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PROMISE, PRAYER, AND IDENTITY

Sherman J. Clark*

I. THREE FACETS OF AVOWAL

A recurring theme in Sanford Levinson's work is a certain distaste for, even wariness of, any form of blind allegiance or thoughtless conformity. For example, when it comes to the awe and reverence Madison hoped the Constitution would inspire, Levinson is avowedly and notoriously Jeffersonian.¹ We should, he urges, have the courage and integrity constantly to question, to push for change, to resist ossification.² I take as my starting point here just one manifestation of this theme in Levinson's scholarship—his uncertainty about the swearing of oaths. In 1987, Levinson was asked to participate in a ceremonial signing of the Constitution in Philadelphia. That provided for him the occasion to think through what it means—and what it ought to mean—to sign the Constitution. First in an article, and then in a book, Levinson explored the implications of swearing allegiance, in the context of the Constitution and elsewhere.³ Why are naturalized citizens required to take an oath of allegiance, while birthright citizens are not? In what ways are citizenship oaths like or unlike other significant vows and oaths, such as marriage vows, or religious affirmations of various sorts? What can be learned by thinking about the various circumstances under which explicit public avowals are or are not required? And this in particular seems to concern Levinson: How can one swear allegiance to a set of propositions that one does not truly understand?⁴

Every day people take wedding vows, swear oaths of office, and sign honor codes of various sorts. Trial witnesses promise honest testimony, school children pledge allegiance to the flag, and taxpayers attest to the accuracy of returns. What are we to make of this array of practices? Is all this swearing and vowing merely

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1. Sanford Levinson, *Why It's Smart to Think about Constitutional Stupidities*, 17 Ga. St. U. L. Rev. 359, 360 (2000) ("Much of what I have written over the past two decades argues that we have, as a culture, accepted far too much a Madisonian posture of 'veneration' of the Constitution and that we could do with a far more Jeffersonian spirit of questioning.").

2. *Id.*

3. Sanford Levinson, *Pledging Faith in the Civil Religion; Or, Would You Sign the Constitution*, 29 Wm. & Mary L. Rev. 113 (1987); Sanford Levinson, *Constitutional Faith* (Princeton U. Press 1988) [hereinafter Levinson, *Constitutional Faith*].

4. Levinson, *Constitutional Faith*, *supra* n. 3, at 122-26.

an archaic and irrelevant holdover from a different age, or, even worse, an exercise in hypocrisy and disingenuousness? Or do oaths and vows serve some important and potentially appealing ends? Are these merely an ad hoc set of phenomenon which all happen to employ the device of avowal in some form or another? Or are there common threads?

In thinking about these questions, it seems to me that a shift in focus may be illuminating. Rather than looking primarily at what has been promised to whom, or at the legal or other external consequences of breach, I am interested in the way in which a particular act of swearing may be experienced by the person making the avowal. Being neither psychologist nor social scientist, I should not be read as making empirical claims about the efficacy of various particular oaths and vows. My hope is rather to identify a theoretical framework that might help illuminate current practice. Is there an as-yet-unarticulated theory of the oath operating implicitly within—and perhaps helping to unify conceptually—our diverse current social practices of public formal swearing? What assumptions are revealed or suggested by our various uses of oaths and vows? Is there a plausible and compelling way of understanding the social role of formal oaths that might shed light on the questions implicit in Levinson's skeptical stance towards formal avowal?

To this end, I believe it useful tentatively to identify three facets of public profession—three different though interrelated functions that might be performed by a process of formal swearing or avowal. For want of better terms, these might be referred to as promise, prayer, and identity.

Most obviously, a formal oath serves as a form of promise, presumably one of particular importance or significance. The purpose of the oath on this view is to highlight the seriousness of a particular obligation, as well as frequently to add consequences to a breach. Any account of the role of oaths and vows will have to make space for and acknowledge this most obvious facet of formal avowal—that of oath as a formalized, externally-directed promise. However, an oath may under the right circumstances perform less obvious but equally important functions. For example, a second role potentially performed by an oath is that of articulating aspiration. Picture an Eagle Scout raising his right hand and vowing to keep himself “physically strong, mentally awake, and morally straight.”⁵ He is not so much assuming a set of concrete obligations as making a statement about his aims and aspirations; it is less promise than prayer. Finally, and most subtly, it seems to me that an oath can under some circumstances come to play a deeper role still—as part of a process of personal transformation or identity formation. The vows

5. The Scout Oath reads: “On my honor I will do my best to do my duty to God and my country and to obey Scout Law; to help other people at all times; to keep myself physically strong, mentally awake, and morally straight.” Boy Scouts of Am. Natl. Council, *Scout Oath (or Promise)* <<http://www.scouting.org/nav/enter.jsp?c=xm>> (accessed Feb. 22, 2003). This ought perhaps to be read in conjunction with the Scout Law, which provides that a Scout must be “trustworthy,” “loyal,” “helpful,” “friendly,” “courteous,” “kind,” “obedient,” “cheerful,” “thrifty,” “brave,” “clean,” and “reverent.” Boy Scouts of Am. Natl. Council, *Scout Law* <<http://www.scouting.org/nav/enter.jsp?c=xm>> (accessed Feb. 22, 2003).

taken by members of religious orders might be a particularly clear example. One who takes religious vows is not merely making a set of externally-directed promises, and not simply articulating a set of aspirations, but rather is likely engaged in a process of transformation, in which the vows will come to play a role in his or her sense of self.

