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Edward B. Lozowicki

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THE CALIFORNIA GRAND JUROR'S OATH: A RELIGIOUS TEST?

INTRODUCTION

Under present interpretation the Federal Constitution prevents both the federal government and the states from imposing religious tests as conditions on holding public office.[1] This prohibition includes oaths of office which incorporate a declaration of belief in God.[2] The California Constitution also proscribes such religious qualifications by prescribing an exclusive form for oaths of public office.[3] Although grand jurors are not clearly within the accepted definition of "public officer,"[4] they are classified as "officers of the court"[5] and "holders of a public trust."[6] If, as the United States Supreme Court held in *Torcaso v. Watkins*,[7] a notary public cannot be compelled to declare his belief in God as a condition of holding office, then the grand juror should not be subjected to a religious test since his responsibility to the public and to the persons with whom he deals is far greater.[8] Thus, at least the grand juror seems to fall within the strictures of *Torcaso*.

California has attempted to obviate the religious oath problem both constitutionally and statutorally. Besides the non-theistic form of oath provided in the state constitution,[9] the codes provide for petit jury oaths which make no reference to a deity.[10] Witnesses

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1 U.S. CONST. art. VI; Torcaso v. Watkins, 367 U.S. 488 (1961).

2 The lower court in the *Torcaso* case observed that the oath in question included the statement "I, Roger R. Torcaso, do declare that I believe in the existence of God." Torcaso v. Watkins, 223 Md. 49, —, 162 A.2d 438, 440 (1960).

3 CAL. CONST. art. XX, § 3. Construing this section the California Supreme Court stated: "[I]t would seem clear that any oath or declaration which imposes a religious or political test is prohibited." Pockman v. Leonard, 39 Cal. 2d 676, 682, 249 P.2d 267, 271 (1952) (dictum).

4 "So far as definition has been attempted, a public office is said to be the right, authority, and duty, created and conferred by law—the tenure of which is not transient, occasional, or incidental—by which for a given period an individual is invested with power to perform a public function for public benefit. The individual who occupies such an office is a 'public officer.'" People v. Rapsey, 16 Cal. 2d 636, 640, 107 P.2d 388, 390 (1940).

5 The grand jury is "an independent judicial body, the members of which are officers of the court." *In re* Peart, 5 Cal. App. 2d 469, 473, 43 P.2d 334, 336 (1935).

6 Schowgurow v. State, 240 Md. 121, —, 213 A.2d 475, 478 (1965).

7 367 U.S. 488 (1961).

8 Schowgurow v. State, 240 Md. 121, —, 213 A.2d 475, 479 (1965).

9 CAL. CONST. art. XX, § 3. The oath appears to be exclusive: "And no other oath, declaration, or test, shall be required as a qualification for any public office or employment." *Id.*

10 CAL. CODE CIV. PROC. § 604 (West 1955). This same form of oath is used in criminal trials. CAL. PENAL CODE § 1046 (West 1955).

may take a variety of religious oaths or, alternatively, an affirmation or declaration.[11] Within this system of alternative oaths for judicial proceedings there remains an anomaly: the grand juror's oath supplied in Penal Code section 911 explicitly requires the speaker to swear by God.[12]

The theistic grand jury oath, then, gives rise to two problems. First, may a person be excluded from the grand jury panel for refusal to take a theistic oath? Second, is a criminal defendant prejudiced when indicted by a grand jury composed solely of theists? In attempting an answer to these questions, this comment will first examine federal and then state constitutional objections to the theistic grand jury oath as presently required in California by Penal Code section 911.

THE OATH AS A RELIGIOUS TEST

In primitive belief the oath was regarded as an instrument of magic, a conditional self-curse by which the speaker invoked supernatural destruction on himself if the condition occurred.[13] But in contemporary thought the oath's power is subjective. "It must involve the calling to mind of some superhuman moral retribution which *according to the witness' belief* is calculated to induce him to refrain from false statements and thus to avoid the retribution."[14] In the modern oath the invocation, "so help me God," is a legal device which effectively deters false-swearing only insofar as there exists a supernaturally imposed sanction.[15] But in present-day law the existence of such a sanction is purely subjective—it requires the speaker's belief. Thus, to require a theistic oath is to require theistic belief. To condition jury service on the taking of a theistic oath is to impose a religious test.

