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Re-thinking the Process for Administering Oaths and Affirmations

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Re-thinking the Process for Administering Oaths and Affirmations

Courts around the world require witnesses to swear an oath to a religious deity or affirm to tell the truth before providing testimony. It is widely thought that such a process has the potential to give rise to unnecessary bias against witnesses based on their religious beliefs or lack thereof. Scholars have offered two main prescriptions to remedy this problem: (i) abolish the oath and have all witnesses promise to tell the truth; or (ii) require oath-swearing witnesses to invoke a non-specific reference to God. The former proposal is problematic as it rests on the unproven assertion that giving an oath does not bind at least some witnesses' conscience to a greater extent. The latter fails to protect against bias towards atheists and other witnesses who refuse to swear an oath. The aim of this article is to develop an alternative procedure that allows witnesses to swear an oath or affirmation outside of the courtroom. This process not only rids the trial process of unnecessary bias, it also furthers the truth-seeking function of the trial process by allowing witnesses to bind their consciousness to a greater extent.

Les tribunaux du monde entier exigent des témoins qu'ils prêtent serment à une divinité religieuse ou qu'ils affirment solennellement de dire la vérité avant de témoigner. Il est largement admis qu'un tel processus peut donner lieu à des préjugés inutiles à l'encontre de certains témoins en raison de leurs croyances religieuses ou de l'absence de celles-ci. Des chercheurs ont proposé deux solutions principales pour remédier à ce problème : (i) abolir le serment et faire en sorte que tous les témoins promettent solennellement de dire la vérité; ou (ii) exiger que les témoins qui prêtent serment invoquent une référence non spécifique à Dieu. La première proposition est problématique car elle repose sur l'affirmation non prouvée que le fait de prêter serment ne lie pas davantage la conscience d'au moins certains témoins. La seconde proposition ne protège pas contre les préjugés à l'égard des personnes athées et des autres témoins qui refusent de prêter serment. L'objectif du présent article est d'élaborer une procédure de rechange qui permettrait aux témoins de prêter serment ou de faire une affirmation solennelle en dehors de la salle d'audience. Cette procédure permettrait non seulement d'éviter toute partialité inutile, mais elle renforcerait également la fonction de recherche de la vérité du procès en permettant aux témoins de lier leur conscience dans une plus large mesure.

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Introduction

The trial process typically requires that adult witnesses providing evidence swear an oath or affirmation to ensure the trier of fact that the evidence provided is truthful.[1] Oaths involve swearing on a religious symbol such as the Christian Bible or the Islamic Quran.[2] Affirmations do not involve religion. Instead, they require that the witness affirm that her evidence will be truthful.[3] Oaths and affirmations typically are administered by the court clerk assisting the presiding judge. The oath or affirmation is generally given in front of the judge and, if applicable, the jury in charge of hearing the case before the court.

The growing literature on bias in the justice system has brought into question the ability of individual jurors to administer their duties without

1. It is notable that there are exceptions for those who do not understand the nature of an oath or affirmation. These witnesses are typically allowed to promise to tell the truth, so long as they understand the importance of telling the truth. See *Canada Evidence Act*, RSC 1985, c C-5, s 16(3). Such a requirement does not require the witness to also understand the nature of a promise to tell the truth. See *R v DAI*, 2012 SCC 5 at paras 24-25. Child witnesses under the age of 14 are presumed to have the capacity to testify under section 16.1 of the *Canada Evidence Act* and are not required to swear an oath or affirmation unless their capacity to do so is affirmatively undermined.
2. See *Canada Evidence Act*, *supra* note 1, s 13; *R v NS*, 2012 SCC 72 at para 53.
3. See *Canada Evidence Act*, *supra* note 1, s 14.

showing explicit or implicit bias towards minority groups.[4] More recent scholarship has also shown that judges harbour implicit biases similar to those of lay people, and recent case law suggests that religious biases are also explicit in the judiciary.[5] As such, it is questionable whether the first thing a judge or jury should know about a witness is her religious beliefs or lack thereof. This raises a question that has yet to be adequately addressed in the literature: can the process for administering oaths and affirmations be amended to rid the trial process of this potential for bias?

Two main prescriptions have been offered to address this issue. First, scholars suggest that the oath and affirmation option be replaced with a requirement that all witnesses promise to tell the truth.[6] Although this proposal would rid the trial process of the potential for bias, it also assumes that giving an oath does not bind *at least some* witnesses' conscience to a greater extent. Second, scholars suggest that oath-swearing witnesses be required to invoke a non-specific reference to "God."[7] This proposal, however, fails to protect against potential biases towards atheists and other witnesses who refuse to swear an oath.

The aim of this article is to develop an alternative procedure that preserves the current oath and affirmation structure while ensuring that bias does not enter the courtroom when swearing in witnesses. The proposal is simple: witnesses may swear an oath or provide an affirmation but must do so in front of the court clerk outside of the courtroom. The presiding judge may subsequently confirm the witness' oath or affirmation. Such a procedure, I contend, not only ensures those whose consciences are more bound by providing an oath will continue to be permitted to swear an oath, it also rids the trial process of the unnecessary opportunity for bias.

The article unfolds in three parts. Part I provides an overview of the various rationales developed over time for allowing witnesses to choose

4. This literature will be discussed in detail below.

5. *Ibid.*

6. See Thomas White, "Oaths in Judicial Proceedings and Their Effect upon the Competency of Witnesses" (1903) 51:7 American Law Regulations 373 at 444; Peter Nasmith, "High Time for One Secular 'Oath'" (1990) 24 L Soc'y Gaz 230; David Tanovich, "J.(T.R.): Time to Remove Religion from the Oath" (2014) 6 CR (7th) 211 at 213; Jakob de Villiers, "Oath or Affirmation? Or Neither?" (2009) 67:2 The Advocate 199; Sidney Lederman et al, *The Law of Evidence in Canada*, 5th ed (Toronto: Lexis Nexis Canada Inc, 2018) at 936; Justice Ted Matlow, "Let's Swear off the Oath in Court," *The Globe and Mail* (14 March 2000), online: <https://www.theglobeandmail.com/opinion/lets-swear-off-the-oath-in-court/article766477/> [https://perma.cc/SYL2-BU95]. For a more recent defence of the option to provide an oath or affirmation, see Myron Gochnauer, "Oaths, Witnesses and Modern Law" (1991) 4:3 Can JL & Jur 67 at 98-100; Michael Bennett, "The Right of the Oath" (1995) 17:1 Advocate Q 40; Michael Bennett, "No Time to Swear?" (1997) 19:4 Advocate Q 444.