I refer to these as aspects of avowal, rather than types or categories, because few if any sworn obligations will consist entirely of one form or another. A wedding vow, for example, is experienced by many as among the most constitutive of oaths; yet it also contains elements of contract-like promising, as well as ample measures of hortatory aspiration. Indeed, my suggestion is that many oaths that are not so obviously part of a personal transformation as are wedding vows or religious orders might still have subtle but important constitutive components. In particular, my interest is in the relationship between the external constraints of enforceable obligation and the identity-based bonds of constitutive avowal.

Viewed from this perspective, my tentative thesis is this: formal avowal may under some circumstances best be understood as a way of trying to attach promise to identity—to transform an outwardly directed obligation into an internally-enforced aspect of self. If so, the act of avowal will not be fully comprehensible if viewed solely as a promise to do or eschew certain acts, or as an expression of agreement with or commitment to a set of propositions or principles. Rather, at least some public professions ought to be understood and evaluated not just as promises or assertions of belief, but as acts of self-definition. As a medical ethicist put it in the context of the Hippocratic Oath, “an oath seems to involve the person of the swearer more deeply than a promise involves the person of the promisor It is not merely a commitment to do something or not to do something. It is a commitment to *be* a particular sort of someone.”⁶

At one level, this analytical starting point is not new, and should not be particularly controversial. Levinson himself recognized, in the context of marriage vows at least, that oaths can under some circumstances be constitutive.⁷ So far, however, this insight has not been pursued. Levinson, for example, seemed to suggest that only truly intimate connections like marriage can be understood in this way.⁸ My aim here is to question this implied limitation, and to extend the analysis of constitutive avowal to a wider range of circumstances. One key, I suggest, is to recognize that it may be the *promise*, rather than necessarily the *promisee*, which becomes an aspect of identity. Put differently, I focus on the inward-looking aspects of avowal—on what a person may understand it to mean to be the kind of person who has made a particular sworn commitment. In this essay, I attempt to explore this idea in the context of several different sorts of oaths and vows, including the citizenship oath, the trial oath, the marriage vow, and the military enlistment oath. Through these examples, a number of points

6. Daniel P. Sulmasy, *What Is an Oath and Why Should a Physician Swear One?*, 20 *Theoretical Med. & Bioethics* 329, 332 (1999).

7. Levinson, *Constitutional Faith*, *supra* n. 3, at 99.

8. *Id.* at 107-14.

emerge. For example, clarifying the propositional content of an avowal may not always be crucial. To the contrary, a certain vagueness, or capaciousness, may be essential to the constitutive function of many oaths and vows. At the same time, the ceremonial or ritual aspects of oaths may be more important than is often acknowledged.

I should acknowledge here a connection between this and other work in which I have tried to think about the meaning, as well as the consequences and/or normative status, of key legal rules or institutions.⁹ It seems to me worthwhile to pay attention to the role potentially played by significant legal and social practices—including the oath—in the construction and articulation of both individual and community identity. In this as in other contexts, it would be helpful if social scientists would turn their attention to the question of what the law's practices may mean in the lives and self-understandings of those engaged in them. In the meantime, what we as lawyers can and ought to do—and what I try to do here in the first part of this essay—is to frame the relevant debates in ways which acknowledge the possibility that some important legal institutions, including oaths and vows of various sorts, may be as significant for their meanings as for their consequences.

The other thing we can and ought to do, of course, is highlight the potential legal implications of this altered perspective. Without claiming in any way to have proven the validity of the implicit social theory that seems to underlie the oath, it is possible to say something about what it might mean to embrace such an account. If it is true that oaths can and do play the constitutive role I would attribute to them, what follows? In the second part of this essay, I offer a set of tentative thoughts about the implications of this approach. I suggest that despite the capacity of an oath under certain circumstances to internalize obligation, it would probably not be wise policy to multiply the use of oaths and vows. On the contrary, it seems to me that there are relatively tight constraints on the circumstances under which we can expect the oath to perform this function well. For example, one important element seems to be historical resonance,¹⁰ which is difficult if not impossible to fabricate or create. The tentative implication of my account, therefore, is not that we should use more oaths, but rather that we should think carefully about when, where, and how we use them.

II. EMBEDDING PROMISE IN IDENTITY

Some obligations and attachments are experienced as aspects of identity. I am a member of a particular family, of a particular faith, and of a particular academic faculty. I am also a husband and a father. At different times in my life, I have been a student, a soldier, and a member of various teams. These things play a role in my sense of who I am, and thus influence my thoughts and actions in

9. See e.g. Sherman J. Clark, *The Courage of Our Convictions*, 97 Mich. L. Rev. 2381 (1999); Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 Neb. L. Rev. 1258 (2003).

