

## Note

# **Disbelieving Nonbelievers: Atheism, Competence, and Credibility in the Turn of the Century American Courtroom**

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In 1997, the *Yale Law Journal* published an article by George Fisher entitled *The Jury's Rise as Lie Detector*.<sup>1</sup> After tracing common law methods of ensuring testimonial truth from the ordeal, Fisher focused on the moment during the mid- to late nineteenth century when the sacred oath system gave way to the jury as a mechanism of truth assurance. The

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1. George Fisher, *The Jury's Rise as Lie Detector*, 107 *YALE L.J.* 575 (1997).

key innovation at this time was allowing defendants to testify.<sup>2</sup> In the United States, Fisher ably demonstrates, this change in the law of testimony was tied to the inclusion of African-Americans as witnesses.<sup>3</sup>

Fisher's nuanced thesis suggests that the fate of testimonial exclusion laws was determined by the political battles surrounding the treatment of freedmen that followed the Civil War. The Northern states wanted the South to abandon its testimonial exclusion of blacks. While "it is unclear why Northerners shunned the more obvious strategy of attacking the Southern racial exclusions as racist,"<sup>4</sup> they chose to argue against the disqualification of witnesses as a matter of evidentiary theory.<sup>5</sup> This broad-spectrum assault left the North open to a *tu quoque*<sup>6</sup> defense: Southerners merely pointed to the North's continued exclusion of defendants as invalidating the North's attack. By accepting the more general Benthamite<sup>7</sup> critique of competency rules, the North opened itself to Southern accusations of hypocrisy.<sup>8</sup> Northern politicians even adopted this attack on occasion: In an 1862 speech, Senator Foster of Connecticut claimed that Massachusetts still excluded atheists and, thus, that Charles Sumner's amendment to allow blacks to testify in federal courts was hypocritical.<sup>9</sup> According to Fisher's thesis, these predominantly Southern responses forced Northern states to eliminate their own competency rules in order to force the South to do the same.<sup>10</sup> Fisher's research demonstrates a remarkably neat historical connection between the North's disavowal of exclusion laws and the South's repudiation of the often-

2. Prior to that time, defendants had been excluded in order to avoid having parties register directly conflicting oaths. Had this occurred, it would have undermined critically the fundamental basis of the system, which was that individuals under oath would never lie.

3. Once African-Americans (along with Indians, Chinese, and other racial minorities) were allowed to testify, Fisher argues that Southern society felt it could no longer afford to prevent defendants from testifying. Otherwise, the word of a person of color could be used to convict a white defendant without the defendant being able to take the stand. See Fisher, *supra* note 1, at 673-74.

4. See *id.* at 675.

5. The broad claim was that categorical testimonial exclusion was contrary to a rational truth-seeking system. The foremost critic on these grounds was Jeremy Bentham, whose critique is discussed more fully *infra* Part II.

6. Roughly translated as "you also," the *tu quoque* defense claims hypocrisy on the part of the prosecutor who, it is claimed, has engaged in the same conduct with which the defendant is being charged.

7. See *supra* note 5, and *infra* Part II.

8. On the other hand, it seems likely that an attack on the grounds of Southern racism would also have drawn this kind of counter. I would suggest that the North was even more vulnerable to a generalized counter-charge of Northern racism, which could be substantiated in a variety of ways, than to a more specific *tu quoque* on the issue of witness exclusion. The latter could only be substantiated in one way, and the elected officials conducting these debates had greater control over it.

9. See Fisher, *supra* note 1, at 678. It is worthwhile to note for purposes of accuracy, as Fisher does, that Massachusetts had disposed of its atheist exclusion law two years earlier. This style of argument nevertheless shows that a *tu quoque* attack on Northern hypocrisy was the order of the day for opponents of these bills.

10. Although the mere fact of Foster's opposition shows that the position was less than unanimous, it was nevertheless far more strongly associated with the North than with the South.

paired bans on defendant and African-American testimony. He convincingly argues that this confluence was not accidental, that the North was hoisted on its own rhetorical petard and forced to abandon its exclusionary laws. Fisher shows that once the *tu quoque* defense became unavailable, the South followed suit, resulting in the widespread elimination (or at least severe limitation) of testimonial exclusion throughout the United States.

