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## THE JUROR'S SACRED OATH: IS THERE A CONSTITUTIONAL RIGHT TO A PROPERLY SWORN JURY?

*Kathleen M. Knudsen*\*

### INTRODUCTION

Within hours of the Tenth Circuit Court of Appeals upholding a conviction by an unsworn jury,<sup>1</sup> news stories questioning the decision began to populate the Internet. Articles such as, “Does a Jury Oath Really Matter?”<sup>2</sup> and “You Forgot to Swear In the Jury? No Prob”<sup>3</sup> were published, reposted, and discussed as bloggers and commentators alike struggled to make sense of a decision that seemingly undermined almost a millennia of jury procedural history.

The modern American conception of a jury trial has its roots as far back as the twelfth century,<sup>4</sup> originating from a blend of Roman law,<sup>5</sup> Germanic law,<sup>6</sup> and Canon law.<sup>7</sup> The earliest forerunners of modern jurors were men of the community with general knowledge about the defendant who were called as “oath-helpers” or compurga-

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<sup>1</sup> *United States v. Turrietta*, 696 F.3d 972, 973 (10th Cir. 2012).

<sup>2</sup> Robyn Hagan Cain, *Does a Jury Oath Really Matter?*, FINDLAW 10TH CIR. NEWS AND INFO. BLOG (Aug. 30, 2012, 3:05 PM), [http://blogs.findlaw.com/tenth\\_circuit/2012/08/does-a-jury-oath-really-matter.html](http://blogs.findlaw.com/tenth_circuit/2012/08/does-a-jury-oath-really-matter.html).

<sup>3</sup> Joe Palazzolo, *You Forgot to Swear In the Jury? No Prob*, WALL ST. J. L. BLOG (Aug. 29, 2012, 4:05 PM), <http://blogs.wsj.com/law/2012/08/29/you-forgot-to-swear-in-the-jury-no-prob>.

<sup>4</sup> *Turrietta*, 696 F.3d at 980-81; CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 240 (1998).

<sup>5</sup> Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1337 (1959).

<sup>6</sup> *Id.* at 1340.

<sup>7</sup> *Id.* at 1343.

tors to testify under oath to the defendant's veracity.<sup>8</sup> Upon this oath, the defendant would be declared innocent of the charge.<sup>9</sup> The word "juror" identifies an individual who took an oath, a "swearer."<sup>10</sup> From this beginning, the modern petit jury trial developed.<sup>11</sup>

Based on centuries of common law procedural history, the juror's oath arrived in America with hardly a ripple.<sup>12</sup> Colonial jurisprudence considered it a basic assumption that a jury would be sworn.<sup>13</sup> When a question arose over whether the jury had been sworn, the Supreme Court held that it was assumed that a "duly sworn" jury had been given the proper oath.<sup>14</sup> Constitutional protections, such as the Fifth Amendment guarantee against a defendant being put in jeopardy twice for the same offense<sup>15</sup> and the Sixth Amendment guarantee of an "impartial" jury,<sup>16</sup> have been explicitly defined by the Supreme Court with the assumption that the jury is sworn.<sup>17</sup> Yet, despite its prevalence, practice, and significance, in over two hundred years the juror's oath has never been explicitly codified in the U.S. Constitution, federal statute, or in eight states,<sup>18</sup> leaving its necessity to be questioned.<sup>19</sup>

This Article will argue that the trial procedure of swearing<sup>20</sup> the jury, with its long judicial tradition and explicit functional significance for constitutional rights, is an implied constitutional require-

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<sup>8</sup> JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INTUITIONS 21 (2009).

<sup>9</sup> WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 62 (1875).

<sup>10</sup> *Juror*, DICTIONARY.COM, <http://dictionary.reference.com/browse/Juror> (last visited Apr. 4, 2016); LANGBEIN ET AL., *supra* note 8, at 38.

<sup>11</sup> SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I 622-23 (2d ed. 1898).

<sup>12</sup> CONRAD, *supra* note 4, at 243.

<sup>13</sup> *Journals of the Continental Congress: Wednesday, October 26, 1774*, LIBRARY OF CONG. AM. MEMORY PROJECT, [https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(jc00142\)\)](https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc00142))) (last visited Apr. 14, 2016) [hereinafter LIBRARY OF CONG.].

<sup>14</sup> *Baldwin v. Kansas*, 129 U.S. 52, 55 (1889).

<sup>15</sup> U.S. CONST. amend. V, § 2.

<sup>16</sup> U.S. CONST. amend. VI, § 2.

<sup>17</sup> *Martinez v. Illinois*, 134 S. Ct. 2070, 2075 (2014) (holding that jeopardy attaches when the jury is sworn); *Dennis v. United States*, 339 U.S. 162, 171 (1950) (holding that an impartial jury is one that can honor their oath).

<sup>18</sup> The other forty-two states have explicitly codified their criminal petit jury oath. See *infra* Appendix: State Statutes on Oaths of the Criminal Petit Jury.

<sup>19</sup> Cain, *supra* note 2; Palazzolo, *supra* note 3.

<sup>20</sup> Unless otherwise specified, throughout this Article the concept of a juror's "oath" will be interchangeable with that of an "affirmation."

ment. However, this procedural requirement may be forfeited by the failure of counsel to object at trial, and does not rise to the level of plain error on appeal. Part I of this Article will present the broad historic background of oaths in society, distinguish between various jurisdictions' use of the modern jury oath, and outline the essential procedural elements of a proper jury oath. Part II will analyze the five reasons that the juror's oath is constitutionally required and why it is functionally important to the jury trial. Part III will outline the five major types of errors that occur in swearing the jury and provide a framework for evaluating whether an error in swearing the jury merits reversal on appeal.

As with many procedural protections, the criminal trial procedure of properly swearing a jury is an often unnoticed but nevertheless vital facilitator of the constitutional protection against double jeopardy and the guarantee of an impartial jury.

## I. AS GOD IS MY WITNESS

### A. The History of Oaths in Culture

Oaths have permeated human history. In ancient Greece, the oath “[held] democracy together,” and affected religion, morality, political organization, and civil and criminal law.<sup>21</sup> From the first chapters of *Genesis*, the Jewish Torah and the Christian Old Testament are replete with references to oaths.<sup>22</sup> Jewish culture used oaths for a variety of societal functions,<sup>23</sup> including binding friendships,<sup>24</sup> making sales,<sup>25</sup> sealing treaties,<sup>26</sup> and arranging marriages.<sup>27</sup> Similar, though not identical, to the Jewish use of oaths, Islam gives a thorough

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<sup>21</sup> WALTER BURKERT, GREEK RELIGION: ARCHAIC AND CLASSICAL 250-54 (John Raffan ed. & trans., Harvard Univ. Press 1985).

<sup>22</sup> The first recorded oath is Jehovah swearing to mankind that He will never again curse the world or purge it with a flood. *Genesis* 8:21; *Isaiah* 54:9. From that point, God is recorded making oaths to man, *Genesis* 24:7, swearing by His own name, *Jeremiah* 44:26, or swearing by Himself, *Hebrews* 6:13.

<sup>23</sup> Swearing was an important obligation and bound a man to perform what he promised. *Numbers* 30:2. Oaths were taken with uplifted hand, *Deuteronomy* 32:40, in the name of the God of Israel. *Isaiah* 48:1; *Isaiah* 65:16.

<sup>24</sup> *1 Samuel* 20:42.

<sup>25</sup> *Genesis* 25:33.

<sup>26</sup> *Genesis* 21:22.

<sup>27</sup> *Genesis* 24.

checklist for swearing a valid oath or “qasam”<sup>28</sup> and discourages false oaths unless they are obligatory.<sup>29</sup>

The feudal system depended on oaths of fealty, predecessor to the medieval notions of chivalry.<sup>30</sup> In the Middle Ages, the Canon law and European Christendom used oaths as the predominant means of maintaining social order.<sup>31</sup> “Oaths undergirded virtually every aspect of society—in rural areas, in university, in pledging fealty to lords and kings, in commercial settings, as well as in the courts.”<sup>32</sup> In America today, the oath continues to be used by society as a way to legally empower individuals to fulfill official functions and to morally motivate those individuals in the performance of their duties.

Oaths<sup>33</sup> are “a solemn declaration, accompanied by a swearing to God. . . that one’s statement is true or that one will be bound to a promise.”<sup>34</sup> It is “any form of attestation by which a person is bound in conscience to perform an act faithfully and truthfully.”<sup>35</sup> This promise invokes a deity to be a witness to the oath<sup>36</sup> and invites divine punishment if the promise is broken or the testimony is false.<sup>37</sup>

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<sup>28</sup> *Nadhr, Qasm, Ahad - Oath / Vow*, ISLAMIC-LAWS.COM, <http://www.islamic-laws.com/oath.htm> (last visited Apr. 14, 2016). The oath must be (1) by someone who was mentally “sane,” (2) voluntary, (3) for a permissible act, (4) sworn to in one of the names of Allah, (5) done verbally (though exceptions apply if the person is mute), and (6) given with the capacity to fulfill the oath. *Id.*

<sup>29</sup> ISLAMIC-LAWS.COM, *supra* note 28, at 2684 (“[T]o make a false oath in the cases of dispute is a major sin. However, if a person takes a false oath in order to save himself, or another Muslim from the torture of an oppressor, there is no objection in it, in fact, at times it becomes obligatory.”).

<sup>30</sup> THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 106-07, 110, 114 (5th ed. 1956) (noting that the “ceremonial oath of fidelity” was the common link between Germanic warrior clan tradition in the fifth and sixth centuries and feudal culture centuries later); THOMPSON ON REAL PROPERTY, THIRD THOMAS EDITION §4.05 (David A. Thomas eds., 2015) (“The tie between lord and vassal was established by the act of homage and oath of fealty . . . The bond thus established was perhaps the most important social tie in northern Europe (including England) throughout the Dark Ages and the medieval period.”).

<sup>31</sup> Virgil Wiebe, *Oath Martyrs* (U. of St. Thomas Legal Stud. Res. Paper, Paper No. 11-28, 2011), <http://ssrn.com/abstract=1932505>.

<sup>32</sup> *Id.* at 17.

<sup>33</sup> *Oath*, DICTIONARY.COM, <http://dictionary.reference.com/browse/oath> (last visited Apr. 14, 2016). The word “oath” has two very different meanings: one in which the speaker is making a solemn promise and the other in which the speaker is making a rude or profane comment. In the context of this article, the word “oath” will always refer to the first type of usage.

<sup>34</sup> *Oath*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>35</sup> *People v. Pribble*, 249 N.W.2d 363, 366 (Mich. Ct. App. 1976).

<sup>36</sup> Steve Sheppard, *What Oaths Meant to the Framers’ Generation: A Preliminary Sketch*, 2009 CARDOZO L. REV. DE NOVO 273, 279 (2009).

<sup>37</sup> *Oath*, BLACK’S LAW DICTIONARY, *supra* note 34.

The oath does not *create* an obligation; it merely strengthens the preexisting social obligation “by uniting it with that of religion.”<sup>38</sup> For example, the witness on the stand has a preexisting social obligation to tell the truth and the judge on the bench has a preexisting social duty to uphold the law—the oath of office merely formalizes that obligation.<sup>39</sup>

Oaths have a stabilizing effect on society for various reasons. Oaths solemnize important occasions,<sup>40</sup> create legally binding statements,<sup>41</sup> act as “instruments of investigation in courts of justice,”<sup>42</sup> and subject the swearer to the penalties of perjury for intentionally giving a false oath.<sup>43</sup> They impose “a solemn obligation upon the minds of all reflecting men, and especially upon those, who feel a deep sense of accountability to a Supreme being”<sup>44</sup> and function as a guarantee that the swearer “will be conscientious in the discharge of his duty.”<sup>45</sup>

Oaths may be either testimonial or promissory. Testimonial oaths occur when an individual swears to testify to something, such as a witness swearing to tell “the truth, the whole truth, and nothing but the truth.”<sup>46</sup> By contrast, in a promissory oath the swearer promises to *do* something. Promissory oaths pervade culture,<sup>47</sup> affecting

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<sup>38</sup> I WILLIAM BLACKSTONE, COMMENTARIES \*369.

<sup>39</sup> BLACKSTONE, *supra* note 38, at 369.

<sup>40</sup> Joseph Story, *Commentaries On The Constitution* (1833), in 4 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 2000), [http://press-pubs.uchicago.edu/founders/documents/a6\\_3s27.html](http://press-pubs.uchicago.edu/founders/documents/a6_3s27.html).

<sup>41</sup> U.S. CONST. amend. IV, § 2.

<sup>42</sup> President George Washington, Farewell Address (Sept. 17, 1796) (transcript available at [http://avalon.law.yale.edu/18th\\_century/washing.asp](http://avalon.law.yale.edu/18th_century/washing.asp)).

<sup>43</sup> 28 U.S.C. § 1746 (2015).

<sup>44</sup> THE FOUNDERS' CONSTITUTION, *supra* note 40, at 1.

<sup>45</sup> THE FOUNDERS' CONSTITUTION, *supra* note 40, at 1.

<sup>46</sup> FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 269 (6th ed. Mar. 2013) [hereinafter DISTRICT JUDGE BENCHBOOK].