10. See *infra* pt. III.

ways I am sure I could never fully describe. I begin, therefore, with what ought to be the uncontroversial assumption that I am not alone in this regard. People's behavior is influenced not just by conditioned reflexes, not just by considered judgments about abstract moral principles, and not just by calculations of cost and benefit, but also by their sense of who they are, which is in turn in part a product of their significant attachments and commitments.¹¹

Granted, however, that some obligations and attachments can be constitutive in this way, the question remains as to what role if any is played by an oath or pledge. Some sworn obligations are understood as aspects of identity, but so too are some connections not accompanied or reinforced by formal avowal. Consider, for example, those connections described by Levinson, following Werner Sollers, as arising out of "descent" rather than "consent," the paradigmatic example being one's connections with and obligations to parents and siblings.¹² Filial obligations are rarely if ever accompanied by oaths or vows, yet can be among our most defining relationships, demonstrating that an oath is clearly not a necessary condition for constitutive attachment. In this light, what function is performed by the act of swearing? Does a formal oath serve merely to mark or highlight some, but certainly not all, important or potentially constitutive obligations? Put differently, what difference does it make, *vis-a-vis* the constitutive nature of a given commitment, whether that commitment has or has not been formalized in a certain way, or accompanied by a particular ritual? Consider, for example, the response an unmarried but committed couple might give when asked when and if they plan to marry. Why should they require a "piece of paper" to demonstrate the depth of their relationship?

This imagined response raises the possibility that formal oaths are simply irrelevant—anachronistic holdovers from bygone ages, with neither meaning nor significance apart from the legal consequences we choose to attach to the breach of certain sworn obligations. A moment's reflection, however, reveals the inadequacy of this explanation. First of all, people behave as though at least some oaths make a difference. People continue to marry, for example, and continue to act for all the world as though it means something to do so. To consider a radically different example, academics who in the 1950s refused to take loyalty oaths, and who lost their jobs as a result, certainly seemed to evince a belief that the meaning of an avowal can be as important as its consequences.¹³ More to the point, the deep historical and cultural roots of various forms of swearing, though not my focus here, are evidence of potential significance, rather than indicia of anachronism. When a practice crosses wide temporal and cultural gulfs, or seems to reinvent itself again and again in widely varying circumstances, it seems sensible

11. Obviously, I do not mean to suggest that habit, morality, or self-interest play no role in behavior, but rather to explore one of the myriad ways in which they may intersect, in the form of identity, to do so.

12. Levinson, *Constitutional Faith*, *supra* n. 3, at 94-95.

13. See e.g. David P. Gardner, *The California Oath Controversy* 65-67 (U. Cal. Press 1967).

to ask whether that practice might be serving some purpose, even filling some sort of need.

Under the right circumstances, I suggest, an oath can be more than a mere marker. Given the right connection between a sufficiently meaningful, voluntarily-assumed commitment and a sufficiently resonant process of ritual elocution, a formal avowal may help to transform an outwardly directed promise into an aspect of identity. The purpose of an oath, on this account, is not just to change the legal or moral consequences of breaching a particular sworn obligation, but also to change the meaning of doing so.

Consider, for example, the oath that naturalized citizens are required to take, in which the new citizen in a “public ceremony” vows, *inter alia*, to “support and defend the Constitution and laws of the United States . . . [and] bear true faith and allegiance to the same.”¹⁴ At one level, this oath, which is generally taken in court,¹⁵ simply operates as a formal promise—an enforceable agreement on the part of the new citizen to do certain things and eschew others. At the same time, it seems to mean much more than that to many of those who take it. For example, Levinson opens his book *Constitutional Faith* with an account of the way in which Felix Frankfurter, who reflected upon his father’s taking of the oath, and Professor Salvemini of Harvard, who had taken the oath himself, each viewed the oath as something deeply significant and even “joyous.”¹⁶

The question posed by Levinson, however, is this: How can we understand this seemingly blind embrace of a system, a Constitution, which is not only vague and ambiguous, but in many ways imperfect if not problematic? How to explain the apparently uncritical willingness on the part of otherwise brave and thoughtful people to sign on to the whole thing as though it were the very epitome of perfection? My suggestion is that taking the oath of citizenship is better understood as the act of embracing American identity, as represented by the Constitution, rather than as agreeing to a set of propositions. This is more consistent with Salvemini’s account of the Constitution as standing for “an ideal life,” as well as Justice Frankfurter’s account of the Constitution as implying

14. 8 U.S.C. § 1448(a) (2000). The “Oath of Renunciation and Allegiance” provides,

A person who has applied for naturalization shall, in order to be and before being admitted to citizenship, take in a public ceremony before the Attorney General or a court with jurisdiction under section 1421(b) of this title an oath (1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the applicant was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5)(A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or (C) to perform work of national importance under civilian direction when required by the law.

Id.