Thus Fisher's article suggests one revolutionary moment in which the voiceless achieved full membership in the truth-seeking process and categorical testimonial exclusion rules became largely extinct, state by state.<sup>11</sup> This Note focuses on Fisher's paper and a key question it generates: do the predictions of his thesis, which suggest that testimonial exclusion should be a dying doctrine by the 1880s or early 1890s at the latest, account for all types of testimonial exclusion? More concretely, is there a form of testimonial exclusion that does not conform to Fisher's thesis?<sup>12</sup>

At the outbreak of the Civil War, three principal grounds for testimonial exclusion were still widely present in the United States: party status (i.e., defendant or defendant's relatives), race, and defect of religious principle.<sup>13</sup> Fisher's Article is only passingly interested in the third.<sup>14</sup> While defendants and people of color were uniformly allowed to testify by 1880,<sup>15</sup> this Note will show that atheists lagged markedly behind, in many cases well into the twentieth century. Furthermore, many jurisdictions developed rules to discredit atheist testimony that were equally long-lived, broadly extant until the last half-century. This Note addresses the following question: Why were institutional prejudices against atheists so resilient compared to those against people of color and defendants that Fisher traces? Using Fisher's analysis as a foundation, this Note seeks to

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11. See Fisher, *supra* note 1, at 656-96.

12. It should be noted that Professor Fisher does not believe the results that follow are inconsistent with his findings. See e-mail from George Fisher, Professor of Law, Stanford Law School, to Paul W. Kaufman (Aug. 22, 2001, 10:21:12 EST) (on file with author). Rather, Fisher believes that, while his paper did not address the issue of religious testimonial exclusion, the data below is consistent with his thesis, given certain social and political factors in play in post-bellum America. See discussion *infra* Part IV.

13. At common law, conviction of certain crimes could also render one incompetent to testify. This was known as incompetency from infamy. In 1843, Lord Denman's Act did away with this doctrine in Great Britain. Since the common law rule changed fully two decades before the period of Fisher's interest and at least a half century before the period of this paper's focus, it is not dealt with in any further depth. It should be noted, however, that the author has done no exhaustive research on exclusion by reason of infamy. Thus it is possible that some or all of the states may not have yet changed their laws and may still have excluded witnesses on those grounds.

14. This statement is intended to be descriptive; it is not a normative critique. As what follows will indicate, religious exclusion is not a particularly clear portion of the law, and Fisher's study was so extensive that it could hardly have included what follows. Its absence in his study is mentioned here merely to indicate that the conclusions which follow, and which are contrary to Fisher's thesis, do not contradict the findings of his article; rather, they suggest limits to its extrapolation.

15. See Fisher, *supra* note 1, apps. A & B.

understand the similarities and differences among the categories of excluded persons.<sup>16</sup> Ultimately, it attempts to make sense of a striking pattern that emerges from those states that actively maintained testimonial prejudice against atheists.

The research that follows indicates that roughly one-third of the states do not conform to Fisher's thesis. Even twenty years after the last state permitted testimony by civil parties in 1881, nearly one-fifth of all states had not abolished the disqualification of atheists. Strikingly, the very states embroiled in the North-South conflict were most likely to exclude atheists from testimony at the turn of the twentieth century. This finding suggests that the general wave of competency laws did not sweep as broadly as *The Jury as Lie Detector* could be read to suggest.

Part I of this Note discusses the methodology used to generate the raw data regarding when each state stopped excluding atheists. The absence of solid trial-level evidentiary decisions resulted in research somewhat less conclusive than Fisher's. Part II examines Britain as an example of common law development and as a window into the contemporary philosophies which would have influenced the decisions of political and judicial actors. Part III details the empirical results of my research. Part IV examines the possible sociological and political explanations for why atheist exclusion did not fade along with party- and race-based disqualification. Finally, Part V concludes by suggesting ways in which further scholarship could enhance this research.