7. See Eugene R Milhizer "So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America" (2009) 70:1 Ohio St LJ 1 at 70.

between swearing an oath or affirmation. Part II then reviews the available literature on bias towards religious minorities, with specific attention to the actors whose bias is most likely to be affected by administering oaths and affirmations: jurors and judges. Part III concludes by problematizing the in-court procedure for administering oaths and affirmations. In so doing, I reject the popular proposals advocating for the abolition or modification of the oath and instead develop a principled and efficient procedure for administering oaths and affirmations outside of the courtroom.

I. *Oaths and affirmations*

In the Western legal tradition, witnesses were required to swear an oath to the Christian God before being declared competent as a witness.[8] This practice began to change in the mid-eighteenth century with the House of Lord's decision in *Omychund v Barker*.[9] The Court affirmed that witnesses may swear oaths to other religious entities so long as retribution followed breaking the oath. As Chief Justice Willes observed, limiting the oath to Christians "is contrary to religion, common sense, and common humanity."[10] As he explained, "it would be absurd for [a non-Christian] to swear according to the Christian oath, which he does not believe; and therefore, out of necessity, he must be allowed to swear according to his own notion of an oath."[11]

The Court in *Omychund* nevertheless concluded that competency to give evidence required some religious binding of the conscience. This in effect excluded the possibility of witnesses taking an affirmation.[12] As a result, atheists were prohibited from testifying in courts, as were those whose religious beliefs—most notably Quakers[13] and Mennonites[14]—prevented them from swearing an oath.[15] Other cultural oaths which bind the conscience were also prohibited. For instance, Chinese witnesses who used alternative oath-swearing ceremonies—including the saucer oath,[16]

8. See White, *supra* note 6 at 386-387.
9. *Omychund v Barker*, (1744), 1 ATK 21, 26 ER 15 (HL) [*Omychund*].
10. *Ibid* at 30.
11. *Ibid* at 31.
12. *Ibid*. See also *Attorney General v Bradlaugh (1885)*, 14 QBD 667 (CA); *R v Tuck* (1912), 2 WWR 605, 5 DLR 629 (ABCA) [*Tuck*].
13. See "Quakers" (3 June 2009), online: *BBC: Religions* <https://www.bbc.co.uk/religion/religions/christianity/subdivisions/quakers_1.shtml> [https://perma.cc/27RN-YL73].
14. See Mennonite Church of Canada, "Confession of Faith—Article 20: Truth and the Avoidance of Oaths" (2019), online: *Mennonite Church of Canada* <http://home.mennonitechurch.ca/cof> [https://perma.cc/QN7H-JMSC].
15. See *Tuck, supra* note 12; *Bell v Bell* (1899), 34 NBR 615 (NBCA); *R v Brasier* (1779), 1 Leach 199, 168 ER 202 (CA (Crim Div)).
16. The saucer oath requires the witness to kneel in front of the witness box, smash a China saucer, and swear that her soul would be cracked like the saucer if they did not tell the truth. See Provincial

paper oath,[17] and, on more serious occasions, the chicken oath[18]—were prohibited from testifying in court based on this ruling.[19]

This insistence upon requiring a religious oath rested on its increased importance to the oath-taker. Although lying is generally viewed as an immoral act, lying under oath is thought to be a particularly serious transgression.[20] As Thomas White observes, "[e]ach ceremony of oath taking involves an expressed or implied imprecation of the vengeance of the being invoked."[21] Taking an oath will therefore result in persons being "more firmly engaged to tell the truth…by the just awe and dread of the Divinity."[22] As White concludes, "[i]n its essential features therefore the oath is a religious ceremony which is thought to impose upon the swearer *an added obligation to tell the truth*, in that if he violate[s] his oath he will suffer divine punishment greater than that which he would have suffered had he told an untruth when unsworn."[23]

The emphasis on oath swearing has subsequently become less prominent.[24] As a result, Christian groups who believed swearing an oath is prohibited by religious text were eventually given the right to affirm.[25] A similar right was also given to atheists, although they would not receive the right in England until the mid-nineteenth century.[26] As John Stuart Mill observed, there was an inherent unfairness in excluding non-believers from testifying in court.[27] In effect, those who were truthful enough to admit their lack of faith were prohibited from being witnesses while those who

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Court of British Columbia, "Oaths and Alternatives, Past and Present, in BC Courts" (27 November 2018), online: *Provincial Court of British Columbia* <https://www.provincialcourt.bc.ca/enews/enews-27-11-2018> [https://perma.cc/U9E6-DP9T].

17. The paper oath requires the witness to sign her name on a piece of paper, burn the paper, and swear that her soul would be consumed by fire if she did not tell the truth. See PS Lampman, "The Chinese Oath" (1904) 3:1 Can L Rev 24.

18. The chicken oath requires the witness to recite an oath, following which she would decapitate a chicken, and then burn the paper on which the oath was written. For a description of each of these three forms of oath and their relative importance see *ibid*. For instances of these forms of oaths being discussed and utilized, see *R v Wooey*, 8 CCC 25, [1902] BCJ No 89 (BCSC); *R v Entrehman* (1842), 174 ER 493 (NP); *R v Ping*, 8 CCC 467, [1904] BCJ No 12 (BCCA).

19. This follows based on the rationale outlined in *Omychund, supra* note 9.

20. See White, *supra* note 6 at 378, n 9.

21. *Ibid* at 378.

22. *Ibid* at 414. White cites several other academic works and judicial rulings for a similar proposition at 414-415.

23. *Ibid* at 415 [emphasis added].

24. Witnesses were in fact allowed to swear an oath or affirmation in Canada's first law dealing with evidence. See *Canada Evidence Act, 1893*, SC 1893, c 31, s 23.

