Kerrigan, ‘Shakespeare, Oaths and Vows’ (2011) 167 *Proceedings of the British Academy: 2009 Lectures* 61.

⁶⁷ John Selden, *Table Talk* (London: Joseph White, 1786) 95 (‘Oaths’, IX).

⁶⁸ Brian Cummings, ‘Swearing in Public: More and Shakespeare’ (1997) 27(2) *English Literary Renaissance* 197, 207. Since its establishment at the Fourth Lateran Council in 1215 in the place of the trial by ordeal, the *inquisitio ex officio* had recognised the principle of *Ecclesia de occultis non iudicat* (‘the Church

William Tyndale, like many protestant reformers who followed him, objected to the use of state power to inquire into the private beliefs and thoughts in this way. He argued that judgement ought to proceed only on the basis of evidence sworn by witnesses, and should not presume to inquire into men's consciences:

in the causes that are brought to them, when they sit in God's stead, let them judge and condemn the trespasser under lawful witnesses. ... Let what is known only to God, and of which no proof can be made or lawful witness brought, abide until the coming of the Lord, who will reveal all secrets. ... God has given them no further authority.⁶⁹

It was more than a century, however, before the Star Chamber and High Commission were finally abolished by the Long Parliament through the enactment of the *Habeas Corpus Act* 1640 and *High Commission Abolition Act* 1641. The erection of such courts was further denounced by the *Bill of Rights* 1689 as 'illegal and pernicious'. The privilege against self-incrimination enjoyed by defendants today is largely a result of the common law's reaction against the use of the *ex officio* oath.⁷⁰

Oaths of office and oaths of allegiance have thus marked the ebb and flow of state authority.⁷¹ They have determined its metes and bounds,⁷² and continue to do so.⁷³ During the English civil war, publicists of all perspectives found it necessary to address the question of the oath as a way of identifying the proper bounds of the authority of the king, the parliament and the people.⁷⁴ James I, for example, had maintained that only God could enforce the coronation oath against the king,⁷⁵ and Philip Hunton argued that the people continue to owe obedience to the king under their oaths of subjection.⁷⁶ On the other hand, Samuel Rutherford insisted that if the 'oath betwixt the king and his people' is broken 'the party injured is loosed from the contract' and the people operating through their inferior magistrates may resist

does not judge secret matters'). But while this protected a person who kept his opinions to himself, it did not protect a person who made his views public, such as the early English Lutheran, Thomas Bilney, whose condemnation was defended by Sir Thomas More in his *Dialogue Concerning Heresies* (1529). For an account sympathetic of More, see David R Oakley, 'English Heresy Procedures in Thomas More's *Dialogue Concerning Heresies*' (2008) 3 *Thomas More Studies* 70.

⁶⁹ William Tyndale, *The Obedience of a Christian Man* (William Gross, 2011 (1528)) 21.

⁷⁰ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 497 (Mason CJ and Toohey J), 526-7 (Deane, Dawson and Gaudron JJ).

⁷¹ Condren, above n 6, 257-60.

⁷² *Ibid* 259.

⁷³ Margaret Kelly, *King and Crown: An Examination of the Legal Foundation of the British King* (PhD Thesis, Macquarie University, 1998) expounds the legal foundations of English, Scottish and British kingship through an exhaustive analysis of the coronation oaths.

⁷⁴ The views of Oliver Cromwell, Henry Ireton, John Locke, Thomas Hobbes and Algernon Sidney are referenced in Woodhouse, above n 48, 9ff, 24, 26-7 and in David Wootton (ed), *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* (Penguin, 1986) 68, 440-2, 472.

⁷⁵ King James I, *The Trew Law of Free Monarchies* (1598), in *ibid* 104.

⁷⁶ Philip Hunton, *A Treatise of Monarchy* (1643), Section III, in *ibid* 179.

tyranny on the part of the king.⁷⁷ Anthony Ascham, like Thomas Hobbes, later argued that self-preservation is the most basic obligation, so that no oath could oblige the oath taker to comply with his oath if that should prejudice his own safety, and that the oath binds him no more than he intended to be bound when taking the oath.⁷⁸ However, Robert Sanderson, who was chaplain to Charles I, responded that this would tend, among other things:

to the bringing in of atheism, with the contempt of God and all religion, whilst every man, by making his own preservation the measure of all his duties and actions, makes himself thereby his own idol.⁷⁹

For reasons such as these, it seems, John Locke famously held that while religious toleration should be extended to all protestant sects, it must not extend to atheists:

Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all.⁸⁰

The sentence of Oliver Cromwell's High Court of Justice, which convicted Charles I of high treason, was premised specifically on the 'trust, oath, and office' committed to him—to be used, it was said, for the 'good of the people' and for the 'preservation of their liberties', and not to erect in himself an 'unlimited and tyrannical power to rule according to his will'.⁸¹ While those involved in the trial and execution of the king were later themselves executed for regicide and the breach of their own duties of loyalty, the assertion of the Parliament's ultimate control over the terms of the coronation oath, the succession to the Crown and the oath of allegiance were crucial to the establishment of its sovereignty as a result of the 'glorious revolution' of 1688/9.⁸² Thus were established the constitutional assumptions of Australian law and government.