## I. THE METHODS AND LIMITATIONS OF RESEARCH

As this Note focuses on a series of states that do not conform to the extrapolation of Fisher's thesis, it is necessary to define "non-conformity" for these purposes. Since Fisher suggests that exclusion rules generally fell within a certain range of time, at the end of that period, an atheist-excluding state can be designated non-conforming. The choice of date is necessarily somewhat arbitrary but should acknowledge that the law moves slowly in some fields, especially those as rarely tested as this one appears to have been. This Note sets the "point of nonconformity" at 1908, roughly forty years after the Fourteenth Amendment was passed and approximately twenty years after the last state that had racial exclusion laws gave civil parties the right to testify.<sup>17</sup>

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16. This Note appears to be the first attempt at using *The Jury's Rise as Lie Detector* in this way. Fisher's Article has been cited some twenty-three times, but almost all of these citations use it for a general principle of trial or jury law. Only once has it been cited for its core proposition. See Renee Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 201 n.21 (2000).

17. See Fisher, *supra* note 1, at 672 tb. 3. The reasons for this somewhat specific date will become clearer as the state evidence is laid out. For now, it suffices to say that 1908 is one of the first years in which almost every state's doctrine was clearly defined. Professor Fisher does not believe that the

Another issue is whether to include states that permitted atheist testimony but allowed attorneys to impeach witnesses' credibility through cross-examination on matters of religion. While Fisher's thesis applies only to exclusion, a successful impeachment of credibility has the similar effect of limiting the jury's consideration of witnesses' statements.<sup>18</sup> In the case of atheist testimony, where the sampling size of definitive dates is so small with respect to strict exclusion, that observed trend is not conclusive. However, since the data on credibility questioning confirm these trends, it is valuable to consider both credibility and competence.

The data set forth below derives from either the case law, a statutory or constitutional provision, or a 1929 North Carolina Law Review article that appears to have been the last attempt at a compilation like this one.<sup>19</sup> Each of these sources has limitations that complicate the process of dating common law changes for each jurisdiction.<sup>20</sup> Dating is straightforward in states that included atheists constitutionally<sup>21</sup> or statutorily<sup>22</sup>. In many places, however, exclusion was part of the common law and may or may not have arisen through a recorded decision.<sup>23</sup> Many times, case law addressing atheist competence is entirely absent. When it does exist, it rarely states whether the judge is changing the common law or merely continuing an interpretation that had been operating for years.<sup>24</sup>

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thesis he articulates has strong predictive force beyond the 1870s, when the last racial exclusion rules were eliminated. At that time, he argues, the reformist urge was essentially spent. E-Mail from George Fisher, Professor of Law, Stanford Law School to Paul W. Kaufman (Mar. 31, 2003, 19:25:12 EST) (on file with author).

18. A significant difference between this Note and Fisher's Article is that the latter dealt only with exclusion rules. In fact, according to Professor Fisher, the development of credibility impeachment on the basis of irreligion was consistent with the trend toward jury empowerment he traces. E-Mail from George Fisher, *supra* note 17.

19. J. Crawford Biggs, *Religious Belief as Qualification of a Witness*, 8 N.C. L. REV. 31, 31-43 (1929).

20. Forty-eight jurisdictions are relevant to this Note. The federal provision on the question allowed local rules to govern; Alaska and Hawaii entered the Union in 1959, too late for this study. One jurisdiction, South Dakota, apparently has no law on the subjects discussed herein; therefore, this paper will focus on only forty-seven jurisdictions, although research of forty-eight was required.

21. Some of the Eastern states amended their constitutions to address questions of religion. Others passed entirely new constitutions during the period in question. Many Western states had provisions explicitly establishing the competence of atheists when they entered the Union. For these states, one needs to establish that fact rather than a change in the law. Those that passed amended constitutions create many of the research difficulties of those that changed their laws through judicial decision. See *infra* text accompanying notes 25-26.

22. Particularly helpful in this regard were the legislative histories of the state equivalents of FED. R. EVID. 610, which prohibits inquiry into questions of religion for purposes of impeaching credibility.

23. In these cases, one can try to piece together a doctrine from related cases, such as whether a child witness must know of God or whether a dying declaration by an alleged atheist should receive the same deference as that of a religious person. It is not always clear how much weight to give these decisions, when they appear in isolation.

24. In this way, the Blackstonian idea of "finding" the law works against the historian. Judges facing a case of first impression used the same kind of language as those who were continuing a decades-old trend. Thus it is often impossible, for example, to tell if a case in 1910 that states atheists are allowed to testify is dealing with the issue for the first time in that state's history, changing an established rule, or continuing a practice that began far earlier.