25. See Hamish Stewart et al, *Evidence: A Canadian Casebook*, 4th ed (Toronto: Emond Montgomery, 2016) at 29. The right came via legislation. See also White, *supra* note 6 at 420-421 citing (1688), I Wm & Mary, c 18, s 13; (1696), 7 & 8 Wm & Mary, c 34, s 1; (1721), 8 Geo I, C 6.

26. See *Evidence Further Amendment Act, 1869* (UK), 32 & 33 Vict c 68, s 4.

27. John Stuart Mill, *On Liberty* (Cambridge: Cambridge University Press, 2011), Chapter 2.

lied about their faith were permitted to testify.[28] This rationale was slowly accepted by various legislatures across the Commonwealth leading to the now-common policy of allowing witnesses to swear an oath or provide an affirmation before testifying in court.[29]

II. *Bias in the judicial system*

Despite judicial systems allowing witnesses to swear an oath or affirmation for well over a century, empirical studies on the potential for triers of fact to be biased by exposure to witnesses' religious beliefs or lack thereof have been relatively scant. As the following review will illustrate, however, there is good reason to believe that such knowledge could have a significant impact on the fairness of the trial process.

1. *Jurors*

Although there are no known studies that consider whether religious groups tend to believe other religious groups to a greater or lesser extent, recent studies have begun to test whether individual biases exist towards atheists. In Canada, thirty-one per cent of people recently agreed with the statement that "[i]t is necessary to believe in God in order to be moral."[30] That number was higher in the United States, at fifty-three per cent.[31] In Europe, thirty-three and twenty-seven per cent of respondents in Germany and Italy, respectively, demonstrated an anti-atheist bias.[32] Responses were lower in Britain and France, where twenty and fifteen per cent of respondents confirmed a bias against atheists.[33]

A more recent study representing over 3,000 participants from 13 different countries drew similar conclusions.[34] The study considered opinion responses to several egregious crimes, including a fact pattern involving the murder of several homeless people.[35] People were more

28. See *ibid.*
29. See White, *supra* note 6 at 393-396.
30. Pew Research Centre, "Worldwide, Many see Belief in God as Essential to Morality" (13 March 2014), online: *Pew Research Centre* <https://www.pewresearch.org/global/2014/03/13/worldwide-many-see-belief-in-god-as-essential-to-morality/> [https://perma.cc/9C8J-NHEH] [Pew Research Centre, "Worldwide"]. It is notable that this number is up one per cent from seven years earlier. See Pew Research Centre, "Views of Religion and Morality" (4 October 2007), online: *Pew Research Center* <https://www.pewresearch.org/global/2007/10/04/chapter-3-views-of-religion-and-morality/> [https://perma.cc/5C4U-S94L].
31. See Pew Research Centre, "Worldwide," *supra* note 30. This number is down four per cent from seven years earlier.
32. *Ibid*. Compared to a previous study from seven years earlier, the number of Germans answering in the affirmative to this question is down six per cent while the number in Italy is up three per cent.
33. *Ibid*. Both countries' answers to these questions are down two per cent from seven years earlier.
34. See Will M Gervais et al, "Global Evidence of Extreme Intuitive Moral Prejudice Against Atheists" (2017) 1 Nature Human Behaviour 1.
35. *Ibid* at 2.

than twice as likely to believe that such extreme immorality would be committed by an atheist than by a believer.[36] Interestingly, this bias was consistent among both "high" and "low" believers.[37] Although to a lesser extent, even atheists believed that other atheists were more likely than religious people to commit such crimes.[38] Only slightly lower degrees of bias towards atheists were observed where the crime committed—failing to pay a restaurant bill—was less serious.[39] As the authors conclude, "across the world, religious belief is intuitively viewed as a necessary safeguard against the temptations of grossly immoral conduct."[40]

Although there is no literature on whether religious beliefs influence the juror deliberation process in Canada, American literature has found that religious beliefs have the potential to significantly affect juror verdicts.[41] As Brian Bornstein and Monica Miller observe in their book *God in the Courtroom: Religion's Role at Trial*, there is legitimate concern that "jurors may mention their religious beliefs, cite scripture during deliberation, pray, or consult with pastors."[42] As the authors observe, there are many instances of such religious behaviour known to have occurred in American jury deliberation rooms.[43] The quantity of decisions on this point

36. *Ibid* at 3.
37. *Ibid.*
38. *Ibid.*
39. *Ibid.*
40. *Ibid*. For studies exploring how different reasoning processes of religious and non-religious people might explain the bias of religious persons towards atheists, see Gordon Pennycook et al, "Belief Bias During Reasoning among Religious Believers and Skeptics" (2013) 20:4 Psychonomic Bull Rev 806; Will M Gervais & Ara Norenzayan, "Analytic Thinking Promotes Religious Disbelief" (2012) 336 Science 493; Gordon Pennycook et al, "Analytic Cognitive Style Predicts Religious and Para-Normal Belief" (2012) 123:3 Cognition 335; Amitai Shenhav, David G Rand & Joshua D Greene, "Divine Intuition: Cognitive Style Influences Belief in God" (2012) 141:3 J Experimental Psychology 423.
41. For an excellent review of the American case law and literature, see Brian Bornstein & Monica Miller, *God in the Courtroom: Religion's Role at Trial* (New York: Oxford University Press, 2009) at 67-81.
42. *Ibid* at 67-76. For instances of use of the Bible in jury deliberations, the authors cite *Oliver v Quarterman*, 541 F 3d 329 (5th Circ, 2008); *Lucero v Texas*, 246 SW 3d 86 (Tex Crim App, 2008).
43. Bornstein & Miller, *supra* note 41 at 71-75, citing among other American cases: *State v Demille*, 756 P2d 81 (Utah, 1988) (juror admitted to voting guilty because God had not answered the juror's prayer and sent the juror a "sign" the defendant was innocent); *State v Williams*, 832 NE 2d 783 (Ohio, 2005); *Holladay v State*, 629 SO 2d 673 (Alabama, 1992) (the fact that the jury prayed together shortly before deciding to sentence the defendant to death was not a sign of jury bias); *People v Harlan*, 109 P3d 616 (Colorado, 2005), leave to appeal to the Supreme Court of the United States refused (juror quoted, among other verses, Leviticus 24:20-21, which provides "[b]reach for breach; eye for eye, tooth for tooth: as he has caused a blemish in a man, so shall it be done to him again. And he that killeth a beast he shall restore it: and he that killeth a man, he shall be put to death." The Court overturned the imposition of the death penalty as a result of reading this verse); *People v Williams*, 148 P3d 47 (California, 2006) (the Court found at 80 that reading Bible verses to the jury which "merely counseled deference to governmental authority and affirmed validity of sitting in judgment of one's

in a comparable country[44] is serious cause for concern. Unfortunately, we may never know the extent to which this practice occurs in Canada given that jurors are strictly prohibited from discussing jury deliberations.[45]