<sup>47</sup> See, e.g., *Definition of Hippocratic Oath*, MEDICINE.NET.COM, <http://www.medterms.com/script/main/art.asp?articlekey=20909> (last visited on Apr. 18, 2016); U.S. CONST. art. VI, cl. 3 (oath of office for United States Representatives and Senators); 5 U.S.C. § 3331 (2015) (oath of office for government officers); 10 U.S.C. § 502(a) (2015) (oath of enlistment for the military); 8 C.F.R. § 337.1 (2016) (oath of citizenship for new Americans); *Rescue Policy 1117 Oath of Office*, WEST VALLEY FIRE-RESCUE, <http://www.westvalleyfire.com/default.asp?pageid=195&deptid=1> (last visited on Apr. 18, 2016) (oath of service for firefighters); *Code of Ethics for EMS Practitioners*, NAT'L ASS'N OF EMERGENCY MED. TECHNICIANS, [http://www.naemt.org/about\\_us/emtoath.aspx](http://www.naemt.org/about_us/emtoath.aspx) (last visited Mar. 31, 2016) (oath of service for EMTs).

the adolescent Boy Scout<sup>48</sup> to the United States President.<sup>49</sup> They are used extensively in American courtrooms, with the judge, the clerk, the bailiff, the lawyers, and the jury all-swearing to fulfill specific obligations.<sup>50</sup> Jurors are sworn twice<sup>51</sup>—“represent[ing] a *solemn promise* on the part of each juror to do his duty according to the dictates of the law to see that justice is done.”<sup>52</sup> Before voir dire, the first oath requires the jurors to swear to answer questions truthfully.<sup>53</sup> Given after jury selection and before the beginning of trial, the second oath requires jurors to swear that they will “well and truly try” the case and render a “true verdict” in accord with the law and the evidence.<sup>54</sup>

### B. Modern Jury Oaths

While the specific language used differs among jurisdictions, “an oath is essential to install . . . a juror. The oath is administered for a purpose, and the juror acts under the solemnity of his oath in his deliberations.”<sup>55</sup> The oath is more than a mere formality required by tradition, it “represents a solemn promise on the part of each juror to do his duty according to the dictates of the law to see that justice is done.”<sup>56</sup> And, “[t]his duty is not just a final duty to render a verdict in accordance with the law, but the duty to act in accordance with the law at all stages of trial.”<sup>57</sup>

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<sup>48</sup> *The Boy Scout Oath*, BOY SCOUTS OF AMERICA, <http://www.scouting.org/scoutsource/BoyScouts.aspx> (last visited Apr. 18, 2016).

<sup>49</sup> U.S. CONST. art. II, § 1, cl. 7.

<sup>50</sup> DISTRICT JUDGE BENCHBOOK, *supra* note 46, at 265-70.

<sup>51</sup> *Poll*, BLACK’S LAW DICTIONARY (10th ed. 2014) (noting that though not technically an oath, jurors may also be “polled” at the conclusion of the trial to verify that the verdict read by the jury foreperson is their own); *see also* 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*, 70 OHIO ST. L.J. 1, 22 (2009) (noting that Henrici de Bracton recorded that early English common law allowed defendants to require “jurors to swear an oath that their decision was just”).

<sup>52</sup> *Pribble*, 249 N.W.2d at 366 (emphasis added).

<sup>53</sup> DISTRICT JUDGE BENCHBOOK, *supra* note 46, at 268 (Oath to venirepersons: “Do you solemnly swear [or affirm] that you will truthfully answer all questions that shall be asked of you regarding your qualifications as a juror in the case now called for trial, so help you God?”).

<sup>54</sup> *Id.* at 269. Unless otherwise specified, throughout the remainder of this Article the oath referenced is the pre-trial oath.

<sup>55</sup> *Siberry v. State*, 33 N.E. 681, 684 (Ind. 1893).

<sup>56</sup> *Pribble*, 249 N.W.2d at 366.

<sup>57</sup> *Id.*

### 1. *Prescribed-Oath Jurisdictions*

Despite moderate differences among jurisdictions, forty-two states have prescribed a juror oath for criminal trials either by statute or by procedural rule.<sup>58</sup> Various states spell out the exact language of the oath, others dictate the various essential concepts, and others merely require that the jury be somehow sworn.<sup>59</sup> Some prescribed oaths are concise<sup>60</sup> while others are detailed.<sup>61</sup> Certain state oaths stress the solemnity of the proceedings<sup>62</sup> while others focus on the oath as a means to ensure the impartiality of the jurors' deliberations and their decision.<sup>63</sup> Examples of state jury oaths include:

**New Jersey:** Do you swear or affirm that you will try the matter in dispute and give a true verdict according to the evidence?<sup>64</sup>

**Michigan:** Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God.<sup>65</sup>

**North Carolina:** Do you *solemnly swear* that you will consider all the evidence in this case, follow the instructions given to you, deliberate fairly and impartially and reach a fair verdict? So help you God.<sup>66</sup>

**Ohio:** Do you swear or affirm that you will *diligently inquire into and carefully deliberate* all matters between the State of Ohio and the defendant (giving the defendant's name)? Do you swear or affirm you will do this to the *best of your skill and understanding, without bias or prejudice*? So help you God.<sup>67</sup>

While the exact language varies among jurisdictions, the essential concepts of solemnity, a decision based on the evidence and the law, and fair or true verdict are consistent across jurisdictions.

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<sup>58</sup> See *infra* Appendix: State Statutes on Oaths of the Criminal Petit Jury.

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

<sup>60</sup> See, e.g., N.J. STAT. ANN. § 2B:23-6 (West 2015).

<sup>61</sup> See, e.g., Mich. Ct. R. 2.511(H)(1) (2016).

<sup>62</sup> See N.D. R. CT. 6.10 (2016).

<sup>63</sup> See OHIO REV. CODE ANN. § 2945.28 (West 2015).

<sup>64</sup> N.J. STAT. ANN. § 2B:23-6 (West 2015).

<sup>65</sup> Mich. Ct. R. 2.511(H)(1).

<sup>66</sup> N.D. R. CT. 6.10 (emphasis added).

<sup>67</sup> OHIO REV. CODE ANN. § 2945.28 (West 2015) (emphasis added).

Many states retain some aspect of the classic oath language that asks jurors to solemnly swear to a “true verdict render according to the law and the evidence, so help you God.”<sup>68</sup>

## 2. *Tradition-Based Jurisdictions*

While most states have prescribed jury oaths, eight states<sup>69</sup> and the federal court system are based on common law, history, and traditional practice.<sup>70</sup> Some of the states that have not codified the oath have explicitly recognized it in their judicial decisions,<sup>71</sup> explaining that “[w]hile there is no explicit statute or rule requiring the administration of an oath to a jury in this state, the need for such an oath had been judicially recognized . . . [O]ur rules of criminal procedure implicitly require that a jury will be sworn.”<sup>72</sup> This implicit recognition is often found in statutory guidelines for alternate juror procedures. Statutes in various state and federal common law jurisdictions may include a reference to the juror’s oath by specifying that the alternate jurors “shall take the same oath . . . as the regular jurors.”<sup>73</sup> Some such statutes also explicitly refer to the swearing of the main jury panel by providing that an alternate juror may be substituted “at any time after the trial jury has been sworn and before the rendition of its verdict.”<sup>74</sup>

While not statutorily codified, the District Court Judge’s Benchbook recommends that the following oath be administered to jurors before a federal criminal trial: “Do each of you solemnly swear [or affirm] that you will well and truly try, and a true deliverance make in, the case now on trial, and render a true verdict according to

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<sup>68</sup> TEX. CRIM. PROC. CODE ANN. art. 35.22 (West 2015).

<sup>69</sup> See *infra* Appendix: Criminal Petition Jury Oaths.

<sup>70</sup> United States v. Pinero, 948 F.2d 698, 700 (11th Cir. 1991) (“We note at the outset that it is not clear from the caselaw whether juries in the federal court system are required to be sworn in. Certainly, that is the standard practice.”); U.S. DIST. CT. FOR THE E. D. OF PENN., CLERK’S OFFICE PROCEDURAL HANDBOOK 104 (2014) (“Some additional duties performed by courtroom deputy clerks are . . . impaneling the jury and administering oaths to jurors.”).

<sup>71</sup> Minich v. People, 9 P. 4, 11 (Colo. 1885).

<sup>72</sup> Hollis v. People, 630 P.2d 68, 69 (Colo. 1981); see also COLO. R. CIV. P. 47(i) (codifying Colorado’s *civil* jury oath).

<sup>73</sup> COLO. REV. STAT. ANN. § 16-10-105 (West 2014); see, e.g., W. VA. CODE ANN. § 62-3-3 (West 2016) (“Alternate jurors shall . . . take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.”); FED. R. CRIM. P. 24(c)(2)(A) (“Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.”).

<sup>74</sup> N.Y. CRIM. PROC. LAW § 270.35 (Consol. 2016).

the law and the evidence, so help you God?"<sup>75</sup> This wording of the recommended federal oath, like the language of oaths in the states still adhering to the un-codified common law oath, has been fairly consistent decade to decade<sup>76</sup> and bears a striking resemblance to oaths given in the common law courts of English kings, including the promise of a "true verdict" according to the evidence.<sup>77</sup>

### 3. *Constitutional Challenges*

One of the most significant juridical analyses of juror oaths has been over their religious nature. From early challenges by Quakers<sup>78</sup> to subsequent challenges by atheists, the constitutionality of the jury oath has been evaluated in light of the Constitution's Article Five clause prohibiting religious "test oaths"<sup>79</sup> and the First Amend-

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<sup>75</sup> DISTRICT JUDGE BENCHBOOK, *supra* note 46, at 269.

<sup>76</sup> See U.S. DIST. CT. FOR D.C., A MANUAL FOR COURTROOM CLERKS (1975) ("Do you and each of you solemnly swear that you will well and truly try and a true deliverance make between the United States and \_\_\_\_\_, the defendant at the bar, and a true verdict render according to the evidence, so help you God?").

<sup>77</sup> State v. Ballen, 510 S.E.2d 226, 227–28 (S.C. Ct. App. 1998).

<sup>78</sup> Due to "the growth of religious tolerance and the necessity of permitting Quakers, unbelievers, and atheists to testify as witnesses, England first permitted Quakers to affirm . . ." instead of swear as early as 1688 and subsequently granted to all "unbelievers and atheists . . . the right of affirmation as witnesses." State v. Dudikoff, 145 A. 655, 657 (Conn. 1929). The American states were "somewhat slower than England in adopting [these] more liberal provisions." *Id.* at 658. Similar to their English counterparts, the Quakers in Colonial America objected to taking oaths because it violated their religious beliefs. State v. Putnam, 1 N.J.L. 260, 260 (1794). Accordingly, American Quakers were given an exclusive exception to "affirm" instead of swear. *Id.* However, by the turn of the twentieth century, the exception had expanded to allow anyone who objected to the religious nature of the oath, including atheists, to affirm under penalty of perjury instead of swearing. *Dudikoff*, 145 A. at 658. Today, the option of affirmation instead of oath has been officially codified in the Federal Rules of Evidence, FED. R. EVID. Federal Rules of Civil Procedure, FED. R. CIV. P. 43, and the Federal Rules of Criminal Procedure, FED. R. CRIM. P. 1. Violation of either affirmation or oath is perjury. 18 U.S.C. § 1621 (2015)

<sup>79</sup> U.S. CONST. art. VI, cl. 3; Jonathan Belcher, *Religion-Plus-Speech: The Constitutionality of Juror Oaths and Affirmations Under the First Amendment*, 34 WM. & MARY L. REV. 287, 301 (1992). In the United States, controversy over whether oaths were constitutional under the "test" clause has notably arisen after major military conflicts such as the Civil War and World War II. For example, concern over southern sympathizers inspired Congress to pass the "Ironclad Test Oath." *History of the Oath of Office*, U.S. SENATE [http://www.senate.gov/artandhistory/history/common/briefing/Oath\\_Office.htm](http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm) (last visited April 18, 2016). Signed into law on July 2, 1862, the oath required anyone elected or appointed to the United States government, with the exception of the president, to "swear or affirm that they had never previously engaged in criminal or disloyal conduct." *Id.* States followed the federal government's lead and imposed similar requirements. However, by 1867, the Supreme Court struck down such oaths as ex post facto laws, *Cummings v. Mis-*

ment protections in the Free Exercise Clause<sup>80</sup> and the Establishment Clause.<sup>81</sup> Today, jurors have the option to make an affirmation instead of taking the oath.<sup>82</sup> Similar to phrases such as “God save the United States and this honorable court” and “one nation under God” in the Pledge of Allegiance,<sup>83</sup> the phrase “so help me God” in a juror’s oath does not constitute an impermissible establishment of religion, as long as jurors have the option of affirming instead of swearing.<sup>84</sup>

### C. Essential Procedural Characteristics

Properly swearing the jury must be done with precise timing, with the defendant present, with solemnity in form, and with all of the essential elements in the language of the oath itself.

The proper swearing process has both timing and presence requirements. Jurors should be sworn immediately after voir dire and immediately before the trial begins.<sup>85</sup> “Swearing the jury immediately prior to the trial serves to emphasize the importance and the seriousness of the juror’s task, and ensures that each juror is indeed

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souri, 71 U.S. 277, 330 (1866), and bills of attainder, *Ex parte Garland*, 71 U.S. 333, 381 (1866). Nearly a century later, the Supreme Court continued to strike down loyalty oaths, holding that an Indiana statute requiring an oath as a qualification for placement on the ballot for state elections was invalid. *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 450 (1974).

<sup>80</sup> U.S. CONST. amend. I, cl. 2; Belcher, *supra* note 79, at 305.

<sup>81</sup> U.S. CONST. amend. I, cl. 1; Belcher, *supra* note 79, at 302.

<sup>82</sup> 1 U.S.C. § 1 (2015) (“[O]ath’ includes affirmation”); *see also* Edward B. Lozowicki, Comment, *The California Grand Juror’s Oath: A Religious Test*, 8 SANTA CLARA L. REV. 232, 232 (1968) (“California has attempted to obviate the religious oath problem both constitutionally and statutorily. Besides the non-theistic form of oath provided in the state constitution, the codes provide for petit jury oaths which make no reference to a deity.”).

<sup>83</sup> Belcher, *supra* note 79, at 303-04.

<sup>84</sup> Belcher, *supra* note 79, at 301 (“The fact that juror oaths may contain the words ‘solemnly swear’ and ‘So help me God’ does not amount to a requirement of belief in God.”); *see* *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (noting that the Pledge of Allegiance, inaugural prayer, and opening court sessions with “God save the United States and this honorable Court” were not violations of the establishment clause); *Craig v. State*, 480 S.W.2d 680, 684 (Tex. Crim. App. 1972) (stating as long as the statute is construed to allow jurors to affirm instead of swear, there is no constitutional violation); *but see* *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (holding that requiring belief in God for public service was a violation of the First and Fourteenth Amendments); *Schowgurow v. State*, 213 A.2d 475, 482 (Md. 1965) (holding that any “requirement of an oath as to such belief [in God], or inquiry of prospective jurors, oral or written, as to whether they believe in a Supreme Being, is unconstitutional”).