Even more problematic is the incompleteness of turn-of-the-century case reports. Often, decisions were only reported at the appellate level and then only if they were thought to be of abiding significance. As a result, very few decisions on this topic survive, and those that do may be misleading. If, for example, the vast majority of state judges allowed atheist testimony but a small minority did not, it could be years or even decades before an atheist who had declared himself as such appeared before this minority.<sup>25</sup> Furthermore, in order for atheist competence to be an issue on appeal, three prerequisites had to be satisfied: (1) the atheist had to be excluded, (2) the court must have ruled against the party attempting to call the atheist, and (3) the losing party had to have the means to appeal. Moreover, since evidentiary decisions are difficult appeals to win, it seems likely that this issue would not often be the focus of an appeal. The legal norm of non-inquiry into religious matters may have further discouraged their mention.<sup>26</sup>

Additional difficulty arises when a court, as a matter of first impression, reasons from an earlier change in statutory or constitutional law. For example, a state supreme court might base a 1925 decision on a general religious toleration law passed in 1904.<sup>27</sup> Given the dearth of trial-level case reports, it is impossible to know whether courts had consistently allowed atheist testimony under the altered statute, so should one date the change to 1925 or to 1904?

Two factors aid the researcher in identifying these historical “moments.” First, many of the newer states resolved the issue constitutionally or statutorily, revealing more clearly the timeline of doctrinal choice.

Second, while little scholarship exists on the subject of atheist exclusion, at least one other scholar has attempted to determine empirically the positions of various states. J. Crawford Biggs, a lawyer and former judge on the North Carolina Superior Court who served as

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25. Even in those states that disqualified atheists, it was not customary to inquire about religious belief. Rather, the issue would be raised by an objection from opposing counsel that required support from the testimony of at least one witness willing to declare under oath that the prospective witness was a self-declared atheist. The alleged atheist then had the opportunity to prove his faith through the testimony of other sworn witnesses. Thus, it was insufficient merely to be an atheist; one had to be a publicly known atheist. Given the civil disabilities that could accompany such a declaration and the odium that attached to the declarant (particularly as anti-Bolshevism grew in strength), it is unlikely that many people were willing to make their consciences known in this way.

26. *See, e.g.,* *Free v. Buckingham*, 59 N.H. 219 (1879) (noting that it “is not customary to inquire” into matters of religion and that trial judges making decisions on whether to allow inquiry will rarely be second-guessed.)

27. Many states passed laws in the late nineteenth and early twentieth centuries stating either that no religious test should be applied for holding public office or that freedom of conscience was guaranteed. Some courts chose to interpret these general provisions as mandating the inclusion of atheists or prohibiting inquiry into their religion, even though on their face these constitutional provisions or statutes did not answer the question.

Solicitor General under Franklin Roosevelt, published an Article entitled *Religious Belief as Qualification of a Witness* in 1929.<sup>28</sup> Therein, Biggs struggles with whether North Carolina law would allow an atheist to testify and concludes that it probably would not.<sup>29</sup> In reaching this conclusion, Biggs relies on the 1856 case *Shaw v. Moore*,<sup>30</sup> cases addressing related questions,<sup>31</sup> and a catalogue of “the law in other jurisdictions,” in which he categorizes the contemporary rules in forty-three states. Despite at least one significant mistake,<sup>32</sup> Biggs’s article is of great value to scholars. In several cases,<sup>33</sup> Biggs’s statements offer the only evidence of whether those states disqualified witnesses. However, certain considerations limit the usefulness of Biggs’s scholarship. It is possible that he may have made additional mistakes. Further complicating things, Biggs does not document his source material; his contribution is principally a snapshot of the states laws in 1929. In other words, he does not differentiate between states in which atheists had been testifying for decades and those in which they were first included in 1928.<sup>34</sup> Finally, Biggs does not address whether impeachment on grounds of atheism was allowed in the states he covers.

## II. THE BRITISH EXAMPLE

Examination of the British common law of testimonial exclusion assists students of nineteenth-century American law in two ways. First, as the font of the common law, Britain was an important source of legal trends for the American states. The British experience models the “proper” timing of common law legal developments, and the American experience profits from parallel evaluation. Second, since the British legal system was not distorted by the American Civil War, the changes in British common law are purer products of the intellectual developments of the time. These same trends in thought affected American common law and shaped the

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28. Biggs, *supra* note 19.

