

REVIEW ESSAY

I SWEAR TO IT: OATHS AS FUNDAMENTAL LANGUAGE AND POWER

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BOOKS REVIEWED

The Sacrament of Language: An Archeology of the Oath, By Giorgio Agamben, trans. Adam Kotsko. Stanford: Stanford University Press, 2011. Pp. 72. \$16.95 (paper). ISBN: 9780804768986.

Oaths and the English Reformation. By Jonathan Michael Gray. Cambridge: Cambridge University Press, 2013. Pp. 286. \$109.99 (cloth). ISBN: 9781107018020.

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Edward Snowden, the systems analyst employed by a contractor for the United States National Security Agency, violated his contractual obligation to guard the nation's secrets and security procedures out of what he has argued was a higher obligation to preserve the privacy guaranteed to Americans by the United States Constitution and a conscientious objection to withholding information about violations of that privacy. Conscience can be conceived as a disposition of heart, mind, and will to act or refuse to act in the face of contravening authority, for what is a superior good in the mind of the actor, and always with the willingness to suffer for one's action or inaction. Snowden ultimately sought to divulge and disrupt programs of intelligence gathering and national security because of his convictions regarding nobler American ideals of liberty and privacy.

Before his work as an NSA contractor, in prior employment with the Central Intelligence Agency, Snowden signed an employment contract that contained promises to keep absolutely secure the secrets that he would encounter. Penalties for breaches of these promises were set forth explicitly in the document. In addition, Snowden signed a generic oath,¹ affirmed by government personnel both inside and outside of the intelligence community. The oath required, in part, that Snowden "support and defend the Constitution of the United States against all enemies, foreign and domestic [and] bear true faith and allegiance to the same."

Nonetheless, in deciding to reveal details of the nation's intelligence collection programs to the media, Snowden argued of the personal and career sacrifices that he was making, "I'm willing to sacrifice all of that because I can't in good conscience allow the U.S. government to destroy privacy, Internet freedom and basic liberties for people around the world with this massive surveillance

1 Amy Davidson, "Did Edward Snowden Break His Oath?," *New Yorker*, January 5, 2014, <http://www.newyorker.com/news/amy-davidson/did-edward-snowden-break-his-oath>.

machine they're secretly building."² The Constitution that he had pledged to defend became the basis of his actions in contravention of his contract and oath of employment. Not only did Snowden aspire to vindicate lofty American ideals with his disclosure, but he also recognized that he would have to suffer when he acted. This is the conscience in action. Snowden was fully aware of contravening authority—the intelligence and espionage laws represented in the pre-employment promises he made—but he nonetheless acted to disclose America's bulk-intelligence-gathering programs notwithstanding the significant consequences that would befall him upon disclosure.

Even so, alternative interpretations of Snowden's actions are possible. As General David Petraeus, architect of the military "surges" in Iraq and Afghanistan and subsequent director of the Central Intelligence Agency observed in 2012, in the aftermath of a conviction of a CIA officer for leaking secrets, "Oaths do matter, and there are indeed consequences for those who believe they are above the laws that protect our fellow officers and enable American intelligence agencies to operate with the requisite degree of secrecy."³ There is some irony in General Petraeus's observations, as he later became involved in a national security scandal of his own over the possible revelation of national security secrets to his biographer, who was also his mistress, in simultaneous contravention of his own official and marital oaths. But the principle that "oaths do matter" is a significant one at the intersection of both law and religion. Two recent books highlight the scope and power of oaths in Western history. These recent books by Giorgio Agamben and Jonathan Gray argue that oaths are phenomena of language and coercion but have also been the impetus of reformation and change.

THE SACRAMENT OF LANGUAGE: AN ARCHEOLOGY OF THE OATH

Giorgio Agamben, the noted Italian philosopher and political theorist, rewards his readers with a rich experience and new perspective on the purpose of the oath as a scaffold of language meant primarily to form and protect human relationships. In fact, Agamben's thesis is plain in the essay's first few pages: The "oath's primary function, in its various forms, is that of guaranteeing the truth and efficacy of language" (4). And again, "[t]he oath, then, seems to be a linguistic act intended to confirm a meaningful proposition (a *dictum*), whose truth or effectiveness it guarantees" (5). Agamben, then, affirms that an oath works much like an offer of collateral whose substance is tested when the underlying promise is acted upon (or not). But, very importantly, the success of the reader's understanding of this brief tome is that oaths are more than pledges or security or the consequences that fall upon the maker should he break the oath.