<sup>85</sup> *United States v. Martin*, 740 F.2d 1352, 1358 (6th Cir. 1984).

sworn before he or she hears any evidence.”<sup>86</sup> The oath should be administered to the jury in the presence of the defendant because the “defendant should be accorded the assurance that the jurors have been sworn to try his case by observing them sworn.”<sup>87</sup> This “defendant present” requirement caused one federal circuit court to implicitly consider the juror’s oath itself as a procedural requirement.<sup>88</sup>

The form of the oath should generally be designed to impress upon the swearer’s conscience the solemnity of the act that he is about to undertake.<sup>89</sup> To the religiously conscious, such an oath is “esteemed the most solemn appeal to God.”<sup>90</sup> For others, the formality of the oath and the resulting civic duty is deeply compelling as a matter of personal integrity.<sup>91</sup> And, despite people disagreeing on whether jurors are obligated to follow the law as explained by the judge or can decide the case merely on the evidence and their own moral judgment (i.e. “jury nullification”), most people would agree that the juror’s oath entrusts the jury with a sacred duty to make a “true verdict” and not to carelessly make a decision regarding the defendant’s guilt.<sup>92</sup>

Proper essential elements of the oath include exhorting jurors on their sacred duty<sup>93</sup> to render a “true verdict”<sup>94</sup> according to (1) the law<sup>95</sup> and (2) the evidence as presented in court.<sup>96</sup> In cases of juror

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1358–359; *see also Baldwin*, 129 U.S. at 55 (agreeing with the Supreme Court of Kansas that it was “highly important and necessary that the oath should be administered . . . in the presence of the prisoner.”) (emphasis added).

<sup>88</sup> *Pinero*, 948 F.2d at 700 (Without directly addressing whether swearing was necessary, the Sixth Circuit recognized “the right of criminal defendants to have the jury receive its oath in their presence . . .” leading the Eleventh Circuit to deduce that, “[p]resumably, then, the Sixth Circuit would deem the swearing of the jury a requirement.”) *Id.*

<sup>89</sup> *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892) (noting that, “[t]he form of oath universally prevailing, conclude[s] with an appeal to the Almighty.”).

<sup>90</sup> *Id.* at 468; Amy J. St. Eve et al., *More From the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64, 84-85 (2014).

<sup>91</sup> St. Eve et al., *supra* note 90, at 84-85.

<sup>92</sup> *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (evaluating jury nullification in light of the “juror’s sworn duty to follow the law” in a “society committed to the rule of law . . .”).

<sup>93</sup> *Holy Trinity Church*, 143 U.S. at 468.

<sup>94</sup> *See, e.g.*, MICH. CT. R. 2.511(H)(1); N.J. STAT. ANN § 2B:23-6 (West 2015); TEX. CODE CRIM. PROC. ANN. art. 35.22 (West 2015); DISTRICT JUDGE BENCHBOOK, *supra* note 46, at 269.

<sup>95</sup> *Martin*, 740 F.2d at 1358.

<sup>96</sup> *Skilling v. United States*, 561 U.S. 358, 398-99 (2010); UNIF. R. CRIM. P. 513 (1987) (“The court shall cause the jurors to be sworn or affirmed to try the case in a just and impar-

oath irregularities, one of the “crucial consideration[s]” is that “[e]ach juror swore before trial to try all criminal cases well and truly *according to the laws* of the United States.”<sup>97</sup> Second, jurors must impartially weigh the evidence presented within the courtroom.<sup>98</sup> The jury “need not enter the box with empty heads” but must be able to “lay aside [their] impression[s] or opinion[s] and render a verdict based on the *evidence presented in court*.”<sup>99</sup>

## II. WHY SHOULD THE JURY BE PROPERLY SWORN?

Disagreement over the necessity of the juror’s oath arises largely from different views of the purpose of the juror’s oath.<sup>100</sup> There are five reasons that a jury should be sworn—though courts rarely, if ever, clearly differentiate among or evaluate all five purposes in an individual decision. First, the historic definition of the word “juror” was someone who is “sworn.”<sup>101</sup> Second, the Supreme Court has rested a constitutional analysis of an “impartial” jury for purposes of the Sixth Amendment on the jury being sworn.<sup>102</sup> Third, the oath legally and morally motivates jurors to faithfully fulfill their duties.<sup>103</sup> Fourth, a sworn jury is essential to the legal formation of the jury.<sup>104</sup> Finally, the Supreme Court has held that the jury oath is the moment that jeopardy attaches for a double jeopardy analysis.<sup>105</sup> For each of these reasons, it is imperative that a jury be properly sworn.

### A. Trial by Oath

The origin of the word “jury” is traceable back to the Anglo-French word “jurer,” which literally means “to swear,”<sup>106</sup> and the Lat-

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tial manner and according to the law and the evidence.”).

<sup>97</sup> *Martin*, 740 F.2d at 1358 (emphasis added).

<sup>98</sup> *Skilling*, 561 U.S. at 398-99.

<sup>99</sup> *Id.* (emphasis added).

<sup>100</sup> *Cain*, *supra* note 2, at 1; *Palazzolo*, *supra* note 3, at 1.

<sup>101</sup> *Juror*, DICTIONARY.COM, <http://dictionary.reference.com/browse/Juror> (last visited Apr. 4, 2016).

<sup>102</sup> *Lockhart v. McCree*, 476 U.S. 162, 183-84 (1986).

<sup>103</sup> *State v. Davis*, 52 Vt. 376, 381 (1880).

<sup>104</sup> *United States v. Green*, 556 F.2d 71, 72 (D.C. Cir. 1977).

<sup>105</sup> *Martinez*, 134 S. Ct. 2070, 2074 (2014) (holding that jeopardy attaches at the oath).

<sup>106</sup> *Jury*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/jury> (last visited Apr. 4, 2016).

in word “iuro,” which means “to swear an oath.”<sup>107</sup> According to an early 1900’s definition, a jury is “a body of men who are *sworn* to declare the facts of a case as they are proven from the evidence placed before them.”<sup>108</sup> Over the last century that definition has not significantly changed. The Federal Bar Association defines a jury as a group of individuals who have “*sworn* to inquire about matters of fact, and declare the truth from evidence presented.”<sup>109</sup> Common themes to the definition of a jury include laypersons (non-legal professionals), who through a selection process dictated by the law and upon taking the juror’s oath, have the power to determine the facts and make legal judgments in a court of law on a specific case.<sup>110</sup>

### 1. *A Thousand Years of Jury Oaths*

The jury trial developed from defendants’ belief that adjudication by a jury of their peers was a preferred substitute to trial by ordeal or trial by battle.<sup>111</sup> The jury was trusted because the oath placed upon them a sacred obligation that “link[ed] the conscience of man to God.”<sup>112</sup>

Prior to the Norman conquest of 1066, English jurisprudence was local, largely unwritten,<sup>113</sup> and based on an eclectic potpourri of practical necessity, custom, and religious beliefs.<sup>114</sup> For example, some ancient cultures had allowed a “trial by oath” in which the defendant would swear an oath, literally invoking divine judgment if he was guilty, and the plaintiff could be obligated to accept the defend-

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<sup>107</sup> Val D. Ricks, *Contract Law and Christian Conscience*, 2003 B.Y.U. L. REV. 993, 1004 (2003).

<sup>108</sup> *United States v. Marsh*, 106 F. 474, 481 (5th Cir. 1901) (emphasis added).

<sup>109</sup> *For The Media: Legal Definitions*, FED. BAR ASS’N, <http://www.fedbar.org/For-the-Media/Legal-Definitions.aspx> (last visited Apr. 4, 2016) (emphasis added).

<sup>110</sup> *Talesman*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/talesman> (last visited Apr. 4, 2016). Until a jury is selected, those summoned are called “talesman,” literally meaning “a member of a large pool of persons called for jury duty from which jurors are selected.” *Id.*

<sup>111</sup> LANGBEIN ET AL., *supra* note 8, at 50.

<sup>112</sup> Milhizer, *supra* note 51, at 19-20.

<sup>113</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 85 (1983).

<sup>114</sup> Dale D. Goble, *Three Cases / Four Tales: Commons, Capture, the Public Trust, and Property in Land*, 35 ENVTL. L. 807, 821 (2005) (noting that the common law evolved out of agricultural necessity); Silving, *supra* note 5, at 1337 (noting that juridical paradigms on oaths were merged by Constantine as part of Christianity’s influence on the Roman Empire).

ant's oath as the final determination of the case.<sup>115</sup> Other "folk courts" dispensed rough, local justice and regularly accepted ordeal or battle as forms of proof for the defendant's guilt.<sup>116</sup> The modern jury trial developed as the common law was systematized and codified.<sup>117</sup> Throughout this change, the juror's oath was integral to the jury trial, with King Ethelred requiring Anglo-Saxon jurors as early as 1015 to swear "that they will condemn no man that is innocent, nor acquit any that is guilty."<sup>118</sup>

Early in the common law, defendants brought men of the community to swear to the veracity of the defendant's oath, upon which the defendant could be declared innocent.<sup>119</sup> In 1166, the Assize of Clarendon created the "presentment jury," in which influential community members were periodically summoned and required to offer indictments under oath against any local suspect of a criminal deed done in their community.<sup>120</sup> The transition from the presentment jury to the trial jury was largely due to defendants' request for

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<sup>115</sup> Milhizer, *supra* note 51, at 8 (explaining that in Jewish, Babylonian, Roman, and Muslim cultures an accusation or response by a party made under a "decisory" oath could suffice as an alternative for evidence in the case).

<sup>116</sup> LANGBEIN ET AL., *supra* note 8, at 50; *see also* Mike Macnair, *Vicinage and the Antecedents of the Jury*, 17 LAW & HIST. REV. 537, 539 (1999) (identifying judicial forums of proof in the early Middle Ages as "testimony, documents, compurgation, ordeal, or battle").

<sup>117</sup> POLLOCK & MAITLAND, *supra* note 11, at 72 (explaining that the early "history of the jury took a turn which made our jurors, not witnesses, but judges of fact"); BERMAN, *supra* note 113, at 85 (noting prior to 1066, English law was not systematized); John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL OF RTS. J. 1, 7 (2013) (noting that the beginning of the English common law was in 1066 with the Norman Conquest).

<sup>118</sup> LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 80 (2004) (1852) (quoting BLACKSTONE, *supra* note 38, at \*302).

<sup>119</sup> FORSYTH, *supra* note 9, at 62. If the defendant could produce a sufficient number of compurgators, "he was entitled to an acquittal." FORSYTH, *supra* note 9, at 62. This was because,

[F]or, in the times of our Anglo-Saxon ancestors, such regard was paid to the sanctity of an oath, and such a repugnance was felt to the idea, that a man of good repute amongst his neighbors could be willfully forsworn, that if . . . he denied it on oath in a court of justice, and could get a certain number of persons to swear that they believed him, he had judgment given in his favor.

FORSYTH, *supra* note 9, at 62-63.

<sup>120</sup> LANGBEIN ET AL., *supra* note 8, at 38 (explaining how the Assize of Clarendon in 1166 created the "presentment jury," which was responsible for initiating and resolving criminal charges against local defendants). According to Henrici de Bracton, the presentment jurors swore to "speak the truth as to that on which you [the justices] shall question me on the lord king's behalf, and for nothing will I fail so to do to the utmost of my power, so help me God and these holy relics." LANGBEIN ET AL., *supra* note 8, at 39.

the jurors to decide the question of innocence or guilt instead of determination by battle or ordeal.<sup>121</sup> An 1898 essay noted that “the verdict of jurors [became] a common mode of proof only because the litigants ‘put themselves’ upon it. . . [The defendant] has asked for it, and by it he must stand or fall. . . *for he has put himself upon their oath.*”<sup>122</sup>

Thus, without relinquishing the essential nature of putting jurors under oath, the jury system evolved from jurors swearing to the defendant’s veracity, to jurors generating indictments upon their oath against the lawbreakers of their community, to, finally, defendants resting upon the fidelity of the jurors to their oath to truly try the facts and deliver a just verdict. Ultimately, the English common law retained all the elements of the jury’s responsibilities but split them into different groups: some people were sworn to bring an indictment (grand jury),<sup>123</sup> some people were sworn to try the case (petit jury),<sup>124</sup> and some people were sworn to testify (witnesses).<sup>125</sup>

By the eighteenth century, the petit jury was considered one of the “great rights” of Englishmen, and it was an uncontested assumption that trial procedure included swearing the jurors.<sup>126</sup> The trial transcript of the 1670 case against William Penn records a jury oath in essentially the final common law form.<sup>127</sup> William Shakespeare wrote of the jury as “the *sworn twelve*.”<sup>128</sup> In 1713, Sir Matthew Hale described the seventh step in a jury trial as the twelve jurors being “sworn to try the same according to their Evidence.”<sup>129</sup>

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<sup>121</sup> LANGBEIN ET AL., *supra* note 8, at 50. The presentment jury only swore to who was suspected of being guilty of crimes within the locale, not whether the individual was in fact guilty. The determination of guilt was still made through a method such as battle or ordeal. LANGBEIN ET AL., *supra* note 8, at 50.

<sup>122</sup> POLLOCK & MAITLAND, *supra* note 11, at 72. One of the earliest jury charges recorded in America was in Connecticut in 1823. CONRAD, *supra* note 4, at 243. The charge began, “Gentlemen of the jury, look on the prisoner, you that are sworn.” CONRAD, *supra* note 4, at 243.

<sup>123</sup> BLACKSTONE, *supra* note 38, at \*301.

<sup>124</sup> BLACKSTONE, *supra* note 38, at \*270.

<sup>125</sup> BLACKSTONE, *supra* note 38, at \*368.

<sup>126</sup> LIBRARY OF CONG., *supra* note 13, at 107 (referring to the jury trial in which jurors pass judgment “upon their oath” as one of the great rights of Englishmen).