29. *Id.* at 36. The fact that in 1929 one of the original colonies would still not be clear about its own law of witness competence is proof of the infrequency with which this issue was dealt and also provides an excellent example of the difficulties a scholar faces in evaluating this area of the law.

30. 49 N.C. (4 Jones) 25 (1856).

31. *State v. Levy*, 122 S.E. 386 (N.C. 1924) (concerning whether there is a religiosity test for jurors); *Lanier v. Bryan*, 111 S.E. 6 (N.C. 1922) (dealing with whether there would be a religiosity test for a child to testify); *State v. Pitt*, 80 S.E. 1060 (N.C. 1914) (discussing whether anything more than a cognizance of the civil penalty for lying is necessary); *State v. Davis*, 80 N.C. 412 (1879). This is an excellent example of the kind of guesswork necessary in dealing with fragmentary texts.

32. Pennsylvania, which he claims still disqualified atheists, had ceased to do so two decades earlier by statute and had confirmed the change in 1911. See *infra* notes 84-85 and accompanying text.

33. *E.g.*, Montana, Nevada, and Nebraska.

34. This uncertainty is one of the reasons that this Note contains no graphs. All attempts to create ones resulted in distortion around the date 1929 to the extent that the other data points were unhelpful.

dialogue about its transformation. What follows summarizes the key developments.<sup>35</sup>

The debate over atheist testimony primarily revolves around the testimonial oath. In the vacuum created by the withdrawal of Vatican support for the ordeal in 1215, the oath's "solemn invocation of the vengeance of the Deity upon the witness, if he do not declare the whole truth"<sup>36</sup> served to dissuade potential perjurers with the threat of eternal damnation. The deeply seated belief that no "mere human authority" should judge another person required a sacred oath to avoid the fallibility of mortal judgment.<sup>37</sup> These oaths were then weighed against one another mechanistically.<sup>38</sup> In this way, "the ultimate decision of the case [was] not within human discretion but [would be] dictated by the rules of law."<sup>39</sup> This reliance on the oath as guarantor of truth underlay the entire common law trial system and accounted for the peculiar rule in *Bethel's Case*.<sup>40</sup> It also explains the curious prohibition on defendant testimony. Not only was this perceived to imperil the defendant's soul, but it could also leave the jury with conflicting sworn testimony, undermining the oath as guarantor of truth and putting human beings in the position of judgment. Defendants were not allowed to testify until the Enlightenment introduced

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35. The bulk of this digest compresses summaries drawn from CHRISTOPHER J.W. ALLEN, *THE LAW OF EVIDENCE IN VICTORIAN ENGLAND* (1997) and from Fisher's Article, *supra* note 1.

36. THOMAS STARKIE, *A PRACTICAL TREATISE OF THE LAW OF EVIDENCE, AND DIGEST OF PROOFS, IN CIVIL AND CRIMINAL PROCEEDINGS* 22 (2d ed. 1833), *quoted in* ALLEN, *supra* note 35, at 50.

37. Fisher, *supra* note 1, at 587 & n.28. This concept was initially implicitly and then later explicitly based on a deity who would reward truth and punish falsehood.

38. Fisher quotes Charles Donahue, who paraphrased a treatise from around 1215:

[T]he judge ought to attempt to reconcile their statements if he can. If he cannot, then he ought to follow those who are most trustworthy—the freeborn rather than the freedman, the older rather than the younger, the man of more honorable estate rather than the inferior, the noble rather than the ignoble, the man rather than the woman. Further, the truth-teller is to be believed rather than the liar, the man of pure life rather than the man who lives in vice, the rich man rather than the poor, anyone rather than he who is a great friend of the person for whom he testifies or an enemy of him against whom he testifies. If the witnesses are all of the same dignity and status, then the judge should stand with the side that has the greater number of witnesses. If they are of the same number and dignity, then absolve the defendant.

Fisher, *supra* note 1, at 589 (quoting Charles Donahue, Jr., *Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law*, in *ON THE LAWS AND CUSTOMS OF ENGLAND* 127, 133 (Morris S. Arnold et al. eds., 1981).