15. 8 U.S.C. § 1421(b) (2000). The oath may also be taken before the Attorney General. *Id.* § 1421(a).

16. Levinson, *Constitutional Faith*, *supra* n. 3, at 3.

“devotion to certain feelings and ideas and ideals summarized as a requirement that they be attached to the principles of the Constitution.”¹⁷

Levinson, being one of the nation’s leading thinkers on constitutional law, has devoted a great deal of time, energy, and thought to explicating and critiquing the propositional content of the Constitution. In the context of the citizenship oath, however, as opposed to in the development of legal doctrine, the propositional content may not be at all central to its meaning. In this situation, the Constitution is a symbol—not a *mere* symbol, as one may be tempted to add *sotto voce*, for my very point is that there need be nothing “mere” about it. It is a symbol of vital importance in the lives of these and other thoughtful people. It is a representation of the kind of life they hope to lead, the kind of community they want to be a part of, and, ultimately, the kind of person they hope to be. The oath they take is not primarily about what the Constitution says as a legal document, which Levinson correctly points out is a difficult thing for anyone to describe with confidence, let alone evaluate in wholehearted terms. Their vow is as much about what the Constitution stands for to them. This shift in focus might help explain a great deal. Above all, it might help explain how people can swear to something they do not clearly understand.

Again, the first and most obvious purpose of an oath is simply to formalize a promise—a way to insure that people fully understand the content and significance of the obligations they are incurring. For example, the oath taken by trial witnesses is intended in part to highlight the seriousness of the occasion, and to bring home to witnesses the importance of the obligation to give truthful testimony.¹⁸ Along the same lines, an oath may attach consequences to the breach of the sworn obligation, thus the trial oath not only highlights an obligation to be truthful, but serves as well as a verbal act, invoking and making applicable the penalties of perjury. This understanding—oath as solemnized promise—makes the substantive content of an avowal seem to be of primary importance. Indeed, it seems almost obvious that an important question to ask about any legal or contractual obligation is the question of just what the obligation entails. How much more important, therefore, to be clear about the requirements embodied in those obligations considered important enough to be formalized and sworn to in the form of oaths or vows of various sorts?

Levinson acknowledges that perhaps communities need borders, if not through which to define themselves, at least in order to mark out a territory—a subset of humanity—to be subsequently defined.¹⁹ Perhaps oaths help play this role. They mark out and fence off the crucial borders of community membership. On this account, the oath says something like this: “whatever else you do or

17. *Id.*

18. See e.g. *McCormick on Evidence* § 245 (John W. Strong ed., 5th ed., West Group 1999) (“The oath may be important in two aspects. As a ceremonial and religious symbol, it may induce a feeling of special obligation to speak the truth, and it may also impress upon the witness the danger of criminal punishment for perjury, to which the judicial oath or an equivalent solemn affirmation would be a prerequisite condition.”).

19. Levinson, *Constitutional Faith*, *supra* n. 3, at 98.

believe—whatever diversity we encompass—*this* much you must agree to. *These* things are fundamental prerequisites to being inside rather than outside.” On this score, Levinson’s query leaps into prominence. Should we not consider it vital to define with some precision these fundamental boundaries?

If, on the other hand, one focuses on the oath as an act of self-definition, the vagueness of an avowal’s propositional content may be less problematic. Indeed a certain capaciousness may be necessary if an oath is to serve a constitutive and potentially unifying role for more than a very focused set of people. Instead of thinking of an oath as defining the borders of a particular community, at least some oaths might be better thought of as providing rallying points. An oath, on this reading, is less fence than flag. If an oath were like a fence, designed to police the question of who is in and who is out, its meaning would need to be relatively precise. A flag, however, is not intended to draw a line between in and out. It may look different from different angles; and its precise contours may remain subject to debate.

Seeing the oath as flag rather than fence highlights as well its aspirational component. The idea of American community symbolized by the Constitution is arguably understood as something not so much agreed to as aimed for. It might seem as though this understanding reintroduces the vagueness problem. How can one aim at something one does not truly comprehend? There is a sense, however, in which precision is the enemy of aspiration. We all want to be kinder, wiser, and more brave, despite the fact that none of us could easily define any of those traits. These are ways of capturing and evoking a comprehensible if irremediably vague set of notions about who we want to be. In its aspirational aspect, an oath may be in this way beacon-like, rather than rule-like—it does not say “do these things” so much as “come this way.” If something is sufficiently far away, we can follow it without agreeing on, or even purporting to know, precisely where it is.

Here let me emphasize explicitly what is already implicit in this account. These three dimensions of avowal—promise, prayer, and identity—are closely and intimately connected to one another. My central claim is that we define ourselves in part by what we have promised (the connection between promise and identity). But it is clearly also true that we define ourselves in part by what we aspire to, and that our aspirations both drive and are driven by our various commitments. I identify these three facets separately not to suggest that they are distinct, but rather in an effort to outline a fuller picture of what is often implicitly portrayed as a one-dimensional practice.