In more recent times, here in Australia, differing views about the nature and location of sovereignty have been at the heart of changes to the oaths of office and oaths of allegiance required of our public officials.⁸³ But sovereignty is a notoriously ambiguous and contested concept. For a start: is it vested in the Queen, the Parliament or the Australian people (or,

⁷⁷ Rutherford, *Lex Rex* (1644), Question XIV, in Woodhouse, above n 48, 207-8.

⁷⁸ Anthony Ascham, *Of the Confusions and Revolutions of Government* (1649), Chapter VII, (1), Chapter VIII, in Wootton, above n 74, 351.

⁷⁹ Robert Sanderson, *A Resolution of Conscience* (1649), in *ibid* 355; see also 337, 354-5.

⁸⁰ John Locke, *A Letter Concerning Toleration* (Hackett Publishing, 1983 [1689]) 52. See also the possibly qualifying observations in John Locke, *An Essay Concerning Human Understanding* (Clarendon Press, 1971 [1689/90]) 1.3.5, discussed in Jeremy Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (Cambridge University Press, 2002) 223-6.

⁸¹ T B Howell (ed), *A Complete Collection of State Trials* (T C Hansard, 1816) 1119.

⁸² *Oaths of Allegiance and Supremacy Act 1688; Bill of Rights 1689; Coronation Oath Act 1689; Act of Settlement 1701.*

⁸³ Gareth Griffith, *The Constitution Amendment (Restoration of Oaths of Allegiance) Bills 2011: Background and Commentary* (New South Wales Parliamentary Library Research Service, 2012) 7-11.

peoples)?⁸⁴ The constitutional answer to this question is far from clear, and the terms of the oaths and affirmations of office within the various Australian jurisdictions reflect this ambiguity. And what is the role and status of our judges in this context? One may have to ask whether today's judges, exercising vast powers of judicial review over legislation and executive action, are always faithful to their oath-bound obligation to do justice 'according to law'. Certainly, Sir Gerard Brennan had occasion on his swearing in as Chief Justice of the High Court of Australia to reflect on the judicial oath as the ground upon which he was obliged to do justice according to law and not according to his own view of what the law ought to be,⁸⁵ thus housetraining 'that wild or vast notion of what in every man's conception is just or unjust'.⁸⁶

Paolo Prodi has argued that 'the early modern state's monopolisation of oaths represents a sacralisation of power in the first step towards a "secular oath"'.⁸⁷ In this connection, it may be worth recalling Dietrich Bonhoeffer's observation that there are two ways in which untruthfulness can undermine an oath: 'either it may actually insinuate itself into the oath ([ie, through] perjury), or else disguise itself in the form of an oath by invoking some secular or divine power instead of the living God'.⁸⁸ The religious oath may be a ready tool in the hands of the political authorities—from Henry VIII to Adolf Hitler—but its complete secularisation can also mark a shift toward totalitarianism. The Soviet Union had an oath—but it was an oath that invoked not God, but rather the 'stern punishment of Soviet law' and the 'universal hatred and contempt' of the proletariat. Joseph Stalin promulgated the following oath of allegiance for members of the Red Army:

I, a citizen of the Union of Soviet Socialist Republics, joining the ranks of the Workers' and Peasants' Red Army, do hereby take the oath of allegiance and do solemnly vow to be an honest, brave, disciplined and vigilant fighter, to guard strictly all military and State secrets, to obey implicitly all Army regulations and orders of my commanders, commissars and superiors. ...

And if through evil intent I break this solemn oath, then let the stern punishment of the Soviet law, and the universal hatred and contempt of the working people, fall upon me.⁸⁹

⁸⁴ Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009).

⁸⁵ Sir Gerard Brennan, 'Speech on Swearing in as Chief Justice', 21 April 1995, (1995) 183 CLR ix.

⁸⁶ Commissary-General Henry Ireton, in Woodhouse, above n 48, 26-7.

⁸⁷ Paolo Prodi, *Das Sakrament der Herrschaft – Der politische Eid in der Verfassungsgeschichte des Okzidents*, translated by J Else (Berlin, 1997). The quotation is from Spurr, above n 54, 40.

⁸⁸ Dietrich Bonhoeffer, *The Cost of Discipleship*, 136. Bonhoeffer continued at 137: 'the abolition of oaths is in itself no guarantee that the truth will be told, indeed it may only lead to its concealment. No general rule can be laid down to enable us to decide where this is so, i.e. where an oath is desirable precisely in the interests of the truth; each case must be decided on its own merits.'