In *Torcaso v. Watkins*[16] the Supreme Court held that a state could not exact, as a condition of holding office, that a notary public declare his belief in God as part of his oath of office.[17] Although the

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11 CAL. CODE CIV. PROC. §§ 2094-97 (West 1955).

12 CAL. PENAL CODE § 911 (West Supp. 1967).

13 Silving, *The Oath: I*, 68 YALE L.J. 1329, 1371 (1959).

14 6 WIGMORE, EVIDENCE § 1816 (3d ed. 1940) (emphasis added).

15 The religious oath has been criticized as illogical: "the turn of thought from the objective to the subjective level amounts to the fact that while the state itself has ceased to countenance the magic operation of the oath and is fully aware of its illogical nature, it, nevertheless, utilizes the fallacious belief of its citizens as a medium of legal control;" Silving, *The Oath: I*, 68 YALE L.J. 1329, 1371 (1959); and ineffective: "it may be questioned whether the oath exerts any deterrent effect on false swearing beyond that exerted by the fear of prosecution for perjury." 74 HARV. L. REV. 611, 612 (1961).

16 367 U.S. 488 (1961).

17 *See* note 2 *supra*.

state requirement struck down in *Torcaso* was an express declaration of belief in God,[18] the Supreme Court's prohibition should be equally applicable to the "so help me God" form of oath. Both declarations have the same force and effect—the speaker must believe in the existence of an avenging God.[19]

Reversed in *Torcaso*, the Maryland Supreme Court has developed a body of case law[20] applying the *Torcaso* rule where the competence of grand and petit jurors was conditioned on declaration of belief in God. In the precedent-setting case of *Schowgurow v. State*,[21] the Maryland court held unconstitutional article 36 of the Maryland Declaration of Rights, which rendered jurors incompetent for failure to declare a belief in God.[22] Although both *Torcaso* and *Schowgurow* involved requirements of an express declaration of belief, it seems that it is not the form of expression which renders such provisions unconstitutional, rather it is the requirement of belief which violates the first amendment. This conclusion necessarily follows because, to be efficacious, an oath sworn by God demands belief in God. Requiring religious belief in the form of a theistic oath rather than an express affirmation should not render the former constitutional. A theistic oath, then, is a religious test within the meaning of *Torcaso*.

First Amendment Objections: The Excluded Juror

As a matter of federal policy the test oath is abhorrent to the American tradition.[23] Article VI, clause 3 of the Constitution, by banning religious tests for offices and public trusts held under the United States, supports this policy.[24] Although the religious test-ban

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[18] "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God." Md. Declaration of Rights art. 37.

[19] Because belief was pre-requisite the atheist was incompetent as a witness at common law. Torcaso v. Watkins, 223 Md. 49, —, 162 A.2d 438, 443 (1960). This rationale is made express in the Maryland Constitution: "[N]or shall any person, otherwise competent, be deemed incompetent as a witness . . . provided he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his act, and be rewarded or punished therefor either in the world or in the world to come." Md. Declaration of Rights art. 36.

[20] *See, e.g.*, Schiller v. Lefkowitz, 242 Md. 461, 219 A.2d 378 (1966); State v. Madison, 240 Md. 265, 213 A.2d 880 (1965); Schowgurow v. State, 240 Md. 121, 213 A.2d 475 (1965).

[21] 240 Md. 121, 213 A.2d 475 (1965).

[22] "[N]or shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God." Md. Declaration of Rights art. 36.

[23] Girouard v. United States, 328 U.S. 61, 69 (1945).