Returning to the example of the citizenship oath, what response does a theory of constitutive avowal give to Levinson’s query as to why we require naturalized citizens to take the oath, but not those born in the United States? Levinson recognizes that one possible explanation may be the assumption that many of those born in the United States will have soaked up constitutional values by osmosis, as it were, and thus may not require an oath to bind them to

constitutional fidelity.²⁰ He points out that this is an empirical assumption, his clear implication being that the assumption is unjustified.²¹ How much do we really think most Americans know enough about what the Constitution requires? How certain are we that most Americans truly embrace those requirements? If we view the oath as set of propositions to be agreed with, Levinson's skepticism here is no doubt well-placed. If, however, we view the oath as a speech act embracing and solidifying an aspect of identity, rather than primarily as an expression of agreement with concrete legal requirements, or even as an agreement to be guided by certain broad, abstract principles, it makes more sense. It does seem safe to say that those born and raised in the United States are more likely to feel some sense of American-ness, even if they might not be able to articulate, much less agree upon, exactly what that means.

The citizenship oath, like a wedding vow, marks a crucial life change for many of those who take it, so perhaps it should come as no surprise that it has this sort of constitutive function. The ability of an avowal to touch upon identity, however, need not be seen as limited to fundamental transitions such as emigration or marriage. Some less obviously formative oaths might likewise best be understood as efforts to embed promise in identity.

Take for example the trial oath adverted to above. Trial witnesses are required to make an "oath or affirmation" that they will testify truthfully.²² Again, it is generally said that the testimonial oath has two purposes: (1) to bring home to the witness the seriousness of the obligation to be truthful; and (2) to attach the potential penalties of perjury to a failure to do so.²³ It seems to me, however, that we actually rely upon the oath to do something more and subtly different. In addition to informing or reminding the witness of an obligation already implicit in the nature of the proceedings, we hope that the taking of the oath will actually generate in the witness an internally-experienced obligation—beyond that created by any fear of prosecution—to be truthful. How so? Traditionally, the idea seems to have been that people will, out of fear for their immortal souls, hesitate to lie under oath.²⁴ To the extent that this explicitly religious motive might seem to have substantially less force in our secular age, we have been forced to look elsewhere for an explanation for the presumed operative force of the witness oath.²⁵ By default, almost, we seem to have retreated into a view that the significance of the speech act lies primarily in its legal consequences. We may, however, have abandoned the traditional understanding prematurely. An oath might well

20. *Id.* at 106.

21. *Id.*

22. See e.g. Fed. R. Evid. 603 (2001) ("Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").

23. See *supra* n. 18.

24. In the English common law, the trial oath was not only relied upon but was indeed central to adjudication. See Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800*, at 7 (U. Chi. Press 1985).

25. I do not mean to dismiss the possibility that the traditional motive retains substantial force for at least some witnesses.

operate on the identity, if not the soul, of a witness in ways which do not require—though do not preclude—religious meanings.

I suggest that the taking of the trial oath may, depending upon how it is experienced by the swearer, change the meaning, as well as the potential consequences, of lying on the witness stand. It may limit the range of ways in which one can explain and justify to oneself the act of giving false testimony. In particular, having sworn to tell the truth, it may be harder to disregard or insulate oneself from the implications of lying. There may be many circumstances in life under which it is acceptable, even appropriate, to shade the truth. In those circumstances, perhaps, one can avoid the implication that the telling of a lie says anything about oneself—about whether one is, in some deeper sense, a true and honest person. If, however, the oath does have the effect of imbedding the promise in one's sense of who one wants to be, it may be harder to dissociate oneself from the lie. If many people are less religious than they once were—if the self has become more sacred than the soul—it makes sense to try and root obligation in the search for identity, much as we once hoped to root it in the hope for salvation.

Obviously, the oath does not have some sort of magical ability to transform an obligation automatically or entirely into an aspect of self. Crucially, the oath is part of a larger communal or ceremonial context. Moreover, the effect is hardly likely to be instantaneous. I suggest merely that, under certain circumstances, a process of formal avowal might, over time, result in the partial embedding of obligation in identity, in such a way as to reduce the need for external, deterrence-based enforcement of the underlying commitment.

In a symposium devoted to the work of Sanford Levinson, it may be appropriate for me to follow his example and draw on my own experience in thinking about the circumstances which an oath might work its effect gradually over time. Although I have never been asked literally to sign the Constitution at Philadelphia, I was asked on an important occasion some twenty years ago to swear fidelity to that document, as well as to avow a range of similar obligations. The occasion was my enlistment in the United States Army. I am sure that I cannot recall what I was thinking at the precise moment when I stood with a row of volunteers and raised my right hand. I know that I soon forgot the precise words and propositional content of that oath.²⁶ I also know, however, that the oath soon came to mean much more to me than the sum of its propositional content.