2. *Judges*

Bias is also discernible in the Canadian jurisprudence regarding the process of taking an oath or affirmation. In *R v J(TR)*, the Crown invited the trial judge to conclude that "for a religious individual to affirm instead of swearing on the Bible leads to an inference that he was not telling the truth."[46] The judge responded: "I do not view the accused's choice to affirm as raising a significant concern respecting his credibility….*However it is a factor to be considered in assessing his evidence*."[47] Although on appeal this rationale was found to be inconsistent with the plain wording of section 14 of the *Canada Evidence Act*,[48] the British Columbia Court of Appeal nevertheless held that "there may be factual circumstances where it could be appropriate for a judge to permit some exploration of the issue

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fellow human beings according to law" did not bias the jury's decision to impose the death sentence); *People v Danks*, 82 P3d 1249 (California, 2004) (juror shared several Bible verses to comfort those who were having reservations about imposing the death penalty. The Court determined that it was unlikely that this swayed the jurors. A juror had also sought guidance about the specific case from her pastor, who told her the scripture allowing the death penalty were "good scriptures" and that the defendant should be executed. Although this was found to be "misconduct" it was not sufficient to overturn the imposition of the death penalty); *Fields v Brown*, 503 F3d 755 (9th Circuit, 2007) (juror read passages from the Bible that were "for" and "against" the death penalty. This was insufficient to overturn the imposition of the death penalty); *Young v State*, 12 P3d 20 (Oklahoma, 2000) (the fact that jurors had discussed their religious beliefs during trial was not enough to require a new trial); *People v Lewis*, 28 P3d 34 (California, 2001) (In response to a juror hesitating to impose the death penalty, the foreman stated "he did not know if it would help her, but what had helped him make his decision was that [the defendant] had been exposed to Jesus Christ and if that was in fact true [the defendant] would have 'everlasting life' regardless of what happened to him." The Court at 71 did not find this statement to be inappropriate and affirmed the death penalty).

44. See James Stribopoulos, "Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule" (1999) 22:1 Boston College Intl & Comp L Rev 77 at 81-82: "For comparative purposes, Canada is unlike any other Common-wealth nation. Canada and the United States share close geographic proximity, similar cultures, and a common language. Both nations have ethnically diverse populations forged from immigrant citizens who predominately reside in concentrated urban areas. Both nations have prospered throughout the post-war era and share similar levels of economic development. Although differences definitely exist, it is arguable that no two nations share so many similarities." See also Luc Turgeon, "Introduction" in Luc Turgeon et al, eds, *Comparing Canada: Methods and Perspectives on Canadian Politics* (Vancouver: UBC Press, 2014) 3 at 13.

45. There is a common law jury secrecy rule. This rule, as well as section 649 of the *Criminal Code of Canada*, RSC 1985, c C-46, which makes it an offence for a juror to disclose "any information relating to the proceedings of the jury when it was absent from the courtroom" subject to very limited exceptions, were upheld as consistent with the *Charter* in *R v Pan; R v Sawyer*, 2001 SCC 42.

46. *R v J(TR)*, 2013 BCCA 449 at para 5 [*J(TR)*].

47. *Ibid* at para 6 [emphasis added].

48. *Supra* note 1 Section 14(2) reads "[w]here a person makes a solemn affirmation in accordance with subsection (1), his evidence shall be taken and have the same effect as if taken under oath."

of the degree to which an oath or affirmation may bind the conscience of a witness."[49]

In *R v K(AH)*, an adverse inference was drawn against a Muslim witness because the witness chose to swear on the Bible as opposed to the Quran.[50] Likewise, in *R v Bell*, a central witness for the Crown who happened to be Muslim had an adverse inference drawn against him for swearing an oath on the Bible.[51] A similar argument was made in *R v Daud* because the witness, who identified as a Sunni Muslim, chose to provide an affirmation instead of swearing an oath on the Quran.[52] Despite a variety of reasons why a Muslim witness might decide to swear an oath on the Bible or affirm,[53] courts and counsel are willing to draw an explicit adverse inference against witnesses who swear on the Quran.

It is also possible that judges will provide too much weight to a witness' choice to swear an oath. In *R v Ali*, for instance, the judge stated that the witness "was one of the most intelligent, sincere and believable witnesses that has ever testified before me. Clutching her copy of the Koran she swore to tell the truth. That oath bound her conscience in a way that came out in Court loud and clear."[54] As for the defendant, the judge continued, "his mild manner and denials were an attempt to camouflage his true self."[55] As opposed to reasoning through both sides of the evidence, the judge appears to have relied heavily on the effect swearing on the Quran had on the witness' credibility.[56] As Canadian judges have shown explicit bias in their written judgments, it is likely that this type of bias infiltrates many other trials given the relative infrequency within which the process for administering oaths and affirmations is litigated.