39. Donahue, *supra* note 38, at 133. Fisher notes that while other scholars believe that Donahue may have gone too far with this, he is not sure that Donahue went far enough. *See* Fisher, *supra* note 1, at 590.

40. *THE TRYAL OF SLINGSBY BETHEL ESQ.* (London, R. Harbottle 1681) (holding that where many witnesses testified that something did not occur and one testified it did, the one was to be believed over the many). Fisher deals extensively with this case and its implications *See* Fisher, *supra* note 1, at 624-38; *see also infra* Part III.A.

faith in rational processes and the individual human intellect into the court system.<sup>41</sup>

Reliance on the oath also significantly affected religious minorities and atheists. During medieval times and the early Enlightenment, it was thought that only those who believed in a future state of rewards and punishments,<sup>42</sup> governed by the Christian deity, could be trusted. This view is generally associated with Lord Coke.<sup>43</sup> However, Coke was either in the minority when he wrote or soon found himself there. In 1744, *Omychund v. Barker*<sup>44</sup> held that any religious person could testify after being sworn in the fashion most binding on her conscience. After *Omychund*, the common view was that “not only Jews, but infidels of any country, believing in a God who enjoins truth and punishes falsehood, ought to be received as witnesses.”<sup>45</sup> Since this development preceded the American Revolution, the colonies adopted this rule with the rest of the common law. While this treatment of religious persons was surprisingly progressive, it did little for atheists. The theory held that, since they did not fear the retribution of any god at all, they could not be trusted to tell the truth. Thus, in the early common law, the atheist was excluded because he did not fear the judgment of God, and the defendant was excluded because everyone feared the judgment of man.

The inclusion of atheists in English courtrooms originated in the arguments of Jeremy Bentham, who in *Swear Not at All* and *Rationale of Judicial Evidence* argued that since conviction for perjury constituted a sufficient punishment for lying in court, a divine guaranty was unnecessary.<sup>46</sup> Furthermore, he argued, the existing law allowed anyone willing to lie about her beliefs to testify, punishing only the scrupulous atheist willing to air her doubts publicly. Additionally, this system allowed criminals to escape punishment as long as the witnesses were either

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41. These changes in the law also followed the explosion of Deism among the intellectual elite in the Americas and in Britain. After all, an aloof deity would hardly be expected to enforce truth with the same ardor.

42. Once the “future state of rewards and punishments” test became the legal standard, the questioning of competency was limited to ascertaining this belief or the lack thereof. See, e.g., *R. v. Taylor* (1790) in THOMAS PEAKE, *CASES DETERMINED AT NISI PRIUS IN THE COURT OF THE KING’S BENCH* 11, (Dublin, P. Byrne, 1975), cited in ALLEN, *supra* note 35, at 52, n. 12.

43. See SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON* § 6b (Francis Hargrave & Charles Butler eds., London, J. & W.T. Clarke 19th ed. 1832) (1628), cited in ALLEN, *supra* note 35, at 51.

44. 26 Eng. Rep. 15, 27-8, 31-2 (Ch. 1744)

45. SAMUEL MARCH PHILLIPS, *A TREATISE ON THE LAW OF EVIDENCE* 12 (London, Saunders and Benning 8th ed. 1838), quoted in ALLEN, *supra* note 35, at 51.

46. The summary of Bentham’s opinions, except where noted, comes from ALLEN, *supra* note 35, at 52-56. Citations to specific ideas are included there, although quotations are cited here for convenience. Although Bentham thought that the civil penalty for perjury was sufficient, he suggested posting brutal, graphic representations thereof on the walls of courthouses as a further reminder of what could happen to those who lied in court.

atheists or Quakers.<sup>47</sup> Conversely, those whose cases could justly be aided by atheist witnesses were denied the benefit of their testimony. Further undercutting the oath's power was the widespread practice of judge-jury tandem nullification,<sup>48</sup> which demonstrated that even the virtuous would forsake their oaths in service of justice.