<sup>127</sup> WILLIAM PENN & WILLIAM MEAD, *The Tryal of William Penn & William Mead for Causing a Tumult* (Don C. Seitz ed. Univ. Press 1919) (1719), <https://archive.org/details/cu31924028831175>; see also *Ballen*, 510 S.E.2d at 227-28.

<sup>128</sup> WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 1, line 20.

<sup>129</sup> SIR MATTHEW HALE, *History of the Common Law of England* 253 (E. & R. Nutt & R. Gosling 3rd ed. 1739).

Adopted from the English common law, in America the jury trial featured prominently in colonial events.<sup>130</sup> The United States Constitution was ratified with specific protections for the trial by jury,<sup>131</sup> with the Bill of Rights further codifying the essential procedural protections of both a grand jury in the Fifth Amendment and a petit jury in the Sixth Amendment.<sup>132</sup>

Though reference to the juror's oath is absent from the federal constitution, colonial jurisprudence regularly referred to it as part of standard jury trial procedure. As early as 1705, Virginia passed an assembly statute that provided that the jury was sworn.<sup>133</sup> The First Continental Congress authorized a letter explaining the rights of Englishmen, including the "great right" of a trial by jury which "provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen . . . upon a fair trial . . . shall *pass their sentence upon oath against him*."<sup>134</sup> As part of the procedure for new states to be admitted to the fledgling United States, Congress guaranteed that American territories "shall always be entitled to the benefits" of a trial by jury and "of judicial proceedings according to the course of the common law."<sup>135</sup> The Federal Judiciary Act of 1789 provided that the courts of the United States "shall have power to impose and administer all necessary oaths or affirmations."<sup>136</sup> While trial transcripts of the time period did not record the oath verbatim, they would note that the jury had been "du-

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<sup>130</sup> See, e.g., *Boston Massacre Trial*, NAT'L PARK SERV., <http://www.nps.gov/bost/historyculture/massacre-trial.htm> (last visited Apr. 19, 2016) (describing John Adams's defense of Captain Thomas Preston after the Boston Massacre, in which a colonial jury returned a verdict of "not guilty" despite the deeply unpopular quartering of British troops in personal homes).

<sup>131</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>132</sup> *United States v. Mandujano*, 425 U.S. 564, 571 (1976) (noting that many of the constitution's Framers were trained in English common law and were well versed in the history of the grand jury as a protection of personal liberty). "'Petit' is the French word for 'small'; petit juries usually consist of twelve jurors in criminal cases and from six to twelve jurors in civil cases. 'Grand' is the French word for 'large'; grand juries have from sixteen to twenty-three jurors." *Federal Courts and What They Do*, FED. JUDICIAL CTR. 8 (2006), [http://www.fjc.gov/public/pdf.nsf/lookup/FCtsWhat.pdf/\\$file/FCtsWhat.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/FCtsWhat.pdf/$file/FCtsWhat.pdf).

<sup>133</sup> CONRAD, *supra* note 4, at 243 (citing CHAPTER XXXII, AN ACT CONCERNING JURIES, ACTS OF ASSEMBLY OF VIRGINIA (1705)).

<sup>134</sup> LIBRARY OF CONG., *supra* note 13, at 10.

<sup>135</sup> *The Avalon Project: Northwest Ordinance; July 13, 1787*, YALE LAW SCH., [http://avalon.law.yale.edu/18th\\_century/nworder.asp](http://avalon.law.yale.edu/18th_century/nworder.asp) (last visited Apr. 18, 2016).

<sup>136</sup> *The Avalon Project: The Judiciary Act; Sept. 24, 1789*, YALE LAW SCH., [http://avalon.law.yale.edu/18th\\_century/judiciary\\_act.asp](http://avalon.law.yale.edu/18th_century/judiciary_act.asp) (last visited Apr. 18, 2016).

ly sworn.”<sup>137</sup>

Thus, despite an absence of statutes specifically dictating a jury oath, founding documents demonstrate that the oath was considered to be a basic and essential part of the “great right” to a jury trial.

## 2. *History: Instructive But Not Dispositive?*

In 1968, the Court incorporated the Sixth Amendment right to an impartial jury in criminal cases and applied it to the states.<sup>138</sup> At that time, evaluation of what constituted a proper jury trial under Article III and the Sixth Amendment was a straightforward historic inquiry: “Was the feature a requisite of the jury trial at common law?”<sup>139</sup> The Court had consistently held that the Sixth Amendment required “a trial by jury as understood and applied at common law, and include[d] all the essential elements as they were recognized in this country and England when the Constitution was adopted.”<sup>140</sup> This definition was “not open to question.”<sup>141</sup>

However, in 1970 in *Williams v. Florida*,<sup>142</sup> the Supreme Court “upended the conventional wisdom on the Sixth Amendment”<sup>143</sup> by holding that the common law requirement of a twelve member jury was merely a “historical accident, unrelated to the great purposes which gave rise to the jury in the first place.”<sup>144</sup> As such, courts were not constitutionally bound to follow this “historic accident,” despite its established presence in the common law.<sup>145</sup> The *Williams* decision transformed a straightforward historic inquiry into a murky policy question: “Does the feature further the central purpose of the jury trial?”<sup>146</sup> This new “inquiry must focus upon the function served by the jury in contemporary society.”<sup>147</sup> Yet despite notable departures from the inflexible common law procedures of ju-

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<sup>137</sup> CONRAD, *supra* note 4, at 239; *Baldwin*, 129 U.S. at 55.

<sup>138</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

<sup>139</sup> *Turrietta*, 696 F.3d at 982.

<sup>140</sup> *Patton v. United States*, 281 U.S. 276, 288 (1930).

<sup>141</sup> *Id.*

<sup>142</sup> 399 U.S. 78, 89-91 (1970).

<sup>143</sup> *Turrietta*, 696 F.3d at 982.

<sup>144</sup> *Williams*, 399 U.S. at 89-91 (holding that a twelve member jury was not constitutionally required).

<sup>145</sup> *Id.* at 102.

<sup>146</sup> *Turrietta*, 696 F.3d at 983.

<sup>147</sup> *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972) (holding that a unanimous jury was not constitutionally required).

ry size and unanimity, the Court has also refused to allow states complete discretion in defining the jury trial. For example, in 1978, the Court affirmed *Williams* but held that “the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members.”<sup>148</sup> And, if a jury is composed of the constitutionally required minimum number, then it must be unanimous.<sup>149</sup>

Prior to *Williams*, an analysis of the history of the juror’s oath as an inherent and incontrovertible part of common law jury trial procedure would have been the final evaluation.<sup>150</sup> However, post-*Williams*, courts have applied the “historic accident” reasoning to juror’s oaths to find that mere presence in the common law tradition is insufficient to justify the oath as a constitutional requirement.<sup>151</sup> Explaining that such a constitutional claim “sounds in history rather than law,” one circuit court held that it was not “obvious,” due to the reasoning of *Williams*, that an unsworn jury was constitutional error; some type of functional analysis was necessary.<sup>152</sup>

An inquiry correlating the size of the jury and the requirement of swearing the jury is an incomplete application of the *Williams* decision. Instead of a sweeping generalization against common law jury trial procedures, *Williams* should be read as articulating the commonsense requirement that trial procedures still serve the essential purpose of the jury trial,<sup>153</sup> instead of the Court requiring tradition merely for tradition’s sake.<sup>154</sup> In *Williams* the Court simply refused to forever codify a feature “incidental to the real purpose of the Amendment.”<sup>155</sup>

By contrast, unlike the size of a jury, the juror’s oath is more than a historical accident—it was integral to the very formation of the earliest juries and without it no jury could be legally formed.<sup>156</sup> Even

<sup>148</sup> *Ballew v. Georgia*, 435 U.S. 223, 239 (1978).

<sup>149</sup> *Burch v. Louisiana*, 441 U.S. 130, 134 (1979) (“[C]onviction by a nonunanimous six-member jury in a state criminal trial for a nonpetty offense deprives an accused of his constitutional right to trial by jury.”).

<sup>150</sup> *Turrietta*, 696 F.3d at 982.

<sup>151</sup> *Id.* at 981.

<sup>152</sup> *Id.* (“[W]e are aware of no binding authority, whether in the form of a constitutional provision, statute, rule, or judicial decision, addressing whether the Sixth Amendment right to trial by jury necessarily requires the jury be sworn.”).

<sup>153</sup> *Williams*, 399 U.S. at 100.

<sup>154</sup> *Id.* at 102–03.

<sup>155</sup> *Id.* at 103.

<sup>156</sup> *United States v. Olano*, 507 U.S. 725, 740 (1993) (“[J]urors . . . commenced their of-

under a post-*Williams* purpose evaluation, unlike the accidental link between the jury trial and requirement of twelve jurors, the “oath is bound up with some of the great principles giving rise to the very concept of a jury trial” and “reveals a strong relationship to the jury’s reliability as a fact finder.”<sup>157</sup> Thus, while history is not dispositive post-*Williams*, it is instructive in identifying the purposes and function of the juror’s oath.

The Tenth Circuit in *United States v. Turrietta*<sup>158</sup> correctly identified that jury oaths have a deep history spanning centuries, and even acknowledged that historically the jury oath has been inextricably connected with confidence in the jury’s role as an impartial fact-finder.<sup>159</sup> But then the court applied *Williams* to hold that because history was not dispositive, the oath was not a constitutional requirement.<sup>160</sup> This is where *Turrietta* erred. Looking to common law trial procedures is instructive in “reflect[ing] a profound judgment about the way in which law should be enforced and justice administered.”<sup>161</sup> Even though a historical analysis may not control in the post-*Williams* era, the juror’s oath is a procedural requirement of a jury trial because of its important constitutional and functional significance—found in both the Fifth and Sixth Amendments.

## B. The Mythically Impartial Jury

Both Article III and the Sixth Amendment guarantee a criminal defendant the right to a jury trial in the state in which the crime was committed.<sup>162</sup> However, the Sixth Amendment adds the additional requirement of an “impartial jury.”<sup>163</sup> Yet, studies show that every person, regardless of his or her background, has some level of personal knowledge and potential bias,<sup>164</sup> causing one court to note

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face with an oath . . .”).

<sup>157</sup> *United States v. Turrietta*, 696 F.3d 972, 981 (10th Cir. 2012)

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 981-83.

<sup>161</sup> *In re Winship*, 397 U.S. 358, 361-62 (1970) (quoting *Duncan*, 391 U.S. at 155); *see also Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (noting that the “beyond-a-reasonable-doubt requirement” was a common-law requirement that has been incorporated into constitutional jurisprudence).

<sup>162</sup> U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI, § 2.

<sup>163</sup> U.S. CONST. amend. VI, § 2.

<sup>164</sup> Steve McNally, ‘Unconscious Bias’ and the Perils of Prejudiced Recruiting, MONSTER (July 10, 2012), <http://www.monster.co.uk/blog/b/unconscious-bias-and-the-perils-of->

that “[t]he jury system is an institution that is legally fundamental but also fundamentally human.”<sup>165</sup> Overcoming this inherent challenge of bias to provide defendants with their constitutionally protected right to an “impartial jury” would be nearly impossible absent some procedure for minimizing the effect of juror bias.

The juror’s oath is an important trial procedure that “is designed to protect the fundamental right of trial by an impartial jury.”<sup>166</sup> “A juror who allows . . . bias to influence assessment of the case breaches the [judicial] compact and renounces his or her oath.”<sup>167</sup> Therefore, “[t]he law presumes, that every juror sworn in the case is indifferent and above legal exception.”<sup>168</sup>

In the 1980s, the Supreme Court confirmed that it is the juror’s oath, which provides the defendant an impartial jury by obligating jurors to set aside any previous knowledge or bias.<sup>169</sup> In *Patton v. Yount*,<sup>170</sup> after a criminal defendant attempted to excuse a juror for cause and the trial judge refused, the Supreme Court held that the key question was whether the juror swore “that he could set aside any opinion he might hold and decide the case on the evidence.”<sup>171</sup> Similarly, a year later, in *Wainwright v. Witt*,<sup>172</sup> the Supreme Court held that “[t]he proper standard for determining when a prospective juror may be excluded for cause . . . is whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’”<sup>173</sup>

Courts have applied the assumption that jurors acting “on their oath” will be impartial in a variety of situations.<sup>174</sup> For example, government employees, in a case in which the government is a party, can be unbiased jurors due to their oath.<sup>175</sup> The Court explained that

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prejudiced-recruiting.

<sup>165</sup> *People v. Marshall*, 790 P.2d 676, 699-700 (Cal. 1990).

<sup>166</sup> *Pribble*, 249 N.W.2d at 366.

<sup>167</sup> *J.E.B. v. Alabama*, 511 U.S. 127, 153 (1994) (Kennedy, J., concurring).

<sup>168</sup> *United States v. Marchant & Colson*, 25 U.S. 480, 482 (1827).

<sup>169</sup> *Patton v. Yount*, 467 U.S. 1025, 1036 (1984).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> 469 U.S. 412 (1985).

<sup>173</sup> *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)) (emphasis added).

<sup>174</sup> *United States v. Rosario*, 111 F.3d 293, 300 (2d Cir. 1997) (“We presume that jurors remain true to their oath and conscientiously observe the instructions and admonitions of the court.”); *United States v. Carter*, 973 F.2d 1509, 1513 (10th Cir. 1992) (“We presume jurors will remain true to their oath and conscientiously follow the trial court’s instructions.”).

<sup>175</sup> *Dennis*, 339 U.S. at 171.

while “one may not know or altogether understand the imponderables which cause one to think what he thinks . . . one who is trying as an honest man to live up to the *sanctity of his oath* is well qualified to say whether he has an unbiased mind in a certain matter.”<sup>176</sup> Even in capital punishment cases, jurors with an aversion to the death penalty can still render a true verdict upon their oath.<sup>177</sup> And, to ensure an impartial jury, the court can exhort jurors in a case with widespread media coverage to be faithful to their oath.<sup>178</sup>

A constitutionally “impartial jury,” as guaranteed by the Sixth Amendment, is one in which jurors “conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case,” irrespective of the collective mixture of different backgrounds, attitudes, and predispositions of the individual jurors.<sup>179</sup> “[T]he juror’s oath is an essential element of the constitutional guarantee to a trial by an ‘impartial’ jury.”<sup>180</sup> To assume “that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, [would be to] conclude that a trial by jury is a farce and our government a failure.”<sup>181</sup>

### C. A Legal and Moral Motivator

In addition to providing the constitutional presumption of impartiality, the juror’s oath provides a legal and moral vehicle for requiring and inspiring jurors to faithfully deliver a verdict in accord with the law and the evidence. The “oath is not only a summary of the duties of the jurors, but is also the only security which the State

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<sup>176</sup> *Id.*

<sup>177</sup> *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (“A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror.”); *see also* *Greene v. Georgia*, 519 U.S. 145, 146 (1996) (affirming that *Wainwright v. Witt* was the federal standard for determining when a juror may be excused for cause because of his views on the death penalty).