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49. *J(TR), supra* note 46 at para 4.
50. *R v K(AH)*, 2011 ONSC 5510 at paras 27-28.
51. *R v Bell*, 2011 ONSC 1218 at para 57.
52. *R v Daud*, 2007 BCPC 68 at para 12.
53. As Tanovich, *supra* note 6 observes at 212-213: "the witness may be unfamiliar with the difference between the two methods or may not even understand what affirm means. In addition, different religions may have different views about the oath and about swearing to God in a public place like the courtroom. Similarly, a Muslim witness may choose to swear on the Bible instead of the Koran because the witness may not want it known that he or she is Muslim because of a concern about stereotyping. Or, they may believe that the Bible is simply a universal courtroom symbol of the oath to God or that it is the standard practice. Alternatively, the witness may be unaware of the availability of another religious book or practice that could be used. More fundamentally, assumptions about religions may simply be uninformed. So, for example, according to Islamic teaching, Jesus is a Prophet of God. Therefore, some Muslim witnesses may feel their conscience religiously bound by swearing an oath on the Bible."
54. *R v Ali*, 2012 SKPC at para 8.
55. *Ibid.*
56. The judge does not attempt to explain why the evidence of the husband was non-credible.

Although general studies on explicit religious bias in Canadian courts do not exist, it is notable that American judges have been found to exhibit significant bias in their decision-making.[57] One judge, by his own admission, gave approximately 1500 defendants the choice between going to jail or attending church for a specified period of time.[58] The judge was not alone in this practice.[59] Others have relied on apparent Biblical prohibitions on homosexuality to justify highly discriminatory decisions.[60] More generally, judges frequently invoke religious text to justify sentencing decisions. As one study concluded with respect to the permissibility of using religious texts for sentencing purposes: "[r]eligious texts are allowed to provide *a* reason for sentencing, as long as they do not provide *the sole* reason, and the latter is virtually impossible to prove."[61]

Although the above accounts expose various forms of explicit bias, researchers have also sought to determine to what extent judges harbour implicit biases.[62] The latter type of bias arises in most people, resulting in subtle stereotypes unknown to the subject biasing their decisions.[63] Such bias often arises even in those who actively embrace non-discrimination norms.[64] To test for implicit bias, study participants often take what is known as the Implicit Association Test (IAT). This test typically requires participants to categorize words and faces over two distinct phases.[65] In the first phase, participants are shown words or pictures on a screen and are told to respond by pushing a button indicating "white/good" or "black/bad."[66] In the second phase, the categories are switched to "white/bad" and "black/good."[67] The latency between response times is then used to measure the subject's implicit bias score.[68]

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57. See Bornstein & Miller, *supra* note 41 at 105-110.
58. *Ibid* at 107 citing David Barringer, "Higher Authorities: Religious Faith Ordinarily is a Personal Matter" (1996) 82:12 ABA J 68 at 71.
59. Bornstein & Miller, *supra* note 41 citing "Judge Gives Offenders Option of Church," Boston Globe (31 May 2005).
60. See *Ex Parte HH*, 830 So 2d 21 (Alabama, 2002) where a judge ruled against a lesbian mother in a custody dispute on the basis, in part, of a prohibition against homosexuality found in Leviticus 20:13.
61. See Bornstein & Miller, *supra* note 41 at 109 citing Lis Wiehl, "Judges and Lawyers are not Singing from the Same Hymnal When it comes to Allowing the Bible in the Courtroom" (2000) 24:2 Am J Trial Advoc 273.
62. See e.g. Jeffrey Rachlinski et al, "Does Unconscious Racial Bias Affect Trial Judges?" (2009) 84:3 Notre Dame L Rev 1195.
63. *Ibid* at 1197 citing Jerry Kang & Mahzarin Banaji, "Fair Measures: A Behavioral Realist Revision of 'Affirmative Action'" (2006) 94:4 Cal L Rev 1063 at 1065.
64. Rachlinski et al, *supra* note 62 at 1197.
65. *Ibid* at 1198.
66. *Ibid* at 1198-1199.
67. *Ibid* at 1199.
68. *Ibid.* For a detailed description and defence of the IAT vis-à-vis criticisms of the test, see *ibid* at 1198-1201.

Perhaps unsurprisingly, the relative novelty of implicit bias studies being applied to the judiciary has resulted in a focus on race relations.[69] One such study, however, has touched on judicial bias towards religious groups.[70] That study applied the IAT to 239 sitting American judges to determine whether they discriminated against so-called "privileged minorities" such as Asian-Americans and Jewish-Americans.[71] The study found that American judges harbour strong to intermediate bias against these groups while holding favourable stereotypes towards Whites and, important for present purposes, Christians.[72] Judges were found to associate negative stereotypes such as being "greedy," "dishonest," and "controlling" with Asian- and Jewish-Americans, while Whites and Christians were associated with positive traits such as being "trustworthy," "honest," and "giving."[73] The study also found that judges' pro-Christian implicit stereotypes often result in shorter sentences for Christian offenders as compared to Jewish offenders who committed a similar offence.[74]

As I observed at the outset, the available literature on bias towards religious and non-religious persons in the legal context is still developing. The results from the American studies cited above, in addition to the more explicit bias found in the Canadian jurisprudence, nevertheless suggest that bias against a person's religious beliefs may very well impact trial fairness. The fact that the empirical research is incomplete does not, however, prevent further thinking on legal policy reform. Indeed, as the next section of this article illustrates, legal scholars have already begun to set out prescriptions for dealing with the potential for bias to arise from the administration of oaths and affirmations in the courtroom.

III. *Prescriptions*

Scholars have made two main proposals to prevent bias towards religious and non-religious groups from entering the trial process through the oath and affirmation process. First, it has been suggested that the oath be abolished. In its place, all witnesses would be required to affirm/promise to tell the truth. Second, those who would preserve oath-taking suggest that witnesses be allowed to make a non-specific reference to "God" when

69. See Justin Levenson, Mark Bennett & Koichi Hioki, "Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes" (2017) 69:1 Fla L Rev 63 at 68, n 12 reviewing the available literature. The authors further observe that testing for implicit bias in the judiciary has only been studied once before the present study, namely, in Rachlinski et al, *supra* note 62.
70. Levenson, Bennett & Hioki, *supra* note 69.
71. *Ibid.*
72. *Ibid* at 68-69, 104, 107, 109-110.
73. *Ibid* at 69.
74. *Ibid.*

swearing an oath. As I contend below, each proposal is problematic. As such, it is necessary to explore alternative methods for administering oaths and affirmations.