[24] The colonists, themselves refugees from religious persecution, imposed religious tests on denominations differing from their own beliefs. This situation induced the

set forth in article VI does not apply to the states, it does portend the scope of the first amendment's protection,[25] applied to the states as a principle of due process.[26] The broad coverage of the first amendment was reaffirmed in *Torcaso*:

> [N]either a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[27]

Requiring the notary public to declare his belief in the existence of God as a condition to taking office was an invasion of his "freedom of belief and religion"[28] and could not be enforced against him.[29] If the requirement imposed upon the notary infringed his first amendment freedoms, as derived through the fourteenth amendment, the theistic oath imposed on the prospective grand juror has no less an effect.[30] First, the requirement of a theistic oath could exert both social and psychological pressure on conscientious non-theists, summoned on venire, to adopt accepted theistic beliefs.[31] The Maryland Supreme Court attempted to excuse this effect on the ground that a person is *not compelled* to believe if office-holding is conditioned on a declaration of theistic belief, since that person is *not compelled* to seek public office.[32] However the Supreme Court rejected this argument.[33] As one commentator noted, "there are few, if any, privileges or rights which citizens are forced to seek and enjoy,"[34] including the privilege of holding office. When government privileges are distributed the classification used in distribution must be based on reasonable distinctions; otherwise the parties against whom the distinction operates are denied equal protection of the laws.[35]

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drafting of Article VI, clause 3 of the Constitution. Torcaso v. Watkins, 367 U.S. 488, 491 (1961).

[25] *See* Torcaso v. Watkins, 367 U.S. 488, 491-92 (1961).

[26] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[27] Torcaso v. Watkins, 367 U.S. 488, 495 (1961). *Accord*, Everson v. Board of Educ., 330 U.S. 1 (1947). Justice Black's reliance on *Everson* in deciding *Torcaso* suggests that *Torcaso* was based on the "establishment of religion" clause. *See The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 143-44 (1961).

[28] Torcaso v. Watkins, 367 U.S. 488, 496 (1961).

[29] There are several popular religions considered non-theistic, for example, Buddhism, Taoism, Ethical Culture, and Secular Humanism. Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

[30] Schowgurow v. State, 240 Md. 121, —, 213 A.2d 475, 479 (1965).

[31] *See The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 143-44 (1961).

[32] Torcaso v. Watkins, 223 Md. 49, —, 162 A.2d 438, 442 (1960).

[33] Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

[34] 36 N.Y.U.L. REV. 513, 518-19 (1961).

[35] Wieman v. Updegraff, 344 U.S. 183 (1952); *Wieman* was cited for this general rule in *Torcaso*. 367 U.S. at 496.

Second, the efficacy of the religious oath in barring the unscrupulous from service is questionable. Because the effectiveness of the theistic oath depends on a subjective belief, honest non-believers are perfunctorily excluded while dishonest non-believers misrepresent their convictions and are impanelled.[36] This method seems to penalize honesty and reward false-swearing, an effect directly contrary to the obvious purposes of the oath.

Third, the historical experience which supports the *Torcaso* rationale seems equally relevant in the jury oath situation. Because the early settlers of the colonies, having themselves fled religious persecution, proceeded to enact their own discriminatory laws,[37] the framers of the Constitution included in article VI the provision that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." But dissatisfied with the guarantees contained in the original document, such as article VI, clause 3, the very people against whom those guarantees were directed brought pressure to bear on the states and the Bill of Rights was adopted, broadening the protection given religion. *Torcaso* brought the notary within this protection.

The strong constitutional policy announced by *Torcaso* militates against the legitimacy of Penal Code section 911.[38] Insofar as it precludes a grand juror from service for refusing to take a theistic oath, Penal Code section 911 is a violation of the juror's "freedom of belief and religion."