<sup>178</sup> *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 564 (1976) (recommending that courts willing to consider sequestering the jury because it “insulates jurors only after they are sworn” and “emphasizes the elements of the jurors’ oaths”); *see, e.g., Hopt v. People*, 120 U.S. 430, 435 (1887) (holding that the judgment of the court upon a juror’s declaration under oath was conclusive when the juror had read about the case in the newspapers but believed himself capable of sitting as an impartial juror).

<sup>179</sup> *Lockhart*, 476 U.S. at 183-84.

<sup>180</sup> *State v. Godfrey*, 666 P.2d 1080, 1082 (Ariz. Ct. App. 1983).

<sup>181</sup> *State v. Pepoon*, 114 P. 449, 453 (Wash. 1911).

and the respondent have for a faithful, fearless discharge of those duties.”<sup>182</sup>

Incidents such as the Arkansas Supreme Court reversing a death row conviction due to jurors sleeping and tweeting during trial<sup>183</sup> reveal the growing threat of juror misconduct<sup>184</sup> and the resulting societal cost of mistrials.<sup>185</sup> Concern over such incidents has inspired surveys on what motivates jurors to faithfully perform their duties<sup>186</sup> and generated official recommendations on how judges may best inspire conscientious behavior in jurors.<sup>187</sup>

Juror misconduct is serious because “[a] talesman, sworn as a juror, becomes, like an attorney, an officer of the court, and must submit to like restraints.”<sup>188</sup> As such, a juror’s “first duty is the administration of justice,”<sup>189</sup> and the juror’s “oath is administered to insure that the jurors pay attention to the evidence, observe the credibility and demeanor of the witnesses and conduct themselves at all times as befits one holding such an important position.”<sup>190</sup> Violation

<sup>182</sup> *Davis*, 52 Vt. at 381.

<sup>183</sup> Jeannie Nuss, *Death Row Inmate’s Murder Conviction Overturned Because Juror Tweeted in Court*, BANGOR DAILY NEWS (Dec. 8, 2011, 2:37 PM), <http://bangordailynews.com/2011/12/08/news/nation/death-row-inmate’s-murder-conviction-overturned-because-juror-tweeted-in-court/>.

<sup>184</sup> Justin Berton, *Courts Crack Down on Facebook Jurors*, MONTEREY HERALD NEWS (Dec. 26, 2011 12:01 AM), <http://www.montereyherald.com/article/zz/20111226/NEWS/111228592> (“[T]he Google mistrial is becoming a more frequent problem . . . [a study] [l]ast year . . . published findings that jurors’ Internet inquiries, blog comments and tweets had been cited by attorneys in challenging at least 90 verdicts since 1999. The researchers found that judges had granted new trials or overturned verdicts in 28 additional criminal and civil cases in that time - 21 of those from 2008 to 2010.”).

<sup>185</sup> Amanda McGee, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 306 (2010) (noting that the societal costs of juror misconduct are “enormous,” with use of each criminal courtroom alone costing thousands of dollars per day).

<sup>186</sup> See generally St. Eve, et al., *supra* note 90; Amy J. St. Eve & Michael A. Zuckerman, *Ensuring An Impartial Jury In The Age Of Social Media*, 11 DUKE L. & TECH. REV. 1 (2012).

<sup>187</sup> Martha Neil, *New Model Jury Instructions Tell Jurors to Turn in Others Who Flout Social Media Ban*, A.B.A. J. (Aug. 23, 2012, 7:50 PM), [http://www.abajournal.com/news/article/new\\_model\\_jury\\_instructions\\_ask\\_jurors\\_to\\_rat\\_out\\_others\\_who\\_violate\\_social/](http://www.abajournal.com/news/article/new_model_jury_instructions_ask_jurors_to_rat_out_others_who_violate_social/). The American Bar Association released an official recommendation that judges instruct jurors to report on other jurors’ violations of any of the court’s instructions in order to minimize jurors’ improper use of social media during trial. *Id.* The judge should tell jurors, “I expect you will inform me as soon as you become aware of another juror’s violation of these instructions.” *Id.*

<sup>188</sup> *Clark v. United States*, 289 U.S. 1, 12 (1933).

<sup>189</sup> JOSIAH HENRY BENTON, *THE LAWYER’S OFFICIAL OATH AND OFFICE* 6-7 (Boston Book Co. 1909) (quoting *In re Thomas*, 36 F. 242, 243 (C.C.D. Colo. 1888)).

<sup>190</sup> *People v. Pribble*, 249 N.W.2d 363, 366 (Mich. Ct. App. 1976).

of their oath can subject jurors to perjury or contempt proceedings.<sup>191</sup> Swearing a false oath in court can subject the swearer to prosecution for perjury.<sup>192</sup> The federal penalty for perjury is a fine, imprisonment of not more than five years, or both.<sup>193</sup> A federal court also has the discretionary power to punish by “fine or imprisonment, or both” any “contempt of its authority [such as] . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command,”<sup>194</sup> such as a violation of jury instructions.<sup>195</sup>

Under the Court's reasoning in using “recent empirical data” to determine if a common law jury trial procedure still fulfills an important constitutional role,<sup>196</sup> the juror's oath should be upheld as a requirement because recent studies show that the oath also still carries moral weight in restraining jury behavior, just as it has for centuries.<sup>197</sup>

In a recent study on social media usage by jurors, a federal district court judge and a state criminal court judge solicited responses from 583 actual jurors to an anonymous questionnaire.<sup>198</sup> The results indicated that two of the most important ethical motivators for jurors were a specific judicial instruction against social media usage and the moral duty imposed by the juror's oath.<sup>199</sup> In the questionnaire, numerous jurors cited to their oath as influential in why they

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<sup>191</sup> Julie Manganis, *Potential Juror in Rape Case Admits Lying to Judge*, SALEM NEWS (Nov. 15, 2012), [http://www.salemnews.com/news/local\\_news/potential-juror-in-rape-case-admits-lying-to-judge/article\\_e00281a4-8cac-5218-b1ed-7f28a6caef19.html](http://www.salemnews.com/news/local_news/potential-juror-in-rape-case-admits-lying-to-judge/article_e00281a4-8cac-5218-b1ed-7f28a6caef19.html) (reporting that a juror was sentenced to two years in prison for perjury after lying under oath during voir dire); Berton, *supra* note 184 (“Before trials, California judges will admonish jurors to forgo any online research or chatter on Facebook or Twitter. The penalty for ignoring the instruction will be contempt of court charges, punishable by jail.”).

<sup>192</sup> 18 U.S.C. § 1623 (2015).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* § 401(3) (2015).

<sup>195</sup> *Clark v. United States*, 289 U.S. 1, 10 (1933) (holding that “[c]oncealment or misstatement by a juror upon a voir dire examination is punishable as a contempt”); *United States v. Juror No. One*, 866 F. Supp. 2d 442, 449 (E.D. Pa. 2011) (holding that it was contempt for a dismissed juror to send an e-mail with their opinion on the verdict to other jurors before the trial finished); *People ex rel. Munsell v. Court of Oyer & Terminer*, 4 N.E. 259, 262-63 (N.Y. 1886) (explaining that the only reason that it was not criminal or civil contempt for a juror to visit the scene of the crime was because there was no statute prohibiting it and no court instruction against it).

<sup>196</sup> *Ballew v. Georgia*, 435 U.S. 223, 232 (1978).

<sup>197</sup> St. Eve et al., *supra* note 90, at 90.

<sup>198</sup> St. Eve et al., *supra* note 90, at 90.

<sup>199</sup> St. Eve et al., *supra* note 90, at 81.

obeyed the judge's instructions: "I took an oath"<sup>200</sup>; "My oath"<sup>201</sup>; "I follow rules under the oath I made"<sup>202</sup>; "I knew it was my duty to fulfill the oath I took before the court not to say anything"<sup>203</sup>; "My duty as a jur[or] under oath"<sup>204</sup>; "I took this very seriously and wanted to do what I swore I would"<sup>205</sup>; "I made an oath and was going to follow rules under the oath I made."<sup>206</sup> At the conclusion of the study, the researchers recommended that "jury instructions should remind the jurors of their oath and its importance, and work in references to civic pride, respect, and democratic ideals" because "[t]hese concepts resonate with jurors."<sup>207</sup>

In contrast to the dangers of a "corrupt or overzealous prosecutor and . . . the compliant, biased, or eccentric judge," the trial by jury constitutes an "inestimable safeguard" of the defendant's rights<sup>208</sup> because a jury composed of "twelve intelligent and impartial men, acting under oath . . . are not likely to do any great wrong."<sup>209</sup>

#### D. Legally Empowering the Jury

American culture regularly uses oaths as the defining moment that society empowers an individual for public service. On inauguration day, the President-elect becomes President and Commander-in-Chief of the United States in a swearing ceremony on the west front of the Capitol building.<sup>210</sup> The judge-elect is vested with all of the authority of the judicial branch upon taking his oath.<sup>211</sup> The senator-

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<sup>200</sup> St. Eve et al., *supra* note 90, at 81.

<sup>201</sup> St. Eve et al., *supra* note 90, at 81.

<sup>202</sup> St. Eve et al., *supra* note 90, at 81.

<sup>203</sup> St. Eve et al., *supra* note 90, at 81.

<sup>204</sup> St. Eve et al., *supra* note 90, at 81.

<sup>205</sup> St. Eve et al., *supra* note 90, at 81.

<sup>206</sup> St. Eve et al., *supra* note 90, at 82.

<sup>207</sup> St. Eve et al., *supra* note 90, at 89-90.

<sup>208</sup> *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

<sup>209</sup> *Roberts v. Mason*, 210 Ohio St. 277, 280 (1859).

<sup>210</sup> *President's Swearing-In Ceremony*, JOINT CONG. COMM. ON INAUGURAL CEREMONIES, <http://www.inaugural.senate.gov/days-events/days-event/presidents-swearing-in-ceremony>; see, e.g., Robert F. Blomquist, *The Presidential Oath, The American National Interest and a Call For Presiprudence*, 73 UMKC L. REV. 1, 21 (2004). President McKinley in his First Inaugural Address on March 4, 1897, said "by the *authority vested in me by this oath*, I assume the arduous and responsible duties of President of the United States." *Id.*

<sup>211</sup> See, e.g., *People ex rel. Holdom v. Sweitzer*, 117 N.E. 625, 631 (Ill. 1917) ("[O]ne who was declared elected to an office would not assume the duties of such office until his commission was issued and he had taken the oath of office."); *Duffy v. Edson*, 84 N.W. 264,

elect assumes his office and all of the rights and responsibilities pertaining to it upon taking his oath.<sup>212</sup> The law student, after graduating law school and passing the bar exam, upon taking his or her oath is granted authority as an officer of the court to practice law within the designated jurisdiction.<sup>213</sup>

Likewise, it is the juror's oath that transforms a group of individuals into a jury with legal authority over their peer.<sup>214</sup> "[U]ntil a jury has been sworn to try the case . . . the twelve individuals in the box have no power to convict [the defendant]."<sup>215</sup> Properly, no individual can be considered a juror unless, "before he shall enter upon the discharge of his duties, he . . . take a solemn oath to the effect that he will perform his office uprightly and impartially."<sup>216</sup> In fact, correct language usage would dictate that such individuals are not even called "jurors" because prior to the moment that the jury is impaneled and sworn, the individuals summoned are called "talesman," literally meaning "a member of a large pool of persons called for jury duty from which jurors are selected."<sup>217</sup> Upon being impaneled, an oath legally "commences" the office of juror.<sup>218</sup> Finally, this oath is required because a "juror serves in an office of trust" as "an integral part of our judicial system," and in his office the juror "exercises a part of the sovereign power of government in the administration of justice."<sup>219</sup>

For more than a century, courts across the nation "uniformly

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270–71 (Neb. 1900) ("The taking of the constitutional oath by a county judge elect is a condition precedent to his entering upon the duties of such office."); *Mims v. State*, 15 S.W.2d 628, 629 (Tex. Crim. App. 1929) ("[E]ven when a special judge has been agreed upon or rightly appointed, he has no legal power or authority to act until he has taken the oath of office.").

<sup>212</sup> Comm. to Recall *Menendez v. Wells*, 7 A.3d 720, 723 (N.J. 2010) (describing how a senator is "officially seated" in the United States Senate after taking the "required oath of office").

<sup>213</sup> *President's Message: Why Are We in This Profession? New Admittees Are Mirrors of Ourselves*, 33 MONT. LAW. 4 (May 2008) (describing how the author "took the oath at my swearing-in ceremony and became a Montana lawyer"); *I Do Solemnly Swear: New Admittees Sworn in to the State Bar*, 11 NEV. LAW. 16 (2003) (describing the "swearing-in ceremony for new admittees to the Bar" as a "momentous occasion").

<sup>214</sup> *Slaughter v. State*, 28 S.E. 159, 160 (Ga. 1897).

<sup>215</sup> *United States v. Green*, 556 F.2d 71, 72 (D.C. Cir. 1977).

<sup>216</sup> *Slaughter*, 28 S.E. at 160.

<sup>217</sup> MERRIAM-WEBSTER.COM, *Talesman*, *supra* note 110; *see also State v. Davis*, 52 Vt. 376, 381 (1880) ("[T]rial by an unsworn jury is a mistrial [because it is a] verdict rendered by such a body of men . . . [that] cannot be called legal jurors in the case.").

<sup>218</sup> *United States v. Olano*, 507 U.S. 725, 740 (1993).