1. *Abolish oaths*

A variety of scholars are in favour of abolishing the oath. In its place, they suggest that witnesses simply promise to tell the truth and be reminded that there are severe legal consequences which result from lying in court.[75] This proposal is not without merit. Its main benefit is that it prevents the judge or jury from knowing the witness' religious beliefs or lack thereof. If it is true, however, that some religious witnesses are *more likely* to tell the truth based on giving an oath, then abandoning the oath will also result in some difficult-to-quantify negative effect on the trial process' ability to get at the truth of the matter.

It may be retorted that there is a lack of evidence to support the view that religious persons view breaking an oath as bringing about divine punishment.[76] Historically, it is certainly true that religious persons held such a view. As the English Common Law Commission observed:

> It can, we hardly think, be doubted that there is a large class of persons who though less alive than they ought to be to a sense of moral duty or to the fear of legal penalties, yet may be deterred from falsehood when to these is added the dread of divine vengeance. Moreover, we think it cannot be doubted that the effect of a transition from the use of judicial oaths to simple declaration would, at least at the outset, by removing one of the barriers to falsehood, encourage false testimony and tend materially to lessen the confidence of the public in the administration of justice.[77]

In a Law Reform Commission of Canada Report considering the merits of oath-taking, Commissioner La Forest (as he then was) decided against recommending abolition of the oath for similar reasons:

> I am convinced that a substantial number of people are more likely to tell the truth, at least the whole truth, if they take the oath. To those who take the oath seriously (and this covers a great many people) the certain demands of conscience are more likely to elicit the exact truth than the

75. See *supra* note 6. Although not all of these authors use this language (I borrow this proposal explicitly from Tanovich, *supra* note 6 and Nasmith, *supra* note 6), it provides a reasonable summary of the general proposal.

76. See *R v B(KG)*, [1993] 1 SCR 740 at paras 86-87, 79 CCC (3d) 257; *R v Fletcher*, 1 CCC (3d) 370 at 377, [1982] OJ No 153 (ONCA) leave to appeal refused (1983) 48 NR 319 (SCC).

77. See White, *supra* note 6 at 431 citing the English Common Law Commission, 2nd Report (1853) at 14.

highly uncertain threat of a prosecution for perjury.[78]

Although the oath may have lost some of its significance among religious circles, the oath has since time immemorial provided a means for better ensuring the truthfulness of a statement.[79] Given this historical record, I take the view that the status quo should not be discarded without strong empirical evidence to the contrary.[80]

It may also be argued that preserving the oath requirement because of its potential to make religious witnesses more likely to tell the truth relies on circuitous reasoning. As White observed, any religious witness who is subpoenaed to testify, and who intends on lying, might choose to affirm thereby avoiding violating the oath and enduring divine punishment.[81] As oaths and affirmations are equal in the eyes of the law,[82] the oath will not have its intended effect as there is no way of requiring the witness to swear an oath to her God. Preserving the ability for religious witnesses to swear an oath would therefore not make the received evidence any more likely to be truthful.

This argument does, however, operate on two key assumptions. First, it assumes that those who intend to lie will also be willing to publicly proclaim that they do not want to swear an oath to their God. Observers known to the accused may very well view such a decision as an affront to the witness' religion.[83] Second, the argument assumes that witnesses will always have made up their mind to tell a lie before taking the witness stand. If the witness is religious and did not take the stand intending to lie, then there is no reason for the witness not to take an oath. In such circumstances, the oath would still place greater weight on the witness to tell the truth in court proceedings.

2. Neutralize oaths

Eugene Milhizer suggests that it would be prudent to modify the oath to allow religious witnesses to swear an oath only via a non-specific reference to "God."[84] In an increasingly pluralistic society, this proposal avoids the necessity of determining which types of religions "count" for the purposes of swearing an oath.[85] It also avoids having to determine which religious

78. See Law Reform Commission of Canada, *Report on Evidence* (1975) at 87.
79. See generally Milhizer, *supra* note 7.
80. The authors who would abolish the oath have not provided any empirical evidence proving that the oath has no significance to religious persons (*supra* note 6).
81. See White, *supra* note 6 at 433.
82. See *Canada Evidence Act*, *supra* note 1, s 14.
83. It is unclear in the literature whether religious groups require witnesses to swear an oath.
84. See Milhizer, *supra* note 7 at 3.
85. *Ibid* at 69.

artifacts ought to be permitted to be sworn upon.[86] Allowing courts to perform this task is arguably problematic as courts do not "have any special competence in rendering judgments about the legitimacy of religions and religious beliefs."[87] In Milhizer's view, "[t]o ensnare secular lawmakers or judges in these confounding matters would be more than wasteful: it could be highly inappropriate, disrespectful, and even sacrilegious."[88]

Although these concerns are legitimate, Milhizer does not provide any examples of this problem arising in practice. This is likely because courts have approached the oath and affirmation process liberally. As the process of oath-swearing is conducted at a preliminary stage of court proceedings, courts have little to gain by restricting the means by which a witness swears an oath. Barring allowance of a particular type of oath somehow infringing upon the rights of some other trial participant—a hypothetical scenario which is difficult to imagine—courts are likely to avoid confrontation and allow witnesses to swear an oath that is meaningful to them.

More obviously, Milhizer's proposal is unpersuasive because it does not address the potential for bias against a particular type of witnesses: non-oath-swearing witnesses. The fact that a witness will not swear to a God strongly implies that the witness is an atheist. As the above review suggests, atheists are less likely to be believed by the trier of fact. Although it is possible that some jurors and judges might attribute choosing to provide an affirmation to the witness belonging to a minority non-oath-swearing religious community,[89] it is unlikely the vast majority of triers of fact would know this nuanced theological fact let alone make such an assumption about every witness who testifies before them. As such, it is reasonable to believe that maintaining the distinction between oaths ("neutralized" or not) and affirmations in the courtroom will likely bias at least some trials.