Oaths can be differentiated based on their function: "assertive" oaths describe a fact that has happened in the past, while "promissory" oaths bespeak their function—the speaker promises a future course of action (6). Nonetheless, all oaths invoke and are invested with "sacrality"—an infusion and presence of the sacred (12). And it is here that Agamben makes a powerful claim about the ultimate orientation of oaths: they are neither purely religious nor purely legal. Rather, they are prototypes, representations of the exact intersection of law (as a sociological system which orders

2 Matt Smith, "NSA Leaker Comes Forward, Warns of Agency's Existential Threat," CNN, June 9, 2013, <http://www.cnn.com/2013/06/09/politics/nsa-leak-identity>.

3 "Message from the Director: Former Officer Convicted in Leak Case," October 23, 2012, <https://www.cia.gov/news-information/press-releases-statements/2012-press-releases-statements/statement-former-officer-convicted.html>.

and governs human affairs) and religion (which does the same). Consider, then, the following statement:

Perhaps the oath presents to us a phenomenon that is not, in itself, either (solely) juridical or (solely) religious but that, precisely for this reason, can permit us to rethink from the beginning what law is and religion is. (19)

And several pages later:

If anything, it is possible that here we have to do with a sphere of language that stands before law and religion and that the oath represents precisely the threshold by means of which language enters into law and *religio*. (28)

And continuing:

My hypothesis is exactly the reverse: the magico-religious sphere does not logically preexist the oath, but it is the oath, as originary performative experience of the word, that can explain religion (and law, which is closely connected with it). (65)

Oaths, then, rise above both the punishment found in law and the punishment and devotion found in religion and provide an impetus for both to develop. The power of the oath comes not so much from a sense of fear or punishment if the oath is broken—much like modern legal realism seeks to create “bindingness” of law by the fear of punishment one faces if one breaks the law. Rather, the oath’s binding power emanates from the “faithfulness” of the maker (23).

Agamben here cites the famous passage from Cicero’s *De officiis* in which a character fulfills an oath knowing with certainty that, in the fulfillment, he will die. He makes his journey of doom because he has made an oath to do so (22). Agamben recalls from Cicero that oaths were made with “religious sanctity” (22)⁴ as their base not so much to remind the maker of the “anger of the gods” if the oath were to be broken, but rather that oath itself is an exercise in trust among the entities comprising the oath (23). “Faithfulness is thus essentially the correspondence between language and actions” (23). We might call this an aspirational view of the oath, in which the maker desires to live out the oath based not on the apprehension of bad consequences should he fail to do so, but rather out of a desire that his conversation partner see that he (the maker) can match what he says with what he does.

Further, Agamben argues, although oaths are bound up with curses—in that the maker invites a curse upon himself if he does not fulfill the oath—the oath is not essentially about curses, but rather it is about “a testimony” (33):

The testimony is given by language itself and the god names a potentiality implicit in the very act of speech. The testimony that is in question in the oath must therefore be understood in a sense that has little to do with much of what we normally understand by this term. It concerns not the verification of a fact or an event but the very signifying power of language. (33)

In essence, the act of swearing an oath harkens back to what is most essential about language, that of declaring and constituting reality.

⁴ Quoting Cicero, *De officiis*, trans. Walter Miller (New York: Macmillan, 1913), 3.104.