<sup>219</sup> *Schowgurow v. State*, 213 A.2d 475, 478-79 (Md. 1965).

held<sup>220</sup> that without being sworn, the jury was not a legally constituted body capable of passing judgment upon the defendant.<sup>221</sup> A Georgia court noted that “[m]en summoned as jurors must also be sworn before they constitute an organized and competent tribunal to which the issues in a cause can be submitted for trial.”<sup>222</sup> In Texas, “twelve men sitting in judgment, unsworn, do not constitute a jury . . . it must be held mandatory that the jury be sworn in a particular case.”<sup>223</sup> Whether the jury has been sworn is the important consideration to determine if a jury has been properly constituted because trial cannot begin “until the jury is sworn.”<sup>224</sup> In criminal cases in Nebraska, “it is essential to the validity of the proceeding that the jury should be sworn.”<sup>225</sup> In West Virginia, “[a] person cannot be legally convicted unless the record shows that the jury which tried the case were sworn according to law.”<sup>226</sup> And in California, “[a] conviction by an unsworn jury is a nullity.”<sup>227</sup>

Even recently courts have held that an unsworn jury “was wholly without authority to pass upon any of the issues at trial, and therefore, to make any determinations whatsoever regarding guilt or innocence,” and concluded that an unsworn jury was “fatally infirm.”<sup>228</sup> Similar holdings have concluded that an unsworn jury “results in an invalid conviction”<sup>229</sup> and is a “nullity and is reversible error.”<sup>230</sup>

Despite this generally consistent precedent, in the last several decades courts have fractured on whether the juror’s oath is necessary to legally constitute the jury.<sup>231</sup> For example, the Oregon Court of Appeals in *State v. Vogh*<sup>232</sup> reasoned that it is a “formalistic view that,

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<sup>220</sup> *State v. Duff*, 161 S.W. 683, 685 (Mo. 1913).

<sup>221</sup> *Slaughter*, 28 S.E. at 161.

<sup>222</sup> *Id.*

<sup>223</sup> *Crisp v. State*, 220 S.W. 1104, 1104 (Tex. Crim. 1920).

<sup>224</sup> *Slaughter*, 28 S.E. at 161.

<sup>225</sup> *State v. Martin*, 255 N.W.2d 844, 848 (Neb. 1977).

<sup>226</sup> *State v. Moore*, 49 S.E. 1015, 1016 (W. Va. 1905).

<sup>227</sup> *People v. Pelton*, 7 P.2d 205, 205 (Cal. App. 1931).

<sup>228</sup> *Spencer v. State*, 640 S.E.2d 267, 268 (Ga. 2007).

<sup>229</sup> *People v. Allan*, 829 N.W.2d 319, 326 (Mich. Ct. App. 2013).

<sup>230</sup> *Brown v. State*, 220 S.W.3d 552, 554 (Tex. App. 2007).

<sup>231</sup> The question of a “legally constituted” jury is separate from any question regarding the constitutional necessity of swearing the jury in order to provide the defendant an “impartial jury.” As such, it is possible that a court could hold that an oath is not necessary to legally form the jury but might still be required as a constitutional right of the defendant.

<sup>232</sup> 41 P.3d 421, 425 (Or. Ct. App. 2002).

until sworn, the jury is not 'lawfully constituted' and cannot render a legal verdict,"<sup>233</sup> and that such "formalism has since given way to a more functional approach."<sup>234</sup> And in *State v. Arellano*, the Supreme Court of New Mexico held that there was no error in the verdict of an improperly sworn jury because:

The jury understood the spirit of the oath and purpose of the jury selection process as emphasized in the voir dire procedures and jury instructions . . . The purpose of administering the oath to jurors is to ensure that the jurors conduct themselves at all times as befits one holding such an important position . . . [A]ny oath or affirmation that awakens the juror's conscience and impresses his or her mind with their duty will suffice.<sup>235</sup>

Despite the seeming logic of the "functional" approach, it is an incomplete analysis to claim that the oath does *not* fulfill one purpose (legally empowering the jury) merely because it does fill another purpose (such as impressing upon the jury the solemnity of their duty). The oath analysis is not a zero sum game. If an oath impresses upon the jurors the solemnity of their duty, that does not preclude the oath from *also* being the act that legally empowers that group of people as a judicial body capable of passing judgment upon their peer. And, if members of the group realize the solemnity of the occasion even absent the oath, that likewise does not add or detract from the separate function of the oath in constituting the jury as a legal body. Finally, if it is not the oath which provides the legal moment in which society empowers the jury as a legal fact-finding body, it is unclear when, or even if, the jury is granted such authority.<sup>236</sup>

### **E. The Magical Moment When Jeopardy Attaches**

If the oath identifies the definitive moment that the jury is legally empowered to try the case, it also identifies that at the same

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 426.

<sup>235</sup> 965 P.2d 293, 295 (N.M. 1998).

<sup>236</sup> The creation of the jury as a legal body at the moment of the oath is clearer in prescribed oath jurisdictions because of their statutes. However, even in traditional jurisdiction there is no other definable moment that the jury is legally formed other than the moment of the jurors taking the oath.

moment jeopardy attaches to the defendant.<sup>237</sup> Sir William Blackstone wrote that the common law *autrefois acquit* plea is the “universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offence.”<sup>238</sup> Codifying the common law pleas,<sup>239</sup> the Fifth Amendment states that no person shall “be twice put in jeopardy of life or limb.”<sup>240</sup> Jeopardy is defined as “[t]he risk of conviction and punishment that a criminal defendant faces at trial,”<sup>241</sup> with the Double Jeopardy Clause protecting against a second prosecution after either an acquittal or a conviction and against multiple punishments for the same offense.<sup>242</sup> This protection against successive prosecutions serves as “a constitutional policy of finality for the defendant’s benefit.”<sup>243</sup> The rationale behind the Double Jeopardy Clause was most famously explained by Justice Black in 1957:

[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.<sup>244</sup>

In 1969, the Supreme Court declared that “the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage” and applies “to the States through the Fourteenth Amendment.”<sup>245</sup>

As a concept “rooted in history”<sup>246</sup> and applicable to both fed-

<sup>237</sup> *Crist v. Bretz*, 437 U.S. 28, 38 (1978) (“[J]eopardy attaches when the jury is empaneled and sworn”); *United States v. Little Dog*, 398 F.3d 1032, 1036 (8th Cir. 2005) (holding that it was error to not swear the jury due to the attachment of jeopardy).

<sup>238</sup> IV WILLIAM BLACKSTONE, COMMENTARIES \*329.

<sup>239</sup> *Autrefois Acquit*, BLACK’S LAW DICTIONARY (9th ed. 2009) (“Double jeopardy” is a generic name for both “previous acquittal” and “previous conviction.”).

<sup>240</sup> U.S. CONST. amend. V, § 2.

<sup>241</sup> *Jeopardy*, BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>242</sup> *Brown v. Ohio*, 432 U.S. 161, 165 (1977).

<sup>243</sup> *Id.*

<sup>244</sup> *Green v. United States*, 355 U.S. 184, 187-88 (1957).

<sup>245</sup> *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

<sup>246</sup> *Gore v. United States*, 357 U.S. 386, 392 (1958) (holding that double jeopardy “is rooted in history and is not an evolving concept like due process”).

eral and state court systems,<sup>247</sup> identification of the moment that jeopardy attaches is important to trial procedure because it determines the precise instant after which the defendant may never be re-prosecuted on the same claim, regardless of ultimate conviction or acquittal.<sup>248</sup> The timing evaluation “serves as the lynchpin for all double jeopardy jurisprudence.”<sup>249</sup> In a jury trial, “[t]here are few if any rules of criminal procedure clearer than the rule that ‘jeopardy attaches when the jury is empaneled and sworn.’”<sup>250</sup> Jeopardy may attach even if the case ends without a final judgment, such as when a jury was sworn but dismissed before hearing any evidence.<sup>251</sup> In 2014, the Supreme Court reaffirmed this “bright-line rule,” explaining that “a jury trial begins, and jeopardy attaches, when the jury is sworn.”<sup>252</sup>

The jeopardy evaluation is necessarily problematic when there is error in swearing the jury. If the defendant is *convicted* and appeals, courts have applied a harmless error analysis to hold that the unsworn jury is able to convict the defendant.<sup>253</sup> Conversely, an unsworn jury would *seem* to be able to acquit under the general rule that an acquittal may never be reviewed “on error or otherwise.”<sup>254</sup> However, unique to the error of an unsworn jury, if “jeopardy” never attached, prosecutors have argued that an acquittal by an unsworn jury is a “nullity.”<sup>255</sup> And, in *Spencer v. State*,<sup>256</sup> the Georgia Supreme

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<sup>247</sup> *Benton*, 395 U.S. at 794.

<sup>248</sup> *Crist v. Bretz*, 437 U.S. 28, 38 (1978).

<sup>249</sup> *Id.*

<sup>250</sup> *Martinez v. Illinois*, 134 S. Ct. 2070, 2074 (2014) (quoting *Crist v. Bretz*, 437 U.S. 28, 35 (1978)).

<sup>251</sup> *Downum v. United States*, 372 U.S. 734, 737 (1963) (holding that jeopardy attached once the first jury was sworn and, therefore, impanelling a second jury violated defendant’s right against double jeopardy).

<sup>252</sup> *Martinez*, 134 S. Ct. at 2075 (“We have never suggested . . . that jeopardy may not have attached where, under the circumstances of a particular case, the defendant was not genuinely at risk of conviction. Martinez was subjected to jeopardy because the jury in his case was sworn.”).

<sup>253</sup> *United States v. Turrietta*, 696 F.3d 972, 976 n.9 (10th Cir. 2012).

<sup>254</sup> *United States v. Ball*, 163 U.S. 662, 671 (1896).

<sup>255</sup> Brief of Appellee by the District Attorney at 1, *Spencer v. State*, 640 S.E.2d 267 (Ga. 2007) (No. So6A1719), 2006 WL 4550855, at 1. (“Summary of the Argument: Jeopardy does not attach until a jury is empaneled and sworn. The first jury was not sworn, so the first trial was a nullity; and the collective judgment of the unsworn 12 was not a verdict but also a mere nullity. Consequently, no acquittal resulted from a void jury’s null and void decision.”).

<sup>256</sup> 40 S.E.2d 267 (Ga. 2007).

Court agreed.<sup>257</sup> The court held that the prosecution could re-prosecute a claim on which the defendant had been previously acquitted by an unsworn jury, reasoning that because “jeopardy does not attach in a jury trial until the jury is both impaneled and sworn . . . . Spencer was not placed in jeopardy at all, regardless of the attempted trial and the pronouncements of the fatally infirm jury.”<sup>258</sup> The D.C. Circuit Court has similarly allowed re-prosecution of a defendant after the first jury had been empaneled but dismissed before being sworn, concluding that “a defendant is not placed in jeopardy until he is subjected to the risk of being convicted.”<sup>259</sup> That risk of conviction “cannot arise until a jury has been sworn to try the case; until that moment, a defendant is subject to no jeopardy, for the twelve individuals in the box have no power to convict him.”<sup>260</sup>

To allow an unsworn jury the power to convict under a theory of harmless error but not to allow the unsworn jury to acquit because jeopardy never attached undermines the intended protection of the Double Jeopardy provision. A properly sworn jury is an implied constitutional requirement under the Fifth Amendment, giving equal protection to the defendant regardless of whether the jury acquits or convicts.

### III. WHAT HAPPENS WHEN A JURY IS NOT PROPERLY SWORN?

#### A. Five Irregularities in the Swearing Process

There are five potential irregularities that may occur in swearing the jury: (1) the oath is unrecorded or improperly recorded, (2) the jury is sworn late, (3) the jury is sworn improperly, (4) the jury is only partially sworn, and (5) the jury is not sworn.

##### 1. *The Unrecorded Oath*

Despite nearly all courtroom trial proceedings being “on the record” with a court reporter taking dictation, jury oaths are generally not recorded verbatim, the record merely noting that the jury was

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<sup>257</sup> *Id.* at 268.

<sup>258</sup> *Id.*

<sup>259</sup> *United States v. Green*, 556 F.2d 71, 72 (D.C. Cir. 1977) (rejecting the defendant’s double jeopardy claim on the basis that the first jury was never sworn.).

<sup>260</sup> *Id.*

“duly sworn.”<sup>261</sup> Under such procedures, perhaps the simplest jury oath error is the unrecorded or improperly recorded oath.

For example, according to the record, in *United States v. Pintero*,<sup>262</sup> a jury was selected and impaneled but not immediately sworn.<sup>263</sup> The following day the court heard arguments on a motion to suppress.<sup>264</sup> Finally, on the third day, the jury was brought in and the trial commenced.<sup>265</sup> The defendants appealed because the trial record never indicated that the jury oath was administered.<sup>266</sup> The Eleventh Circuit held that the issue was factual, and as a matter of law, “[t]he mere absence of an affirmative statement in the record . . . [was] not enough to establish that the jury was not in fact sworn.”<sup>267</sup> Under the presumption of regularity, courts also presume that the proper language has been used when the record does reflect that the jury has been sworn.<sup>268</sup>

The presumption of regularity helps thwart frivolous claims of an unrecorded oath, such as in *United States v. Gibson*.<sup>269</sup> After being convicted of passing multiple forged postal money orders with intent to defraud, the defendant appealed *pro se*, claiming that an unsworn jury had tried him.<sup>270</sup> The court, in dismissing his claim, held

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<sup>261</sup> See, e.g., Trial Transcript, *United States v. Guevara*, 96 Fed. Appx. 745 (2d Cir. 2004), (No. 02-1104), 2001 WL 36133508 (N.D.N.Y.) (“Whereupon a jury was duly selected and sworn”); Trial Transcript, *Brown v. Harris*, 240 F.3d 383 (4th Cir. 2001), (No. 00-1127), 1999 WL 34872401 (E.D.Va.) (“Thereupon, the jury panel was sworn and examined on voir dire, and from said panel present came a jury of seven who were duly sworn to try the issues.”); Trial Transcript, *Tariq v. Ramirez*, 2006 WL 6649107 (Md. Cir. Ct.) (noting that “the jury panel was duly sworn”); Plaintiff Angel Mercado’s Opening Statement, *Mercado v. Manny’s T.V. and Appliance, Inc.*, 928 N.E.2d 979 (Mass. App. Ct. 2010), (No. 09-P-520), 2007 WL 7297705 (Mass. Super.) (noting in a parenthetical that “[t]he jury was duly sworn.”); Trial Transcript, *Sims v. Precision Hydraulic Services Co.*, 2002 WL 34443721 (Pa. Com. Pl.) (noting in a parenthetical “Jury Panel Duly Sworn”).