I had, in fact, been put on notice that military enlistment would be constitutive rather than merely contractual, though the person who explained that

26. The oath I took is the same one currently required of military enlistees by 10 U.S.C. § 502 (2000):

"I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God."

to me certainly did not use those words. Although I ended up enlisting in the Army, it was actually a Marine Corps recruiter who tried to clue me in. I recall vividly my visits to the local recruiting offices of the Army, and of the Marine Corps. The Army recruiter talked to me about the benefits I would receive if I enlisted—in particular a nice enlistment bonus upon entry, and money for college when I got out. The next day I visited the Marine recruiter. I told him about the things the Army had offered and asked him about the benefits being offered by the Marine Corps. “What,” I asked the Sergeant behind the desk, “can you do for me?” He paused for a moment, and looked at me intently. “Maybe,” he said deliberately, pausing again, “we can make you a Marine.” Although the Marine Corps recruiting technique was less effective in my case, it was fundamentally more honest.

The transformation did not happen overnight, but by the time I finished my initial training and settled into my permanent duty station, I had come to understand that I was not just a person who had agreed to spend a certain amount of time in the Army. I had come to see myself as a soldier—a self-conception which had a certain amount of influence over not only my behavior when actually on the job in uniform, but across the board. How I behaved in a range of circumstances, how I thought and talked about duty and responsibility, even how I dressed when off duty; all these things were subtly but undeniably influenced by my sense of what it meant to be a soldier. Further, at least in the context of volunteer armed services, there can be no doubt that the oath played some role in the construction and development of that identity. “Nobody forced you to raise your right hand” was a constant refrain in basic training and beyond.²⁷ In part, of course, this admonition was simply a reference to the voluntary nature of the commitment. The implicit point, however, was not that one had agreed to suffer this or that particular indignity or inconvenience associated with military service, but that one had voluntarily chosen to be a soldier.

Obviously, the swearing of a vow does not guarantee compliance with the underlying promise or commitment. People can and do choose to break their vows; they lie under oath, cheat on their spouses. My claim is not that the taking of an oath works some subtle magic that somehow takes away one’s ability to choose to breach the relevant obligation. Rather, a formal avowal can change the terms of that choice. Under some circumstances, an oath can be part of a larger process through which one changes what it would mean to violate a particular sworn commitment.

III. WHERE TO SWEAR?

If avowal can indeed function to internalize obligation, should oaths be used more often? As “law and norm” theorists have rediscovered, legal rules may be

27. Interestingly, ancient Roman military practice seemed implicitly to acknowledge the gradual process of becoming a soldier by employing a two-part swearing process. When undertaking to serve, a soldier would take an initial oath known as the *sacramentum*. At a later phase, the soldier would complete the transition with a second oath known as the *iusiurandum*.

more effective if crafted with an awareness of their social meaning.²⁸ In particular, people may be more likely to follow a particular rule, or cooperate with a particular administrative scheme, to the extent that they understand it as in some sense their own, and not merely imposed from without.²⁹ Following this logic, could we generate higher rates of compliance with legal rules by requiring or encouraging people to swear oaths of various sorts? In general, I think not. There may be limited circumstances where formal oaths might be useful, but it seems to me that trying to require the swearing of oaths and vows in a wide range of circumstances would not be helpful, and might well be counterproductive. The paradigmatic case of failure in this regard is the attempt by various institutions during the early years of the Cold War to require the swearing of “loyalty oaths” disavowing any connection to or sympathy with the Communist Party.³⁰ As is well documented, many resisted and even refused to sign such oaths, even when confronted with substantial professional or personal costs. More to the present point, however, is the utter absence of any evidence that the oaths were effective even among the many who did agree to sign. Do we really believe that Cold War loyalty oaths produced any increase in the actual loyalty of those who felt obligated to sign?

Drawing on this negative experience, and in light of the account offered here, what are the circumstances under which processes of formal swearing might be more effective? In particular, under what conditions might we reasonably expect an oath to perform the embedding function described above?

As a threshold matter, it seems safe to say that an oath will be more effective—more likely to embed itself as an aspect of identity—when the obligation being sworn to is understood as voluntary. This does not mean that only voluntary obligations can be constitutive. Again, it is quite likely that at least some un-chosen obligations, including not just familial connections but also certain religious or ethnic affiliations, will be experienced as aspects of identity. My claim is simply that the taking of a formal oath is unlikely to generate a constitutive obligation—unlikely to perform the hypothesized function of embedding promise in identity—if the underlying commitment is experienced as coerced. Forcing people to swear fidelity to rules or principles they do not truly embrace is more likely to produce resentment and hypocrisy than respect and compliance.

In thinking about the efficacy of swearing, moreover, it may be misleading to draw a sharp dichotomy between voluntary and involuntary oaths. In many cases, an oath of some sort is required as a condition of membership in a particular community. New citizens must avow their allegiance in order to become naturalized. Military enlistees must take an oath if they want to become soldiers.

28. See e.g. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. Chi. L. Rev. 607 (2000); Tracey L. Meares, *Place and Crime*, 73 Chi.-Kent L. Rev. 669 (1998); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338 (1997).