In the latter half of the book, Agamben undertakes an extended discussion on blasphemy:

If the connection that unites language and the world is broken, the name of God, which expressed and guaranteed this connection based in blessing [*bene-dicente*], becomes the name of the curse [*male-dizione*], that is, of a word that has broken its truthful relation to things. In the mythical sphere this means that the curse [*male-dizione*] directs against perjury the same evil-doing force that its abuse of language has liberated. The name of God, released from the signifying connection, becomes blasphemy, vain and meaningless speech, which precisely through this divorce from meaning becomes available for improper and evil uses. (42–43, brackets in original)

It is in his description of defective speech that Agamben helpfully describes the correct function of the name of God—that of a connector or a “truthful relation to things.” The invocation of God’s name points the hearer to what reality is. Blasphemy fundamentally robs God’s name of the power to be the “pure experience of speech” (53) and instead reduces it to an exclamation, that does not have the same power to signify as language. Exclamations, and therefore blasphemy, are “interjections,” and “[l]ike every exclamation, blasphemy also is ‘a word that one “let’s slip out” under the pressure of a sudden and violent emotion” (47).⁵ Blasphemy is a burst animated by strong emotion. And while the name of God sounds itself much like an interjection, it is something more; it is a “pure experience of speech”:

We can therefore specify further the meaning and function of the name of God in the oath. Every oath swears on the name par excellence, that is on the name of God, because the oath is the experience of language that treats all of language as a proper name. Pure existence—the existence of the name—is not the result of a recognition, nor of a logical deduction: it is something that cannot be signified but only sworn, that is, affirmed as a name. The certainty of faith is the certainty of the name (of God). (53)

Overall, Agamben’s book presents an argument that must be carefully excavated by the reader. It is aptly subtitled “An Archaeology of the Oath,” and Agamben capably whisks away the dust from multiple artifacts of the oath. This is a very challenging book—one that will reward the reader with successive close readings. It is likely to become a definitive interdisciplinary treatment of the phenomenon of the oath. Its argument is significant for the interdisciplinary study of law and religion because Agamben has set up and described the oath as the quintessential proto-legal and proto-religious act. Yet the oath, an utterance in which the oath swearer exclaims the name of God to create something fundamentally legal, is a new “obligation” where one did not exist before the interjection (61).

OATHS AND THE ENGLISH REFORMATION

Jonathan Michael Gray, a professor at the Virginia Theological Seminary has written a compelling account of how King Henry VIII ushered the Protestant Reformation to England—an account that crucially involves matters of oaths and oath swearing. The broad outline of the start of the English Reformation is uncontroversial: Henry was dissatisfied with his queen, Katherine of Aragon, mostly because she failed to give birth to a son and heir. In order to marry his second wife, Anne Boleyn, he had to claim jurisdiction over the Catholic Church in England because the pope would not grant an

5 Quoting Emile Benveniste, “Le blasphème et l’euphémie” [Blasphemy and euphemism], in *Problèmes de linguistique générale* (Paris: Gallimard, 1974), 2:256.

annulment of his marriage to Katherine. The king took over the church himself and had the annulment granted. In order to maintain a measure of credibility, Henry had to persuade England that he had ultimate temporal and spiritual authority in the realm. Jonathan Gray's contribution to the history of the English Reformation is his retelling of how Henry ingeniously deployed oaths, which bound the oath taker in conscience to agreeing with Henry's supremacy over both the kingdom and the church.

To be sure, oaths were not the only devices used by Henry's court to usher in the king's reforms. "Proclamations, injunctions, visitations, executions, representations of the monarch, and the various 'carrots' the regime offered to those who collaborated with it remain important" (7). Yet, Gray argues that Henry was concerned with obedience by his subjects rather than mere coercion (7–8). Gray contends, against other Reformation scholars who saw state oaths as "superfluous" (8),⁶ that oaths bound conscientious Christians with a "spiritual bond" (9).

One of the true strengths of the book is Gray's discussion of the nature of the spiritual bond on the life and heart of the swearer. "If by citing God as witness, the swearer acknowledged his omniscience, his omnipotence, and his essence as truth, then in the very act of taking an oath the swearer actually worshipped God" (20–21). God, therefore, was the foundation and object of the oath. For good Christians in Reformation England, "[o]aths were a form of worship, and worship should be given to God alone" (21). Gray nicely compares oaths sworn as worship to God to oaths sworn upon tangible creatures. When either was sworn upon, either was worshipped. It was defiant, disordered worship, then, to swear upon corporeal creatures. It was therefore particularly enlightening (for this critic) to read Gray's extended explanation of the tangible things, such as the sacramental body and blood of the Lord or copies of the Gospels, upon which the Christian swore oaths. Both the sacrament of the Mass and the physical Gospels were manifestations of God's presence and power (22–27). Oath takers who invoked either of these holy objects as the mediating structure in their oaths were particularly keen to keep them, as they were tantamount to invoking God (Christ) himself as a witness and guarantor of the substance of the oath (22–27). Though Gray reports that as English Protestantism grew, it moved away from seeing Christ's presence in the Gospels, but continued to swear by the Gospels as a reminder that they were the "word of God" (33).