There is some debate as to the originality and effectiveness of Bentham's critique,<sup>49</sup> but by 1828 Parliament had begun to reform the oath system in ways that fundamentally disconnected it from religion. In that year, the Marquis of Lansdowne introduced a bill giving Quakers and Moravians<sup>50</sup> the right to affirm instead of swearing.<sup>51</sup> That bill rapidly passed both Houses and received the Crown's assent. The right to affirm was later extended to Separatists.<sup>52</sup> In 1838, Benjamin Hawes of the House of Commons and Lord Denman of the House of Lords began a small-scale campaign to allow all those with conscientious objections to affirm. The first clause of the bill, which put in statutory form the holding of *Omychund v. Barker*, passed both Houses and was signed by Queen Victoria;<sup>53</sup> the more controversial affirmation section, however, was defeated in the House of Lords, apparently on the advice of the common law judges.<sup>54</sup> MP Hawes introduced a similar bill allowing for affirmation in 1839, but this time it was defeated in Commons. A more elaborate version of this bill, providing extensive safeguards against a religious person seeking to shirk the oath, passed Commons in 1840 but failed to gain support in the House of Lords. Attempts by Lord Denman to pass similar bills in the House of Lords fell short in 1842 and 1849. In 1852, the Second Report of the Common Law Commissioners questioned the

47. Quakers refused to take an oath for religious reasons. As early as the reign of Charles II (1660-1685), they were allowed to affirm instead of taking an oath in civil trials. See ALLEN, *supra* note 35, at 52 n.13, for a list of statutes to this effect. It is important to note that this privilege was limited to civil trials; Quakers and members of other sects who refused to give oaths could still be held in contempt of court for failing to take an oath in a criminal trial.

48. Judges and juries often underestimated the value of stolen goods to avoid assigning the death penalty for a property crime.

49. See ALLEN, *supra* note 35, at 90-94 (summarizing both sides of this argument).

50. The Moravians were a lesser known and less populous sect that also eschewed oaths.

51. An Act for amending the Law of Evidence in certain Cases, 1828, 9 Geo. 4, c. 32. According to a Connecticut judge reflecting on these events in 1929,

[the] steadfastness of the Quakers in refusing to swear because of their belief that it was a profanation of Deity finally won for them the right of affirmation in deference to their scruples of conscience and for many years gave to them the distinction of being the only sect known to English law having this right.

State v. Dudicoff, 145 A. 655, 658 (Conn. 1929). It is unclear whether the judge was engaging in revisionist history or accidentally ignored the Moravians, although given the relatively small number of Moravians, the latter seems more likely.

52. See An Act to allow the People called Separatists to make a solemn Affirmation and Declaration instead of an Oath, 1833, 3 & 4 Will. 4, c. 82.

53. An Act to remove Doubts as to the Validity of certain Oaths, 1838, 1 & 2 Vict., c. 105. The Act was signed by the Queen on August 14, 1838.

54. See ALLEN, *supra* note 35, at 57.

discrepancy between the treatment of Quakers and other organized groups on the one hand and the treatment of individuals with conscientious objections on the other. "In principle," the Commissioners concluded, "there does not appear to be any reason why the same regard which is had to the scruples of a body of persons should not be extended to those of an individual."<sup>55</sup> The Common Law Procedure Act of 1854,<sup>56</sup> a general reform bill passed in response to the Commissioners' comments, made affirmation available to any person declaring religious objections. The Common Law Procedure Act applied only to the civil courts, but the Criminal Proceedings Oath Relief Bill<sup>57</sup> extended this reform to the criminal courts in 1861.

By 1861, all religions stood on ostensibly equal testimonial grounds in England. It took only eight more years to remove the question of religion from witness competency altogether. Although attempts in 1861 and 1863 failed to gain atheists the right to testify, in 1869 George Denman (the fourth son of Lord Denman, a member of the House of Commons who became a distinguished jurist) introduced a bill stating that no religious opinion, including the lack of belief, could affect the testimonial competence of a witness.<sup>58</sup> After an amendment passed requiring a judicial finding that an oath would no more bind the witness's conscience than an affirmation, this bill was ratified by both Houses and received royal assent on August 9, 1869.<sup>59</sup>

These developments would most likely have influenced the American legal system. In both nations, there seems to have been a movement away from centralized Protestantism as a universal guiding ethos.<sup>60</sup> Deism had become quite strong among the educated classes of Britain and apparently was even stronger and more widely tolerated in America.<sup>61</sup> The ascent of

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55. Second Report of H.M. Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Superior Courts of the Common Law, pp. 1852-3 [1626] XL, cited in ALLEN, *supra* note 35, at 59 n.45.