Historically, the jury verdict would also reaffirm the jury’s original oath by stating, for example, “We, the jury duly impaneled, charged and sworn, in the above entitled action, do, on our oath, find the defendant . . . guilty of murder in the first degree.” *Baldwin v. Kansas*, 129 U.S. 52, 56 (1889) (emphasis added).

<sup>262</sup> 948 F.2d 698, 699 (11th Cir. 1991).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 699.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Pintero*, 948 F.2d at 700.

<sup>268</sup> See *Baldwin v. Kansas*, 129 U.S. 52, 56 (1889).

<sup>269</sup> See *United States v. Gibson*, 462 F.2d 400 (5th Cir. 1972).

<sup>270</sup> *Gibson*, 462 F.2d at 401.

that the allegations were meritless.<sup>271</sup>

## 2. *The Tardily Sworn Jury*

The second type of error in swearing the jury occurs when the jury is not sworn immediately after being empanelled and before opening statements. Courts have evaluated belated oaths at points all throughout the trial process, such as swearing the jury after opening statements but before the presentation of any evidence,<sup>272</sup> swearing the jury after the state's first witness,<sup>273</sup> swearing the jury after five witnesses had testified,<sup>274</sup> swearing the jury after the prosecution's case-in-chief,<sup>275</sup> swearing the jury after conclusion of the trial but before substantive jury deliberations,<sup>276</sup> and swearing the jury after deliberations had begun but before a verdict was announced.<sup>277</sup> In one case, two weeks after the trial had been completed a defendant requested that his jury be reassembled, officially sworn, and "sent back to deliberate a second time."<sup>278</sup> The court refused.<sup>279</sup>

## 3. *The Improperly Sworn Jury*

A jury is improperly sworn when the jury is not given the exact wording of the oath prescribed by statute or tradition, or the procedure for swearing the jury is improperly followed.<sup>280</sup> Examples include when a statute prescribes specific oath language but the record only shows a partial recitation of the oath, leaving off important elements such as "according to the law and the evidence,"<sup>281</sup> jurors being given the wrong oath prior to trial, such as the voir dire oath instead of the trial oath,<sup>282</sup> or swearing procedures being improperly followed, such as the defendant not being present to observe the jury

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<sup>271</sup> *Id.*

<sup>272</sup> *Cooper v. Campbell*, 597 F.2d 628, 629 (8th Cir. 1979).

<sup>273</sup> *Hollis v. People*, 630 P.2d 68, 69-70 (Colo. 1981).

<sup>274</sup> *State v. Frazier*, 98 S.W.2d 707, 715 (Mo. 1936).

<sup>275</sup> *United States v. Hopkins*, 458 F.2d 1353, 1354 (5th Cir. 1972).

<sup>276</sup> *State v. Godfrey*, 666 P.2d 1080, 1081-82 (Ariz. Ct. App. 1983).

<sup>277</sup> *Brown v. State*, 220 S.W.3d 552, 553 (Tex. App. 2007).

<sup>278</sup> *State v. Vogh*, 41 P.3d 421, 423 (Or. Ct. App. 2002).

<sup>279</sup> *Id.* at 429.

<sup>280</sup> *Baldwin v. Kansas*, 129 U.S. 52, 54 (1889).

<sup>281</sup> *Id.* at 54-55.

<sup>282</sup> Defendant-Appellant's Brief Opposing Application for Leave to Appeal at 4, *People v. Cain*, No. 149259 (Mich. 2014).

being sworn.<sup>283</sup>

#### 4. *The Partially Sworn Jury*

Despite all of the procedural rules and the best amount of preparation, unexpected occurrences still happen in trials.<sup>284</sup> One such instance occurred in *People v. Clemmons*<sup>285</sup> when a trial court properly swore the jury but then dismissed one of the jurors because he declared that he could not be impartial.<sup>286</sup> The defendant refused to continue the trial with only eleven jurors, and so the court declared a mistrial.<sup>287</sup> Instead of selecting a completely new jury for the second trial, the court brought back eleven of the original jurors.<sup>288</sup> The court subsequently excused another juror, bringing the number of jurors to ten.<sup>289</sup> Two new jurors were then selected and sworn, and as a result, only two of the twelve jurors were sworn to try the new case.<sup>290</sup>

#### 5. *The Unsworn Jury*

The clearest instance of swearing error is when the jury is never given the pre-trial oath at any point during trial. A classic example of such error is *Harris v. State*,<sup>291</sup> in which after a morning of voir dire and selection of the jury panel, the judge dismissed the jurors for an early lunch.<sup>292</sup> When the jury returned, the trial began without the jurors being sworn.<sup>293</sup> At various points throughout the trial, the clerk and defense counsel inquired about swearing the jurors.<sup>294</sup> Additionally, the clerk noted on the docket that the jurors

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<sup>283</sup> *United States v. Martin*, 740 F.2d 1352, 1359 (6th Cir. 1984).

<sup>284</sup> Stephen D. Easton, *Cameras In Courtrooms: Contrasting Viewpoints: Whose Life Is It Anyway?: A Proposal to Redistribute Some of the Economic Benefits of Cameras in the Courtroom from Broadcasters to Crime Victims*, 49 S.C. L. REV. 1, 4 (1997) (explaining that real, live courtrooms contain "suspense, mystery, and high drama").

<sup>285</sup> 442 N.W.2d 717 (Mich. Ct. App. 1989).

<sup>286</sup> *Id.* at 720.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Clemons*, 442 N.W.2d at 720.

<sup>291</sup> 956 A.2d 204 (Md. 2008).

<sup>292</sup> *Id.* at 206.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 209.

were *not* sworn and prosecuting counsel, while responding to defense counsel's other arguments, ignored objections to the jury being unsworn.<sup>295</sup> At the conclusion of trial, defendant was convicted of vehicular manslaughter and sentenced to fifteen years imprisonment.<sup>296</sup> Defendant appealed his conviction based on the unsworn jury, and the conviction was ultimately reversed on that ground.<sup>297</sup>

## B. Is an Improperly Sworn Jury Reversible Error?

Similar to most legal errors, the effect of an improperly sworn jury depends on how quickly it was noticed and brought to the court's attention. For error to be reversible, it must be preserved for appeal and be prejudicial, not harmless error.<sup>298</sup> The only way for unreserved error to be reversed on appeal is "plain," meaning that the error affected the defendant's substantial rights.<sup>299</sup>

### 1. Was There Error?

Under both a preserved error and plain error analysis, the first question is whether there was error. There is presumptively no error in an unrecorded oath<sup>300</sup> and no error in an improperly sworn jury as long as there was "substantial compliance" with the oath.<sup>301</sup> However, by contrast, if a jury is only partially sworn, belatedly sworn, or not sworn at all then it is error.<sup>302</sup>

More than a century ago, in *Baldwin v. Kansas*,<sup>303</sup> the Supreme Court addressed both the unrecorded oath and a substantially compliant oath.<sup>304</sup> The Court held that the record does not need to give the exact wording of the juror's oath, "especially in view of the statement in the journal entry that the jurors were 'duly' sworn."<sup>305</sup> Instead, once the oath has been noted on the record without any at-

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<sup>295</sup> *Id.*

<sup>296</sup> *Harris*, 956 A.2d at 206.

<sup>297</sup> 956 A.2d at 207-08.

<sup>298</sup> FED. R. CRIM. P. 52(a).

<sup>299</sup> FED. R. CRIM. P. 52(b).

<sup>300</sup> 129 U.S. at 55.

<sup>301</sup> *Id.*

<sup>302</sup> *United States v. Little Dog*, 398 F.3d 1032, 1036 (8th Cir. 2005) ("[I]t was error not to administer the oath to the jurors before the beginning of the trial.").

<sup>303</sup> 129 U.S. 52 (1889).

<sup>304</sup> *Id.* at 55.

<sup>305</sup> *Id.*

tempt to give its language verbatim, the “presumption will be that the oath was correctly administered.”<sup>306</sup> This presumption continues, with the Eleventh Circuit noting that “mere absence of an affirmative statement in the record, however, is not enough to establish that the jury was not in fact sworn.”<sup>307</sup> Also, the Maryland Supreme Court noted that the “presumption of regularity applies to the issue of whether a jury has been sworn.”<sup>308</sup> Finally, if an improperly sworn jury is given an oath in “substantial compliance” with statutory language or is given an oath that includes all of the essential elements, such as rendering a “true verdict” in accord with the “law and the evidence,”<sup>309</sup> any error is harmless because the oath is still “obligatory and binding.”<sup>310</sup> To be valid, the oath must only be administered “substantially in the manner prescribed by law.”<sup>311</sup>

However, the basic requirement that the jury be *somehow* sworn at the beginning of trial, either presumptively or substantially, necessitates that it is error for a jury to be only partially sworn, belatedly sworn, or not sworn at all.<sup>312</sup> As outlined above, error occurs because historically “juror” means someone who is “sworn,”<sup>313</sup> a sworn jury is necessary for the constitutional presumption of an impartial jury,<sup>314</sup> the oath legally and morally motivates jurors,<sup>315</sup> the oath legally creates the jury,<sup>316</sup> and the oath identifies the moment that jeopardy attaches.<sup>317</sup>

## 2. *Was the Error Prejudicial or Structural?*

The second question in a reversible error analysis is whether

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<sup>306</sup> *Id.*

<sup>307</sup> *United States v. Pinero*, 948 F.2d 698, 700 (11th Cir. 1991).

<sup>308</sup> *Montgomery v. State*, 47 A.3d 1140, 1148 (Md. 2012); *State v. Mayfield*, 109 S.E.2d 716, 724 (S.C. 1959) (“Absence of affirmative statement in the transcript that the jury was sworn furnishes no factual support for appellant’s contention that it was not.”).

<sup>309</sup> *Baldwin*, 129 U.S. at 55.

<sup>310</sup> *Preston v. State*, 90 S.W. 856, 856 (Tenn. 1905) (holding that a jury that was not sworn with the proper procedure was still binding).

<sup>311</sup> *Baldwin*, 129 U.S. at 55.

<sup>312</sup> *Little Dog*, 398 F.3d at 1036.

<sup>313</sup> DICTIONARY.COM, *Juror*, *supra* note 10.

<sup>314</sup> *Lockhart v. McCree*, 476 U.S. 162, 183-84 (1986).

<sup>315</sup> *State v. Davis*, 52 Vt. 376, 381 (1880).

<sup>316</sup> *United States v. Green*, 556 F.2d 71, 72 (D.C. Cir. 1977).

<sup>317</sup> *Martinez v. Illinois*, 134 S. Ct. 2070, 2074 (2014) (holding that jeopardy attaches at the oath).

the error was prejudicial or harmless.<sup>318</sup> Generally, an appellate court may not reverse if the error was harmless to the outcome of the trial.<sup>319</sup> Errors may be either “trial” errors or “structural” errors.<sup>320</sup> A trial error is an error during the trial that can be quantitatively assessed by a jury “in the context of other evidence presented.”<sup>321</sup> Trial errors are subject to a harmless error analysis,<sup>322</sup> in which the test is whether it is “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”<sup>323</sup>

Courts almost unanimously hold that that there was harmless error when a jury has been belatedly sworn.<sup>324</sup> One court explained that “the apparent majority view [is] that a failure to swear the jury until the case has commenced is generally harmless error, at least, where there is no actual prejudice shown and the oath is administered prior to deliberations.”<sup>325</sup> This holding seems to be consistent across the decades<sup>326</sup> and among jurisdictions.<sup>327</sup>

In contrast to trial errors, structural errors are errors in the mechanism or framework of the trial<sup>328</sup> that make the trial either “fundamentally unfair” or an “unreliable vehicle for determining guilt or innocence.”<sup>329</sup> Structural errors defy a harmless error analysis.<sup>330</sup> While few situations reach the stringent standard of structural er-

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<sup>318</sup> FED. R. CRIM. P. 52(a).

<sup>319</sup> 28 U.S.C. § 2111 (2015).

<sup>320</sup> *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

<sup>321</sup> *Id.* at 307–08.

<sup>322</sup> *Id.*

<sup>323</sup> *Neder v. United States*, 527 U.S. 1, 15 (1999).

<sup>324</sup> *State v. Godfrey*, 666 P.2d 1080, 1081 (Ariz. Ct. App. 1983).

<sup>325</sup> *Id.*

<sup>326</sup> *Little Dog*, 398 F.3d at 1036-37 (“In the absence of prejudice caused by the delay in administering the oath, the error is harmless.”); *Fedd v. State*, 680 S.E.2d 453, 456 (Ga. Ct. App. 2009) (holding that belated oath subject to harmless error analysis); *Stark v. State*, 97 So. 577, 577 (Miss. 1923) (holding that swearing three members of the jury after the state’s case-in-chief was harmless error); *State v. Frazier*, 98 S.W.2d 707, 716 (Mo. 1936) (holding that if the jurors are “sworn during the progress of the trial and before they had begun to deliberate” the error is harmless).

<sup>327</sup> *Cooper v. Campbell*, 597 F.2d 628, 629 (8th Cir. 1979) (holding that delayed swearing did not prejudice defendant’s “rights to a jury trial, fair trial or due process”); *United States v. Hopkins*, 458 F.2d 1353, 1354 (5th Cir. 1972) (evaluating belated oath for prejudice to defendant); *Hollis v. People*, 630 P.2d 68, 70 (Colo. 1981) (holding that “late administration of the jury oath by the trial court was harmless error”).

<sup>328</sup> *Fulminante*, 499 U.S. at 309; *Rose v. Clark*, 478 U.S. 570, 577-78 (1986) (internal citations omitted).