3. *External administration*

As the current proposals are problematic, it must be asked whether there are alternative means to preserve the current choice for swearing an oath or affirmation without potentially biasing the trial process. To accomplish these ends, I suggest that witnesses be permitted to swear an oath of their choice or provide an affirmation but be required to do so in front of the court clerk outside of the courtroom. In other words, the oath and

86. *Ibid.*
87. *Ibid.*
88. *Ibid.*
89. Recall that Quakers and Mennonites believe swearing an oath is contrary to their religion (see *supra* notes 13-14).

affirmation process would be administered out of view from judge and jury. The witness' choice may then be confirmed by the presiding judge before the witness testifies in court. The judge may do so by simply asking witnesses to confirm that they swore an oath *or* affirmation to tell the truth in the courtroom. Upon so confirming, witnesses would then proceed to provide their testimony.

This process has four main benefits. First, and most obviously, the proposal removes knowledge about witnesses' religious beliefs from the trial process. As a result, defendants will be more likely to have a fair trial and the Crown will be better able to pursue convictions without interference of bias. To be sure, this proposal by no means guarantees that bias towards witnesses' beliefs will be removed from the judicial process. Their religious beliefs *may* still be surmised by the nature of their dress, accent, or other indicia, or in some instances if their religious beliefs form part of their testimony. Nevertheless, the proposal here still represents a means for removing unnecessary potential for bias in many other cases.

Second, my proposal would also be more efficient. Currently, the judge, jury, court clerk, and both sides' lawyers are required to sit through the administration of all oaths and affirmations. If the court clerk affirmed to the court and parties' lawyers that "all witnesses appearing in court today have been sworn or affirmed to tell the truth" the administration of the oath in court would become unnecessary. If it were deemed preferable for witnesses to confirm their oaths or affirmations publicly, witnesses could simply be asked if they "reaffirm the sworn oath or solemn affirmation to tell the truth in this court provided to the court clerk." By answering only "yes" or "no," the oath and affirmation process would be shortened for the judges and lawyers involved: the more costly parties to the administration of justice.

This proposal would be especially efficient when accommodating those who wish to swear more time-consuming oaths.[90] This problem has been viewed as pressing enough to convince some legislatures of the need to prevent certain witnesses from swearing their chosen oath during regular court proceedings. For instance, the *British Columbia Evidence Act* provides that if "it is not reasonably practicable without inconvenience or delay to administer an oath to a person in the form or manner appropriate to the person's religious beliefs, the person must, despite any other enactment or law, make a solemn affirmation in the prescribed form."[91]

90. The chicken oath provides one example (see *supra* note 18).
91. RSBC 1996, c 124, s 20(3).

Such an amendment would be significantly less necessary if the process did not need to be overseen by all parties in the trial process.

Third, allowing witnesses to swear an oath is consistent with Canada's commitment to multicultural values. Accommodating diversity of religious belief is a necessary tenet of multiculturalism. As the Court observed in *R v NS*, "[a] secular response that requires witnesses to park their religion at the courtroom door is inconsistent with the jurisprudence and Canadian tradition."[92] The Court continues, "[t]he long-standing practice in Canadian courts is to respect and accommodate the religious convictions of witnesses, unless they pose a significant or serious risk to a fair trial."[93] Where allowing citizens to express their religious beliefs serves at worst as an inconvenience—as would be the case under my proposed external administration procedure—religious toleration therefore dictates allowing a religious practice to continue.

It may be countered, however, that both the current procedure (and presumably the proposed external administration procedure) unconstitutionally *compels* a person to communicate their religious views contrary to section 2(a) of the *Charter*.[94] The argument is straightforward: by telling witnesses of the option to swear a religious oath, any witness who chooses to provide an affirmation will be compelled to implicitly admit they are an atheist. Similarly, if a witness chooses to swear on a holy book, this action will communicate something about a witness' religious beliefs. Either way, a witness is compelled to say *something* about her religion or conscience.[95] A witness' refusal to be so compelled in turn compromises her ability to testify and thus her right to make fair answer and defence and her right to a fair trial.[96]

Two courts have considered whether the oath and affirmation procedure violates section 2(a) of the *Charter*.[97] This right provides that government may not, in purpose or effect, "coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose."[98] Each of the aforementioned decisions found that the oath and affirmation option was consistent with section 2(a) of the

92. *NS*, *supra* note 2 at para 2. With respect to the important role the oath has played in particular, see para 53.
93. *Ibid* at para 2.
94. See *R v Anderson*, [2001] 7 WWR 582, 85 CRR (2d) 107 (MBPC) [*Anderson*]; *R v Robinson* (2004), 181 Man R (2d) 75 (MBPC) [*Robinson, MBPC*], aff'd 2005 MBQB 50 leave to appeal refused 2005 MBCA 69.
95. See *Anderson*, *supra* note 94 at para 6.
96. *Ibid* at paras 11-12. See also *Robinson, MBPC*, *supra* note 94 at paras 2, 8.
97. See *Anderson*, *supra* note 94 and *Robinson, MBPC*, *supra* note 94.
98. *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344, 18 CCC (3d) 385.

Charter.[99] As one court concluded, choosing to affirm or swear an oath on a holy book such as the Bible or the Quran leads to no reliable inferences about one's religious beliefs.[100] There is some rationale to this argument, as non-religious people may swear an oath and religious people may believe it is a sin to swear an oath.[101] It is notable, however, that both courts failed to explain how affirming or swearing an oath would not speak to the high *likelihood* of the person holding a particular religious or non-religious belief.