FOURTEENTH AMENDMENT OBJECTIONS: THE PREJUDICED DEFENDANT

Although religious discrimination against grand jurors clearly threatens rights contained in the first amendment, applied to the states as a matter of due process, prejudice to a defendant indicted by a grand jury impanelled under an unconstitutional regulation results from deprivation of rights contained in the fourteenth amendment. In *Thiel v. Southern Pacific Co.* the Supreme Court held as a matter of policy that:

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury[39] drawn from a cross-section[40] of the community. . . . This

[36] "[M]en's consciences grow so large that the respect of their private advantage rather induces men . . . to perjury." Slade's Case, 76 Eng. Rep. 1074, 1078 (K.B. 1602). *See* 36 N.Y.U.L. REV. 513, 519 (1961).

[37] *See* Torcaso v. Watkins, 367 U.S. 488, 491 (1961).

[38] CAL. PENAL CODE § 911 (West Supp. 1967).

[39] U.S. CONST. amend. VI.

[40] "[Cross-section] means a fair sample; and a sample drawn at random from

> does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community. . . . But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. . . . Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.[41]

This broad principle clearly applies to grand jury selection as well.[42] Within this principle a plethora of cases has arisen most of which find racial exclusion prejudicial to the defendant as a denial of equal protection.[43]

Moreover, in a long line of cases,[44] the Maryland Supreme Court has held that a defendant is deprived of equal protection when indicted by a grand jury which was selected under a state constitutional provision that conditioned competence on making a declaration of belief in God. Adhering to the prohibition against religious tests for public office announced in *Torcaso v. Watkins*[45] the Maryland court decided that the first amendment protected the grand juror as well as the notary public since the grand juror's duties and responsibilities are far greater.[46] Because the grand jury was, therefore, unconstitutionally composed solely of theists, the non-theistic defendant was denied equal protection by analogy to the racial exclusion cases.

The Exclusion Problem

In the racial exclusion cases[47] defendants were denied equal protection where members of their race were systematically or inten-

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the whole community will of course represent the distribution of wealth in the community as a whole, as it would represent the distribution of age, height, pre-disposition to sclerosis, or any other characteristic; but nobody contends that the list must be a sample of the whole community." United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950).

[41] Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946). The case was decided by the Court in its capacity as administrator of the federal court system. Thus the Court did not reach the issue of whether article VI of the Constitution applied also to the states.

[42] *Accord*, Chance v. United States, 322 F.2d 201 (1963).

[43] *See* Eubanks v. Louisiana, 356 U.S. 584 (1958); Reece v. Georgia, 350 U.S. 85 (1955); Hernandez v. Texas, 347 U.S. 475 (1954) (Mexican-Americans excluded).

[44] *See, e.g.*, Schiller v. Lefkowitz, 242 Md. 461, 219 A.2d 378 (1966) (defendant in civil action entitled to constitutionally selected jury); State v. Madison, 240 Md. 265, 213 A.2d 880 (1965) (defendant not a member of excluded class); Schowgurow v. State, 240 Md. 121, 213 A.2d 475 (1965).

[45] 367 U.S. 488 (1961).

[46] Schowgurow v. State, 240 Md. 121, —, 213 A.2d 475, 479 (1965).

[47] Cases cited note 43 *supra*.

tionally excluded from the grand or petit jury because of their race. Under the general principle enunciated in *Thiel v. Southern Pacific Co.*[48] exclusion on religious grounds is equally abhorrent to American tradition. However, in the racial discrimination cases defendant adduced evidence of actual exclusion of members of his race from the juries involved,[49] whereas there was no evidence of actual exclusion in *Schowgurow v. State.*[50] The Maryland Supreme Court distinguished the case on the ground that, while the racial exclusion cases contained an actual showing of discrimination, the statutes involved were ostensibly non-discriminatory whereas in *Schowgurow* the state constitution was discriminatory on its face.[51] Since compliance with this unconstitutional jury qualification must be presumed, a showing of actual exclusion was unnecessary.[52] It is settled that a statute which on its face excludes persons from the grand jury on the ground of race violates the fourteenth amendment.[53] In view of the *Thiel* principle, exclusion on the basis of religion is also unconstitutional.