29. See Kahan, *supra* n. 28; Meares, *supra* n. 28; McAdams, *supra* n. 28.

30. See Exec. Or. 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947).

In these and many other circumstances, the oath taken is voluntary in that it is not literally coerced, yet involuntary in that the avowal is in a sense being required. Here, it is helpful to recognize a category sometimes referred to as corporate oaths—oaths that are required for membership in some group or community.

One key to predicting the efficacy of this sort of oath may be whether its substance is understood as arising legitimately from the nature of the relevant community. If an individual feels as though a particular commitment is not truly inherent in the nature of a given undertaking, but is rather an arbitrary demand, the person is hardly likely to embrace that obligation, let alone experience it as an aspect of self. For example, according to the most vocal and articulate of the opponents to the requirement of loyalty oaths in the California system, one of the primary difficulties was that a disavowal of Communist connections bore no inherent or necessary relation to the role of an academic.³¹ It was perceived as an arbitrary condition, a concession being extracted, even extorted, rather than an obligation or commitment growing out of or inherent in the nature of the relevant community.

In a more familiar and recurring context, it makes sense to ask newlyweds to swear fidelity, and to hope that faithfulness will come to play some role in their self-understanding. Fidelity is, if not necessary to, at least fairly inherent in or organic to, the institution of marriage. By contrast, consider what might happen if the state were to try and exploit the desire to marry by requiring couples also to make unrelated auxiliary vows, such as an oath not to litter, or to wear seat belts when driving. Many couples might be willing to take these oaths, depending in part on how badly they want to marry. Many might even obey the precepts of the auxiliary oath, depending in part on the applicable enforcement procedures and penalties. But oaths extorted in this way could hardly be expected to perform the embedding function described here. This suggests that oaths might be most profitably employed where the underlying sworn obligation will be understood as fairly and naturally arising out of the relevant commitment or affiliation.

Given that the obligation sworn to through a particular oath does arise legitimately out of the context in which a particular oath is demanded, what form should the oath take in order best to serve the end of transforming that obligation into an aspect of identity? Does my account offer any guidance as to the way in which oaths should be crafted and delivered?

Initially, the ceremonial context of an avowal may not be irrelevant. Consider the various ceremonies that traditionally accompany swearing. Trial witnesses place one hand upon a bible or other sacred book or object, while raising the other. Inaugurated presidents perform a similar ceremony. Newlyweds in various traditions exchange rings, join hands, circle one another, stand under crowns, or jointly light candles. Children in their informal swearing perform a dazzling array of physical symbols ranging from “cross my heart and

31. Ernst H. Kantorowicz, *The Fundamental Issue* (Parker Printing Co. 1950) (available at <http://sunsite.berkeley.edu/uchistory/archives_exhibits/loyaltyoath/symposium/kantorowicz.html>).

hope to die” to spitting and shaking to the finger prick of Tom Sawyer.³² At the very least, it is in part the ceremonial, often public context of oath-giving that marks it out in the mind of the swearer as different and special from the usual run of day-to-day conversation and negotiation. This makes possible, although in no way guarantees, that the oath might come over time to be understood and experienced as something not just different from but deeper than an ordinary promise. In addition to the role played by a ceremony in marking out an oath as somehow special, there may be something crucial as well about the particular details of the ceremony used. Absent some careful historical, anthropological, and psychological research on point, one can only speculate about what sorts of ceremonies might best enable an oath to perform the embedding function hypothesized here. Still, there are several things one might look for.

The first and most important trait would perhaps be historical resonance. Granting the importance of some ceremony, a ritual which is obviously concocted or invented for a particular occasion is likely to strike many as silly, rather than solemnizing. For this reason, it would seem sensible to associate or incorporate oaths with or into ceremonies with some cultural or historic roots, and therefore with some potential resonance in the minds of those doing the swearing. A second trait, perhaps implicit in the first, would be an out loud articulation, rather than one made solely in writing. If the main purpose were to attach a set of consequences to the breach of a given obligation, the precision of writing might well be preferable to the ceremonial resonance of an oral swearing. If, however, the aim is in part to embed the obligation in identity—to encourage the person to feel ownership of the obligation—it may make sense to force them to bring it out of his or her own mouth. This might help explain why important legal commitments are almost invariably executed in writing rather than orally, yet important oaths and vows continue to be taken aloud.

More tentatively, an oath may better serve this end if it can be stated in the affirmative, rather than in the negative—as an account of what one will do or be, rather than what one promises to eschew. Again, if the sole or primary purpose of an oath were to attach a set of particular enforceable legal consequences to the breach of a promise, it might make sense for oaths to be framed in the negative—in the form of a careful list of precisely what will count as a breach. If, however, the aim is also for the oath to serve as a publicly articulated aspiration, and to help the promisor construct a sense of self, an affirmative goal might be more effective—albeit substantially less precise—than a list of barred conduct. Recall for example the role I have attributed to the citizenship oath. If it is indeed to serve as a symbol or rallying point, rather than primarily as a set of concrete or enforceable obligations, as flag rather than fence, it may be a good idea that much

32. My ten-year-old daughter reports that the “pinky swear” is currently a popular way of solemnizing a promise or obligation among the fifth-graders at her school.