⁸⁹ Joseph Stalin, 'Oath of Allegiance of the Workers' and Peasants' Red Army' (23 February 1939), published in *Pravda*, 25 February 1939, reproduced in Joseph Stalin, *Works* (London: Red Star Press, 1978) Vol

Aleksandr Solzhenitsyn testified to what the stern punishment of Soviet law looked like in practice. In his accounts of Soviet justice, there is very little reference to the sworn testimony of witnesses, and much more about endless interrogations, exquisite tortures and forced confessions.⁹⁰ The predictions of the pseudonymous ‘David’, an opponent of the ratification of the United States Constitution, seemed at last to come true: the possibility of a ‘government of influence and opinion’, based on the religious and ethical convictions of the people, had been replaced by a ‘government of mere force’, under which there are ‘no principles of restraint but laws of their own making’.⁹¹ An oath may be a kind of spiritual torture, as Kant said, but it respects the internal domain of a person’s conscience as something known and judged by God alone. In a review of Giorgio Agamben’s *The Sacrament of Language: An Archaeology of the Oath*,⁹² Justin Clemens observes:

It is thus no wonder today, when the oath has fallen into desuetude, that torture is explicitly back on the agenda even for those democratic states which had prided themselves on their thoroughgoing rejection of it. Without any trust in oaths—indeed, having repudiated almost altogether their function and efficacy—our contemporary materialist polities can imagine no other recourse than direct psycho-physical incursions into bodies in a forlorn and terrifying attempt to extract “reliable” “information.”⁹³

If this is so, the advice given to early Anglo-Saxon kings by Dunstan, Archbishop of Canterbury (959-988), may be worth recalling. He said:⁹⁴

The justice of a consecrated king is that he condemn no man [unjustly]; and that he defend and protect widows and orphans and foreigners; ... [that he] have the old and wise and temperate as his counsellors; and appoint righteous men as officers; because, whatever they do unjustly by means of his might, he must give a reckoning on judgement day for all of it.

The Code of the Emperor Justinian (r 527-565) spoke in a similar register when requiring that judges must not ‘permit the hearing of a process to begin unless there is a copy of the Holy Scriptures placed before the judicial bench’. It was observed that:

Attending in this way to the holy Scriptures and consecrated by the presence of God, they [the judges] will have greater assistance in their decisions from the knowledge that they are as much judged as judging, and that judgement is more terrible for them than for the parties, since the weighing of a litigant’s cause is matter for man’s supervision, the weighing of a judge’s cause is reserved for God’s.⁹⁵

14, accessed at <<https://www.marxists.org/reference/archive/stalin/works/1939/02/23.htm>> (2 September 2015).

⁹⁰ Aleksandr Solzhenitsyn, *The Gulag Archipelago 1918-1956*, translated by T P Whitney (New York: Harper & Row, 1974), Part I, ch 3.

⁹¹ ‘Letter by David’, in Herbert Storing, *The Complete Anti-Federalist* (Chicago: University of Chicago Press, 1981) IV.248.

⁹² Giorgio Agamben, *The Sacrament of Language: An Archaeology of the Oath* (Adam Kotsko trans, Stanford University Press, 2010).

⁹³ Justin Clemens, ‘The Sacrament of Language: An Archaeology of the Oath (Review)’ (2011) 19 *Symplokē* 414.

⁹⁴ Early English Laws, Coronation Oath, composed for either Edward the Martyr (r 975-978) or Æthelred II (r 978-1016): <<http://www.earlyenglishlaws.ac.uk/laws/texts/sacr-cor/#versions>> (accessed 19 August 2015).

⁹⁵ *Codex Constitutionum* III.1.14, in Oliver O’Donovan and Joan Lockwood O’Donovan (eds), *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought, 100-1625* (Eerdmans, 1999) 193.

CONCLUSIONS

Writing of the seventeenth century, Conal Condren observed:

Overlooking the oath, or not recognising it as problematic, above all because it was a religious act, has been a remarkably economical way of creating a premature secularisation of political debate in which issues of office then need to be pared down to suitably secular politics, of promises and agreements and of contractual rights, in order to conform to expectations.⁹⁶

There has, undoubtedly, been a secularisation in our practice of oaths and affirmations.⁹⁷ But we have to be careful about what we mean by secularisation. The solemn affirmation as a substitute for the oath was originally invented for religious reasons—to avoid injury to the religious consciences of Anabaptists, Quakers and Moravians. Even today, a clear majority of our officeholders still opt for the religious oath. Since the late 1970s, a fairly consistent figure of around 70% of senators and 75% of members of the House of Representatives have chosen to take oaths rather than solemn affirmations.⁹⁸ And even in that most secular of states—the Soviet Union—a secular oath was still found to be indispensable. The chilling thing is that, as fearful as the judgement of God might be, the horrors that Solzhenitsyn recounted in his *Gulag Archipelago* were enough of a hell upon earth as it is.

The oath of office places a limit on public power. It binds our governors to the responsibilities of office and reminds them that they are ‘as much judged as judging’. The oath suggests that if we are to *have* faith in public office, we will also need to *keep* faith in public office.

⁹⁶ Condren, above n 6, 352.

⁹⁷ Richard S Willen, 'Rationalization of Anglo-Legal Culture: The Testimonial Oath' (1983) 34 *The British Journal of Sociology* 109.

⁹⁸ Precise figures appear in: Deirdre McKeow, 'Oaths and affirmations made by the executive and members of federal parliament since 1901' (Department of Parliamentary Services, Parliament of Australia, 2013) 7-8.