Further, Gray very helpfully erects a three-part structure for discerning a legitimate oath over against a false or vain one. The oath must be true ("not only never confirming an objective falsehood with an oath but also avoiding using an oath to deceive someone, even if the content of the oath was objectively true") (36). The oath must sound in "judgement" (38). It must not be sworn over a trivial subject matter. "Clerical writers referred to these oaths [sworn without judgement] as vain oaths and further described them as customable, idle, frivolous, light, trifling, rash, of sport, for nought, or without necessity" (38). Finally, the oath must sound in "justice" (40). "Catholics and Protestants uniformly condemned oaths that were unjust, illicit, or against the law" (40). Gray admits that determining which oaths are unjust was notoriously difficult (41). And this is the point: sophisticated oath swearers could find ways to swear in line with the king's prescribed oaths that promoted his supremacy over the church and prescribed his monarchical succession, or they could use this moral scaffolding to refuse to swear the oaths. Writing particularly of the justice precondition, Gray contends,

6 Quoting David Martin Jones, *Conscience and Allegiance in Seventeenth Century England: The Political Significance of Oaths and Engagements* (Rochester: University of Rochester Press, 1999), 61. Gray cites many scholars who either gave superficial treatment to oaths, contended that they were not important to the Reformation, or not beneficial to Henry's program, "useful only to the extent that they 'made people solemnly aware of their new duty'" (9, quoting Geoffrey R. Elton, *Policy and Police: The Enforcement of the Reformation in the Age of Thomas Cromwell* (Cambridge: Cambridge University Press, 1972), 230).

But they then applied this logic to different oaths: [Thomas] Cranmer [the archbishop of Canterbury] claimed that his logic allowed him to break his oath of canonical obedience to the Pope and [Thomas] Martin claimed that this logic allowed him to break his oath of supremacy to Henry VIII. For an oath to be lawful, its content had to be in accordance with truth and justice, but since truth and justice were in dispute in the sixteenth century, what was lawful for one religious group was not lawful for another. (47–48)

This scaffolding—truth, judgment, justice—would prove to be both a boon and bane to Henry’s regime. When laid on top of the Crown’s oaths, these strictures lent moral heft and weight to the oaths (49). When used by a conscientious objector, they provided an escape hatch from swearing, or, once sworn, obeying the oaths (49).

Gray’s detailed accounting of both the timing and targets of oaths provides a foundation for understanding Henry’s program of supremacy and succession. And while the recitation of who swore what and when is tedious at times, it is helpful all the same; for it shows the systematic, yet quick progression of the oath throughout England among its clerical and educated elite. Select bishops were asked to swear their fealty to Henry’s succession. And then, over a relatively short period of time, these bishops’ oaths were further cemented in oaths to confirm the Act of Succession by members of Parliament, and then by the English episcopacy and (some) clergy, and the Cambridge and Oxford faculties, and the monastic orders and others. Some bishops swore more than once to oaths slightly altered from their previous iterations. The rapidity with which Henry pressed his oath-swearing campaign and his targets for these oaths reflects how much the king wanted “his” religious and educational functionaries on board with his marital and sexual innovations (55–84)—a fact further emphasized by Henry’s targeting the oath-swearing campaign at the religious, political, and scholarly elite, who posed the most resistance to Henry’s innovations (85).