of the oath is stated in the affirmative—in terms of what is aimed for, rather than what is to be avoided.³³

There may be other aspects of particular ceremonies which could increase their capacity to help embed oath in identity. Some rituals seem actually to enact the embedding function, as where a hand is held to the heart, or the heart is symbolically “crossed.”³⁴ Others, perhaps more commonly, employ the laying of hands on objects of religious significance.³⁵ It may be true, as some have suggested, that these “corporal” aspects of swearing originated in pre-literate times, and served primarily to mark the occasion of an oath.³⁶ At the same time, it is conceivable that certain physical acts might, along with an affirmative oral articulation in a resonant context, serve to increase the efficacy of an oath. I would hesitate to place too much importance in the particulars of given rituals, however. It is likely that historical and cultural resonance, rather than evocative pantomime, is central to the internalizing role of a formal oath or vow.

If pressed to abandon generalities and come forward with an example of a circumstance under which, on my account, the further use of oaths or vows might be worthwhile, I would point to the possibility of swearing to a small college or law school honor code. If one perceives the educational vision and values of a given institution to be valuable, and if one sees particular obligations as organic to those at that institution, then having the occasion to out loud and in public embrace that vision and those values might help one to internalize them as one's own. Perhaps this could take place at the very outset of one's matriculation, or perhaps at some subsequent time, after one has had the chance to experience and evaluate the particular values of that institution. Also, in this situation there would be a tradition on which to draw, and a ceremonial context in which to situate a formal avowal of some sort. Most schools have a traditional commencement ceremony at the end of each year. Such a ceremony could be modified to include not only graduating seniors, but also students completing their freshman year. At that point, it might really mean something for a student to stand up and say, out loud, in front of the community, in that potentially evocative

33. It is, of course, possible for people to rally around, even define themselves in part by, what they eschew as well as what they do. The keeping of Kosher might be the best example. Similarly, it is quite common for people to unify around a sense of common enemy. For those reasons, it seems wisest to acknowledge the possibility that under certain circumstances a negative vow—a promise not to behave in certain ways—might be capable of serving the embedding function described here, if not the aspirational role.

34. More extreme examples include the practice of actually branding, with a hot iron, a fraternity symbol into the flesh of new members, or the practice unofficially conducted by graduates of U.S. Army Airborne School, in which newly trained paratroopers allow the two “1/4” prongs of the ornamental “wings” to be literally, though temporarily, pounded into their chest.

35. The presidential oath, for example, like the trial oath, is traditionally taken with a hand on a Bible.

36. See e.g. Michael L. Closen, *To Swear or Not to Swear; Document Signers: The Default of Notaries Public and a Proposal to Abolish Oral Notarial Oaths*, 50 Buff. L. Rev. 613, 620 n. 24 (2002) (citing David S. Thun, *In the Spirit of Truth*, Natl. Notary 10, 12 (Nov. 2000) (quoting Bernard Hibbits, *Anderson's Manual for Notaries Public* (8th ed., Anderson Publ. 1999)) (“In societies where few if any people could read . . . these gestures were an important way of demonstrating to the populace that an official act had taken place.”)).

ceremonial context: "I understand what it means to be a member of this community, and that is who I want to be."

I hesitate to speculate further on whether a formal oath or vow would be useful in this or that situation—a matter which will depend crucially on the particular people involved, the particular commitment avowed, and the particular communal and cultural context. Instead, I would rather conclude by acknowledging one aspect of the world view which underlies my account of the oath, and which may help explain why I see these questions somewhat differently than does Sanford Levinson, whose work has provided the occasion for these reflections.

Levinson asks, albeit implicitly, how an individual can maintain his or her integrity, autonomy, and self-respect if he or she is willing to swear to things he or she has not thought through carefully, and indeed does not truly or fully understand. The implication is that we each have an obligation, as we make our way through the world, to make our *own* way. At the least, perhaps, we have an obligation to satisfy ourselves that the way we are following, even if mapped out by others, is truly our own. The promise-maker I envision, however, is not merely or even essentially an individual, negotiating life, making promises, and perhaps occasionally forming bonds intimate enough to be in some sense constitutive. Rather, he or she is a person building identity and meaning over time, largely, though not entirely, through embracing and submitting to important obligations, commitments, and attachments.³⁷ Sworn allegiance is, for some people under some circumstances, part of in the process of weaving oneself into the fabric of a life. On this view, when we see someone swearing an oath, it makes sense to ask not merely what he or she is promising to do, but to ask as well what sort of person he or she is aspiring or undertaking to be.

37. I do not mean to be coy by avoiding the terms "liberal" and "communitarian" in contrasting Levinson's perspective and my own. My concern is just that those terms mean so much to so many that they may have come to mean very little indeed; and it seems to me wiser simply to try and state the differences rather than engage in a debate over the proper labels. If, however, it helps situate my account to describe it as a communitarian counterpart to Levinson's liberal, autonomy-driven account of the oath, I do not object to the characterization.