<sup>329</sup> *Rivera v. Illinois*, 556 U.S. 148, 160 (2009) (internal citations omitted).

<sup>330</sup> *Fulminante*, 499 U.S. at 309.

ror,<sup>331</sup> examples include deprivation of the assistance of counsel<sup>332</sup> and trial before a biased judge.<sup>333</sup>

In *Sullivan v. Louisiana*<sup>334</sup> the Supreme Court held that a constitutionally deficient reasonable-doubt jury instruction was structural error, not subject to a harmless error analysis, for two reasons: (1) because of the centrality of the reasonable-doubt instruction to the validity of the jury verdict and (2) because denial of the proper instruction was a non-quantifiable procedural error.<sup>335</sup> Similar to the deficient jury instruction, the centrality of the oath to the formation of the jury and the inability to quantify the impact of the error indicate that an unsworn jury should be categorized as structural error. To hold that failure to swear the complete jury is a mere trial error, and not a structural error, would require the jury to be able to evaluate the swearing error in the overall context of the trial proceedings.<sup>336</sup> Because one of the very issues is whether the jury itself has been legally formed, it would be absurd to claim that the jury in question could decide its own legitimacy. Consistent with the understanding that failure to swear the complete jury panel is structural error, even courts that willingly hold a belated oath to a harmless error standard “have no hesitation in finding reversible error [for an unsworn jury] even absent any showing of actual prejudice.”<sup>337</sup> An unsworn jury is structural error affecting the framework within which the trial proceeds that requires no showing of prejudice to the defendant.<sup>338</sup>

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<sup>331</sup> *Neder v. United States*, 527 U.S. 1, 8 (1999) (explaining that federal courts only find structural error in a “very limited class of cases”).

<sup>332</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>333</sup> *Tumey v. Ohio*, 273 U.S. 510 (1927).

<sup>334</sup> 508 U.S. 275 (1993).

<sup>335</sup> *Id.* at 281.

<sup>336</sup> *Fulminante*, 499 U.S. at 307-08.

<sup>337</sup> *State v. Godfrey*, 666 P.2d 1080, 1082 (Ariz. Ct. App. 1983).

<sup>338</sup> *Harris v. State*, 956 A.2d 204, 213 (Md. 2008). A “complete failure to swear the jury can never be harmless error” because a “jury which has never been sworn falls into the same ‘structural error’ category as a defective reasonable doubt instruction, the denial of a right to a jury trial, the total deprivation of counsel, discrimination in the selection of juries, etc.” *Id.*

However, while an unsworn jury defies a harmless error analysis upon direct appeal, a challenge to the sufficiency of an unsworn jury through a habeas petition in federal court under a Sixth Amendment ineffective assistance of counsel claim still requires a showing of prejudice. *Frashuer v. Clipper*, 2012 U.S. Dist. LEXIS 39767, 2012 WL 1004767 (N.D. Ohio 2012). Unlike a facial challenge to an unsworn jury as structural error, bringing a claim over counsel’s *failure to object* to the unsworn jury requires a showing of prejudice as part of the constitutional ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been differ-

### 3. *Was the Error Preserved for Appeal?*

When a jury is either partially sworn or not sworn at all, “it is incumbent upon the defense to raise an objection . . . at trial or risk waiving the issue on appeal.”<sup>339</sup> Due to the contemporaneous objection rule, if the error is not objected to at trial it generally has been forfeited on appeal.<sup>340</sup> The only exception, in which a court may reverse for unpreserved error, is when an appellate court conducts a discretionary review for plain error.<sup>341</sup>

If a jury has not been sworn and an objection is timely raised, the trial court has the ability to quickly address the issue by immediately swearing in the jury. Additionally, “if the *form* of the oath was defective, the attention of the court should have been called to it at the time the oath was taken, so that it might have been corrected.”<sup>342</sup> As already noted, a correct but belated oath is mere harmless error.<sup>343</sup> As such, a situation is very unlikely in which an objection has been properly preserved but the trial court did not address it. Were such a situation to occur, it would constitute preserved structural error, and the case would be subject to automatic reversal.<sup>344</sup>

Finally, due to the ease of fixing such an error at the trial court level after a proper objection, *knowingly* withholding objection to an unsworn jury in the hope of reversal on appeal,<sup>345</sup> waives the objection.<sup>346</sup> “A party cannot sit silently by and take the chance of

ent.”); *Lamar v. Hetzel*, 2014 U.S. Dist. LEXIS 78093 (S.D. Ala. 2014) (“That is, the error must be so serious ‘as to deprive the defendant of a fair trial.’ Here . . . [t]here is no showing that an unsworn jury somehow impacted the result of his trial.”).

<sup>339</sup> *People v. Abadia*, 767 N.E.2d 341, 349 (Ill. App. Ct. 2001).

<sup>340</sup> FED. R. CRIM. P. 51(b); *Puckett v. United States*, 556 U.S. 129, 134 (2009) (requiring a contemporaneous objection to preserve an issue for appeal).

<sup>341</sup> *United States v. Olano*, 507 U.S. 725, 734 (1993).

<sup>342</sup> *Baldwin v. Kansas*, 129 U.S. 52, 56 (1889).

<sup>343</sup> See *supra* notes 302-04.

<sup>344</sup> *Harris v. State*, 956 A.2d 204, 213 (Md. 2008). A “complete failure to swear the jury can never be harmless error” because a “jury which has never been sworn falls into the same ‘structural error’ category as a defective reasonable doubt instruction, the denial of a right to a jury trial, the total deprivation of counsel, discrimination in the selection of juries, etc.” *Id.*

<sup>345</sup> *Turrietta*, 696 F.3d at 986; *Wilcoxon v. United States*, 231 F.2d 384 (10th Cir. 1956) (holding that oath error was waived by counsel knowing but not objecting); *State v. Arellano*, 965 P.2d 293, 296 (N.M. 1998) (holding that defense counsel waived right to a sworn jury when “counsel knew of the defect in the proceedings and the right of a sworn jury, yet engaged in gamesmanship, waiting to see the result of the verdict before notifying the court”). Cf. *State v. Davis*, 52 Vt. 376, 382 (1880) (holding that the right to a properly sworn jury may not be waived by silence).

<sup>346</sup> *Olano*, 507 U.S. at 733 (“Waiver is different from forfeiture. Whereas forfeiture is the

acquittal, and subsequently, when convicted, make objections to an irregularity in the form of the oath.”<sup>347</sup> In *United States v. Turrietta*, despite inaccurately reasoning that the unsworn jury might not be constitutional error, the Tenth Circuit correctly concluded that the “crucial fact” was that defense counsel knew that the jury was not sworn, but chose not to object.<sup>348</sup> “Under these circumstances, the failure to make a contemporaneous objection was a matter of strategy, not neglect, and constituted consent to proceed with an unsworn jury.”<sup>349</sup>

The only exception to the requirement that error be preserved for appeal is a plain error analysis.<sup>350</sup> Plain error requires: (1) a showing of error; (2) a showing that the error was plain; and (3) a showing that the plain error affected substantial rights.<sup>351</sup> If these threshold elements are met, in the appellate court’s discretion, it may correct an error that “seriously affects the fairness, integrity, or public reputation of judicial proceedings,”<sup>352</sup> such as when an innocent defendant is wrongly convicted.<sup>353</sup> However, because a plain error review is discretionary, a threshold showing of error affecting substantial rights does not *require* reversal.<sup>354</sup> Due to the discretionary nature of the review, courts disfavor a plain error analysis and only apply it in limited circumstances.<sup>355</sup> For this reason, “a defect in the administration of the oath cannot rise to the level of ‘plain error.’”<sup>356</sup>

## CONCLUSION

Nearly ninety-five percent of the world’s jury trials occur in

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failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’ ”).

<sup>347</sup> *Baldwin*, 129 U.S. at 56.

<sup>348</sup> *Id.* at 986 (Kelly, J., concurring).

<sup>349</sup> *Id.*

<sup>350</sup> FED. R. CRIM. P. 52(b).

<sup>351</sup> *United States v. Cotton*, 535 U.S. 625, 631 (2002) (quoting *Johnson v. United States*, 520 U.S. 461, 466-67 (1997)).

<sup>352</sup> *United States v. Olano*, 507 U.S. 725, 734 (1993) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

<sup>353</sup> *Id.* at 736.

<sup>354</sup> *Puckett*, 556 U.S. at 135 (noting that if the first three parts of the plain error analysis are satisfied, the appellate court “has the discretion to remedy the error”).

<sup>355</sup> *Id.* at 134-35 (“If an error is not properly preserved, appellate-court authority to remedy the error . . . is strictly circumscribed. . . . Meeting all four prongs [of the plain error analysis] is difficult, ‘as it should be.’”).

<sup>356</sup> *Ex parte Borden*, 769 So. 2d 950, 955 (Ala. 2000).

the United States.<sup>357</sup> Each year an estimated 32 million people are summoned for jury service.<sup>358</sup> Of those summoned, nearly 1.5 million individuals are impaneled to serve<sup>359</sup> in one of the 154,000 estimated jury trials per year.<sup>360</sup> One court described such jury service as “a high duty of citizenship” in the “maintenance of law, order, and in the administration of justice.”<sup>361</sup> Jurors themselves described serving on a jury as an “awesome responsibility”<sup>362</sup> and “personally rewarding.”<sup>363</sup>

Both the defendant and society have an interest and expectation in having these juries properly sworn—a juror by historic definition is someone who is sworn, an “impartial” jury is one that can fulfill its oath, the oath is a legal and moral motivator for jurors, swearing the jury legally constitutes the jury with the powers of their office, and the oath is the moment that jeopardy attaches. The essential elements of the oath include impressing upon the jurors their sacred duty to render a “true verdict” in accordance with the law and the evidence. However, courts inconsistently handle irregularities in administration of the oath such as the unrecorded oath, the belated oath, the improper oath, the partially sworn jury, and the unsworn jury.

For these reasons, courts should uniformly hold<sup>364</sup> that the ju-

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<sup>357</sup> *Jury Information*, COLO. JUDICIAL BRANCH, <http://www.courts.state.co.us/Jury/Index.cfm> (last visited Apr. 19, 2016).

<sup>358</sup> D. Graham Burnett, *A Juror's Role*, 14 EJOURNAL USA 7, 8 (2009).

<sup>359</sup> *Id.* at 8.

<sup>360</sup> Fred Graham, *American Juries*, 14 EJOURNAL USA 4, 6 (2009).

<sup>361</sup> *Guide to Jury Service*, LANCASTER CNTY, PENN., CT. OF COMMON PLEAS, <https://palancastercountycourts.civicplus.com/136/Jury-Services> (last visited Nov. 25, 2014).

<sup>362</sup> Mary Angell, *A Juror's Oath, A Juror's Responsibility*, THE WYO. LAW., Apr. 2007, at 32.

<sup>363</sup> See St. Eve et al., *supra* note 90, at 89. Two judges after completing a survey of jurors explained that while “[s]ome may cringe at the prospect of jury duty, . . . in our experience, nearly all who serve take their obligation seriously and find the experience personally rewarding.” See St. Eve et al., *supra* note 90, at 89.

<sup>364</sup> It is important for Federal Circuit Courts and the United States Supreme Court to provide a clear precedent because district courts have denied that defendants have a constitutional right to a properly sworn jury due to the lack of a clear precedential ruling on this issue. See, e.g., *Anderson v. Rapelje*, No. 2:11-14825, 2012 WL 2720165, at \*5 (E.D. Mich. July 9, 2012) (reasoning that “there is no Supreme Court precedent which establishes a federal constitutional right that requires a state trial court to administer an oath to an empaneled jury”); *Pinkney v. Senkowski*, No. 03Civ.4820, 2006 WL 3208595, at \*1 (S.D.N.Y. Nov. 3, 2006) (evaluating a habeas petition claiming an improperly sworn jury and concluding that the “[defendant’s] claims, even if true, do not implicate a violation of a constitutional right or of federal law”); *Rodriguez v. Brown*, No. 11-CV-1246, 2011 WL 4073748, at \*10

ry oath is essential to legally form the jury,<sup>365</sup> and is constitutionally required as part of a jury trial under the Fifth Amendment for purposes of double jeopardy<sup>366</sup> and under the Sixth Amendment to create the “impartial” jury.<sup>367</sup> Additionally, tradition-based jurisdictions should codify their oath to clarify the procedural necessity of the juror's oath.

If an oath is not properly administered at trial and counsel raises an objection to the irregularity with the oath, the trial court may either grant a mistrial or properly swear the jury at the time of the objection, provided that the jury has not yet left to deliberate. If no objection is made at trial, the claim of error is forfeited on appeal. If counsel knew about the error and chose not to object, the error was waived and may not serve as a basis on appeal.<sup>368</sup> Due to the ease of correction at the trial court, such error does not rise to the level of plain error. However, the rare occurrence of a properly preserved objection to an unsworn jury is structural error necessitating automatic reversal on appeal regardless of a showing of prejudice.

The juror's “oath is administered to insure that the jurors pay attention to the evidence, observe the credibility and demeanor of the witnesses and conduct themselves at all times as befits one holding such an important position.”<sup>369</sup> The judicial system should ensure that these jurors are properly equipped, both legally and morally, through their oath to assume their temporary but significant societal office.

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(E.D.N.Y. Sept. 12, 2011) (holding that “[b]ecause there is no federal statutory or constitutional” requirement to a sworn jury, the defendant was not entitled to habeas relief for a defectively sworn jury).

<sup>365</sup> *United States v. Green*, 556 F.2d 71, 72 (D.C. Cir. 1977).

<sup>366</sup> *Martinez v. Illinois*, 134 S. Ct. 2070, 2074 (2014) (jeopardy attaches at the oath).

<sup>367</sup> *Lockhart v. McCree*, 476 U.S. 162, 183-84 (1986); *State v. Davis*, 52 Vt. 376, 381 (1880).

<sup>368</sup> *United States v. Martin*, 740 F.2d 1352, 1358 (6th Cir. 1984).

<sup>369</sup> *People v. Pribble*, 249 N.W.2d 363, 366 (Mich. Ct. App. 1976).