Henry’s deliberate march for his new family and succession arrangements to find approbation across England did not find uniform success. Notable persons, including Sir Thomas More, refused the Oath of Succession as presented to them. Gray notes that the preamble of the Act of Succession and text of the oath for More (and others) do not survive; so it is impossible to know with certainty why More was offended by the Oath of Succession (120–24). However, (perhaps unsurprisingly) Gray speculates that More was troubled by the circumstances of Henry’s break of vows with Katherine (124) rather than any appointments of new successors (119), though Gray admits that it is possible that More was displeased by text in the “preamble” (one different than the preamble to the Act of Succession), which exalted Henry’s authority over the English church and against that of the pope (122).

Gray concludes the book by detailing the effect of the Pilgrimage of Grace on oaths administered to English laity (143–69). The Pilgrimage of Grace was a revolt in the North of England against Henry’s reforms, including participation by tens of thousands of commoners and many nobles. Gray helpfully describes the rebels in the Pilgrimage of Grace swearing oaths as an “imitation” of the oaths required by the king, including the oath of succession:

To a large extent, the Pilgrimage was a popular reaction against the Henrician Reformation of the 1530s, a reaction in which oaths played a major role. . . . In the same way in which Henry sent commissioners throughout his entire realm to administer the oath of succession, so did the rebels of the Pilgrimage of Grace tender their oaths throughout every region that they controlled. (144–45)

And in the final chapter, Gray provides an account of how oaths were used in the Henrician Reformation to quell accusations of evangelical heresy (170–200). After a substantial conclusion

(201–14), Gray very helpfully provides appendices with texts of various oaths used before and during the Henrician Reformation.

Overall, Gray's book should be considered an unqualified success. It rewards careful reading and will be most beneficial to the guild of historians specializing in English Reformation history and the more general audience of scholars in law and religion. Gray has fruitfully set his course for early modern British history. However, interdisciplinary law and religion scholars will also be benefited by the narrative that Gray weaves in combining the oath's authoritative force over the swearer's soul along with its ability to create authority and force in the temporal realm. Gray's consistent narrative is that the oath was a device perfectly suited to its time for Henry to leverage his subjects' obedience.

THE OATH AS NEW REALITY

Oaths concretize the spoken word and join it to the reality that the speaker desires to bring about or affirm. Giorgio Agamben argues for a perspective on oaths in which they are seen as a guarantor of language, preceding both of the traditional social forces typically associated with the oath; law and religion. Jonathan Gray argues that oaths served important instrumental purposes in the Henrician Reformation: that of rendering the loyalty of the speaker to a regime that had just cleaved itself from the traditional moorings of religion and authority. For both of these authors, the oath is more than a simple formula of promise, invocation of deity or other authority, and warning of dire consequences if the party breaches the promise. Rather, oaths bind, create new relationships, and remind their swearers of obligations freely taken.

Since the Snowden revelations, issues of oath swearing and conscience have emerged in another highly publicized case. Kim Davis, the county clerk in Rowan County, Kentucky, denied marriage licenses to same-sex couples as a matter of conscientious objection based on her religious beliefs—an action that many argued violated her oath of office. Davis's case has similarities to the Henrician oaths sworn during the English Reformation, in which some subjects held out when confronted with an oath text that was odious to them, trying to change it through an accommodation that was more agreeable (see Gray, 2). Specifically, Davis wanted an accommodation to match the employment responsibilities she was willing to undertake with the requirements of the job as expressed in the oath. In these accommodation contexts, there is a mismatch between the text of the oath and the action that it requires or the truth that it asks the oath swearer to affirm. The Snowden and Davis cases are two recent cases that have brought questions of conscience and the meaning and import of oath swearing—particularly oaths sworn to the state or its agencies—at a time in which the concepts of conscience and conscientious objection are receiving renewed attention in law and religion.⁷

Oaths restrict and channel belief and action. They affirm and create a new reality and identity for the oath swearer. Once the reality that was first represented by oath changes, the swearer has the hard choice of whether acting in conscience it is a better course to remain faithful to the oath or deviate and closely adhere to her more cherished ideals and principles. Whatever is chosen, oaths are not meaningless as some are wont to argue. Rather they are essential in binding the mind and bending the will. This is the power of oaths on conscience and action.

7 For an example in the health law context, see Jeffrey B. Hammond, "Conscience as Contract. Conscience as Covenant," *Faulkner Law Review* 4 (2012–2013): 433–44.