Since Penal Code section 911 imposes a theistic grand jury oath which constitutes a religious test within the meaning of *Torcaso v. Watkins*, it seems discriminatory on its face. The non-theist indicted by a grand jury sworn under section 911 is denied equal protection of the laws in the same manner as the Negro defendant indicted by a grand jury from which members of his race have been excluded.[54]

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[48] 328 U.S. 217 (1946) *supra.*

[49] For example, in *Eubanks* one-third of the parish of trial were Negroes; a substantial number of these were qualified to serve on the grand jury; the jury commission had regularly picked Negroes for jury service since 1936; but only one Negro had served within memory, apparently because he was mistaken for a white man. Eubanks v. Louisiana, 356 U.S. 584 (1958).

[50] This was a point of dissent, 240 Md. at —, 213 A.2d at 485.

[51] *See* note 22 *supra.*

[52] "When the system of jury selection on its face shows discrimination and exclusion, an actual showing of discrimination on the basis of comparative numbers of the excluded and non-excluded classes on the jury lists is unnecessary." 240 Md. at —, 213 A.2d at 482.

[53] Strauder v. West Virginia, 100 U.S. 303 (1880). "Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the [fourteenth] amendment." *Id.* at 308.

[54] The Maryland Court has also ruled that a defendant could successfully quash the indictment even if he is *not* a member of the class excluded from the grand jury. Because the state constitution is discriminatory on its face, no individual prejudice need be shown. Where the method of trial is unconstitutional defendant cannot be tried without depriving him of due process. Moreover, to permit the non-theist to quash the indictment but deny it to the theist would be discriminating on the ground of religion—a classic example of denial of equal protection. State v. Madison, 240 Md. 265, 213 A.2d 880 (1965).

Although the Supreme Court has held that petitioner need not show that he was individually prejudiced, nor that he was one of the excluded class, in that case the court acted in the exercise of its power of supervision over the administration

CALIFORNIA CONSTITUTIONAL AND STATUTORY POLICY

Article XX, section 3 of the California Constitution provides an exclusive form of oath for all public officers and employees, including those judicial, and provides that "no other oath, declaration, or test, shall be required as a qualification for any public office or employment." Motivation for this provision was the infamous Statute of Charles II[55] which imposed loyalty oaths and religious tests.[56] Moreover the state constitutional framers were probably influenced by the ban on religious tests contained in article VI, clause 3 of the Federal Constitution.[57] While the language of a particular oath is not limited to the words of article XX, the form of words must not go beyond the intent, object and meaning of the State constitution.[58] Nevertheless, in view of the history of article XX, it seems that "any oath or declaration which imposes a religious or political test is prohibited."[59]

Although the grand juror has been termed an "officer of the court"[60] and "holder of a public trust,"[61] it is uncertain that he would be a "public officer"[62] within the scope of article XX.[63] While article XX, clause 3 may not directly control the constitutionality of the grand juror's oath found in Penal Code section 911, nevertheless California constitutional policy militates against religious test-oaths.[64]

California statutes provide a comprehensive system of alternative oaths for participants in judicial proceedings. Section 604 of the Code of Civil Procedure contains a simple form of jury oath for civil jurors which makes no reference to a deity.[65] This form is administered to criminal jurors under Penal Code section 1046.[66]

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of justice in federal courts and, hence, the decision does not control the fourteenth amendment issue. Thiel v. Southern Pac. Co., 328 U.S. 217 (1946).

55 25 Car. II, c. 2 (1673).

56 *See* Pockman v. Leonard, 39 Cal. 2d 676, 682, 249 P.2d 267, 271 (1952).

57 *Id.* at 691, 249 P.2d at 276 (dissent).

58 Cohen v. Wright, 22 Cal. 293, 310 (1863); *accord,* Pockman v. Leonard, 39 Cal. 2d 676, 249 P.2d 267 (1952).

59 Pockman v. Leonard, 39 Cal. 2d 676, 682, 249 P.2d 267, 271 (1952) (dictum).

60 *See* note 5 *supra.*

61 Schowgurow v. State, 240 Md. 121, —, 213 A.2d 475, 478 (1965).

62 CAL. CONST. art. XX, § 3; under the Constitution of 1879 the article included "holders of the public trust" as well as "public officers." But that phrase was deleted in 1952 and replaced with "[public] employment."