If requiring witnesses to swear an oath or affirmation constituted compelled religious expression, it is likely that any violation would readily be justified under section 1 of the Charter if the oath or affirmation was sworn outside the courtroom.[102] There are many laudable effects that arise from the proposed procedure: it allows religious witnesses to be bound to tell the truth to the greatest extent; better ensures bias does not infiltrate the trial process; promotes multicultural values; and is more efficient than the current procedure. When weighed against the minimal religious expression required in swearing an oath or affirmation to the court clerk outside of public view, the oath and affirmation process ought to constitute a rational, minimally impairing, and proportional invasion of any religious expression implicit in swearing an oath or affirmation.[103]

Finally, it has proven difficult to convince a legislature to abolish the oath given the influence of religion in society. Proposals to abolish the oath are not new, extending back at least to the mid-nineteenth century.[104] Yet, these proposals typically fail.[105] Even in an increasingly secular society,[106] a recent proposal to abolish the oath in England was defeated in 2013.[107] The Magistrates' Association agreed with religious leaders that the oath

99. See *Anderson, supra* note 102 at paras 38-39; *Robinson*, *MBPC, supra* note 102 at para 56.
100. See *Robinson*, *MBPC*, *supra* note 94 at paras 56-57. Similarly, see *Anderson*, *supra* note 94 at paras 38-39.
101. See Part I, above.
102. This was in fact the alternative conclusion come to in *Anderson*, *supra* note 94 at paras 60-66.
103. See *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.
104. See White, *supra* note 6 at 427-430 and the numerous sources he cites therein.
105. In Canada, see Law Reform Commission of Canada, *Report on Evidence*, *supra* note 78 at 36, 86-87; Ontario Law Reform Commission, *Report on the Law of Evidence* (1976) at 113-131. In England, see the Criminal Law Revision Committee, *Evidence (General)*, Report 11 (1972) at paras 274-281. In Scotland, see The Scottish Law Commission, *Draft Evidence Code (First Part)*, Memorandum 8 (1968) at 66-70; The Scottish Law Commission, *The Law of Evidence*, Memorandum 46 (1980) at paras 6.02–6.10. In New Zealand, see the Northern Territory Law Reform Committee, *Report on The Oaths Act*, Report 32 (2008) at 9-13.
106. See Pew Research Centre, "Worldwide," *supra* note 30.
107. See Robert Pigott, "Motion to End Bible Oaths in Court Defeated" *BBC News (2013)*, online: <https://www.bbc.com/news/uk-24588854> [https://perma.cc/WS3R-4PNZ].

still served the function of strengthening the evidence of witnesses.[108] A recent law reform commission in Canada also rejected the proposed abolition of the oath for this reason.[109] As a practical matter, then, it may be difficult to convince a legislature to abolish the oath due to political costs.

Modifying the procedure for administering oaths and affirmations therefore presents a more palatable response. Fortunately, it is unlikely that effecting such a change would require a legislative amendment. Consider the wording of the most frequently invoked Canadian oath provision: section 13 of the *Canada Evidence Act*. It provides that "[e]very court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, has power to administer an oath to every witness who is legally called to give evidence before that court, judge or person." The term "administer" only requires that the court be responsible for ensuring the oath or affirmation is undertaken. Nothing in the term implies that such a duty cannot be delegated to a court clerk so long as the judge confirms in court that either an oath or affirmation took place outside of the courtroom walls.

Two further objections to this proposal also merit comment.[110] First, it may be retorted that it is central to the purpose of the oath and affirmation process that it be performed in a courtroom before the judge (and jury), the accused, lawyers, and gallery. This ceremony, the reasoning goes, enhances the witness' commitment to tell the truth. Perhaps more importantly, it also permits the trier of fact to assess the witness' demeanour when being sworn, a factor that they can take into account in assessing the witness' credibility. By taking the administration of the oath and affirmation out of the courtroom, this opportunity is lost.

I am not convinced that the mere ceremony itself enhances the likelihood of a witness to tell the truth. Even if it has a minimal effect, it is important to recall that my procedure for administering oaths and affirmations requires that witnesses confirm that they swore an oath or affirmation in front of all parties in the courtroom. As for the lost potential to assess demeanour, it is unclear why demeanour is valuable when a witness first takes the witness stand. The witness' words when swearing an oath or affirmation are unrelated to the merits of the trial. Moreover, nothing in my proposal prevents the judge, jury, and counsel from assessing the

108. *Ibid.*
109. See Alberta Law Reform Institute, *Oaths and Affirmations: Final Report (2014)*, online (pdf): <https://www.alri.ualberta.ca/docs/FR_105.pdf> [https://perma.cc/YM7U-T8WY] at 16-17.
110. I thank an external reviewer for pointing out these two counter arguments.

witness' credibility during the critical component of the trial: the provision of testimony.

Second, and relatedly, it may be contended that administering oaths and affirmations outside of the courtroom violates the accused's right to be present during the entire trial. As a result, the accused ought to have the right to be present outside the courtroom during the administration of the oath and affirmation process. This argument, however, again assumes that anything relevant with respect to trial fairness, such as opportunity to assess demeanour, occurs during the oath or affirmation process. Even if I am wrong and demeanour has some value at the oath or affirmation stage, the proposed law would likely be upheld under section 1 as the purpose of the law is to rid bias from the trial process. In my view, fulfilling such a pressing and substantial objective is proportionate to any *de minimis* loss of the opportunity to assess the demeanour of witnesses while swearing an oath or affirmation.

Conclusion

Several commentators have laudably attempted to rid the trial process of the potential for unnecessary bias arising from administering oaths and affirmations in the courtroom. Their proposals, however, are not optimal. Substituting a requirement that all witnesses promise to tell the truth would certainly rid the trial of any potential for bias. However, swearing an oath has long been thought to bind a witnesses' conscience to a greater extent. Without affirmative evidence to the contrary, abandoning the oath requires discarding a valuable tool for truth-finding in the trial process. Requiring oath-swearing witnesses to invoke a non-specific reference to "God" would solve potential bias against different religions. It is also more respectful of religious diversity than abandoning the oath. This proposal, however, fails to protect against potential biases towards atheists and other witnesses who refuse to swear an oath.

The benefits derived from preserving the current oath and affirmation procedure may nevertheless be maintained by modifying the way in which they are sworn. By requiring that all witnesses swear an oath or affirmation outside of the courtroom, the trial process would allow religious witnesses to bind their conscious to a greater extent thereby furthering the truth-finding function of the trial. Swearing oaths and affirmations out of the view of the trier of fact also ensures that unnecessary bias does not infiltrate the trial process. Moreover, the external administration procedure is more efficient than the current procedure as it requires less participation from the more costly members of the judicial process: lawyers and judges. Given these benefits and the absence of any statutory impediment to adopting

an external procedure for administering oaths and affirmations, Canadian judges should adopt the external administration procedure on their own motion.