63 "The terms 'office' and 'public trust' have been said to be nearly synonymous . . . , but the particular positions to which they apply have not been clearly defined . . . . [T]he meaning and extent of the term 'office' tends to vary with the purpose of the statute in which it appears." Pockman v. Leonard, 39 Cal. 2d 676, 683, 249 P.2d 267, 272 (1952).

64 *Id.* at 682, 249 P.2d at 271 (dictum).

65 CAL. CODE CIV. PROC. § 604 (West 1955).

66 CAL. PENAL CODE § 1046 (West 1955).

Code of Civil Procedure, sections 2094 through 2097 provide a number of non-theistic oaths and alternate affirmations for witnesses.[67] Although section 2097 states that "Any person who prefers it may declare or affirm," that section is titled "Oath to witness" and it also incorporates the form of section 2094, the usual witness' oath.[68] Moreover Penal Code section 911, the grand juror's oath, is exclusive.[69]

Despite the fact that the grand juror's oath of Penal Code section 911 is exclusive there does not appear to be any policy which would militate against the adoption of alternate forms. In fact, the comprehensive system of alternatives for petit jurors and witnesses indicates a liberal legislative policy with regard to alternate forms of oath. By requiring an exclusive oath section 911 is an anomaly in this system and should be changed.

CONCLUSION

The familiar oath of the modern courtroom is derived from pre-religious rituals of primitive cultures. As a self-curse, dependant on magical power, the oath did not survive the rise of Western monotheism, but instead its magical power was replaced with the retributive power of the God of monotheistic religions.[70] In its subjective form, dependent on the individual's belief, the religious oath is not only illogical[71] but can be conducive of perjury rather than honesty.[72]

Since it requires the belief of the speaker the theistic oath is in reality a religious test and is therefore abhorrent to federal constitutional principles. In particular, the California grand jury oath may prejudice the rights of at least two parties. If the public official is denied freedom of belief and religion when required to make a declaration of belief as part of his oath of office,[73] the grand juror is also deprived of his rights when required to give a religious oath contrary to his belief.[74] If the criminal defendant is denied equal protection of the law when indicted by a grand jury from which

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[67] CAL. CODE CIV. PROC. § 2094-97 (West 1955).

[68] "You do solemnly swear (or affirm as the case may be), that the evidence you shall give in this issue . . . shall be the truth . . . ." CAL. CODE CIV. PROC. § 2094 (West 1955).

[69] "The following oath shall be taken by each member of the grand jury." CAL. PENAL CODE § 911 (West Supp. 1967).

[70] *See generally* Silving, *The Oath: 1*, 68 YALE L.J. 1329 (1959).

[71] *Id.* at 1371.

[72] *See* note 36 *supra.*

[73] Torcaso v. Watkins, 367 U.S. 488 (1961).

[74] Schowgurow v. State, 240 Md. 121, 213 A.2d 475 (1965).

members of his race have been excluded,[75] he is also denied equal protection when the grand jury is chosen solely from theists by force of a religious oath.[76]

Not only does California constitutional policy militate against the imposition of religious oaths,[77] but the statutes also reveal a legislative intent to provide alternatives to the religious oath.[78] Already an anachronism, the religious oath found in Penal Code section 911 is an anomaly in California's system of oaths for judicial proceedings and should be changed.

Edward B. Lozowicki

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[75] *See, e.g.*, Eubanks v. Louisiana, 356 U.S. 584 (1958).
[76] Schowgurow v. State, 240 Md. 121, 213 A.2d 475 (1965).
[77] Pockman v. Leonard, 39 Cal. 2d 676, 682, 249 P.2d 267, 271 (1952) (dictum).
[78] *See* statutes cited notes 65-67 *supra*.