56. 17 & 18 Vict., c. 125 (Eng.).

57. Criminal Proceedings Oath Relief Act, 1861, 24 & 25 Vict., c. 66.

58. ALLEN, *supra* note 35, at 61 (giving the details of both the bill and George Denman's judicial career).

59. The bill brought by George Denman appears in *House of Commons Sessional Papers 1868-9* II.411 [Bill 25], cited in ALLEN, *supra* note 35, at 61. After amendment, it was passed as the Evidence Further Amendment Act, 1869, 32 & 33 Vict., c. 68.

60. One could argue that the fact of a centralized Anglican Church undercuts the comparison to American religious life. In practice, however, many American colonies had been organized around this kind of a centralized religion, and many states maintained very strong churches and religiously inspired laws. Furthermore, one would expect that the absence of a centralized church would only broaden the reformist impact in the United States, since there would be no single, powerful group to resist the move away from Protestantism as a central axis of life. In short, insofar as America was more pluralist than England, this would be expected to increase, not decrease, the impact of the reforms ongoing in England.

61. It has been suggested that most of the Founding Fathers were deists. Although these claims are usually made by deist sympathizers, the influence of Locke, Voltaire, Tindal, and Rousseau on the American colonial leaders was significant. Many of these Deists were also rationalists and

rationalist religious thinkers and the widespread dissemination of their works facilitated systematized inquiry into the basis of religious belief. By 1845, one writer estimated that perhaps as few as one-fifth of the members of the House of Commons were earnest adherents to Christianity.<sup>62</sup> There is evidence that this erosion was affecting the lower classes, too.<sup>63</sup> By 1861, small atheist or deist “secular” societies had sprung up throughout Britain.<sup>64</sup>

The feeling that religion was imperfect but important as a social glue<sup>65</sup> was particularly potent in the years after the French Revolution, when it appeared to the ruling classes as though society was collapsing. Under such conditions, Parliament was understandably hesitant to chip away at the religious mortar perceived to be holding its nation together. However, as the calls for toleration became stronger, support for atheist exclusion waned, particularly in the face of the double injustice of freeing the guilty while denying the righteous key testimony. A study focusing on the British history of exclusion would have to trace the development of atheists’ rights in greater detail.<sup>66</sup> For the purposes of this Note, however, Britain merely acts as a foundation for a study of the American states.

### III. THE EMPIRICAL DATA ON THE FORTY-EIGHT STATES

Essentially, states can be sorted into four categories: those that disqualified atheists, those that allowed them to testify but also allowed examination into their credibility, those that allowed them to testify and protected them from impeachment, and those that allowed testimony but whose position on credibility questioning is unclear.<sup>67</sup> What follows is a discussion of the data that begins with those states that adopted the modern position early on, examines next those states in which the doctrine is clear, and concludes with those states in which the position is unclear.

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Enlightenment scholars whose ideas of society were more likely to attract attention in colonies in foment than in the more stable, stratified society of Great Britain. Allen also suggests that the broader movement toward Catholic emancipation in Great Britain may have quietly driven some of these reforms. See ALLEN, *supra* note 35, at 66.

62. ALLEN, *supra* note 35, at 68 n. 65.

63. See *id.* at 68-69.

64. See *id.* at 69-70 (discussing the case *Maden v. Catanach*, 158 Eng. Rep. 512 (Ex. 1861)).

65. See, e.g., J.S. MILL, *AUTOBIOGRAPHY* (London, Longmans, Green, Reader, and Dyer 1873), reprinted in 1 *COLLECTED WORKS OF JOHN STUART MILL* 73 (John M. Robson & Jack Stillinger eds., 1963-91).

66. See ALLEN, *supra* note 35, at 71-87.

67. The only exception to this categorization is South Dakota, the position of which is unknown on both issues. While North Dakota added a constitutional provision regarding atheist exclusion when it became a state, South Dakota did not. The original Dakota Code of 1877 did not address witness religion as an explicit disqualifier but also failed to make a substantive rule regarding it. This silence is unusual, given the movement at the time toward making rules about atheist testimony. Even more unusual is the complete absence of later case law on the question.

*A. Rule 610 Three Generations Early: States That Allowed No Question on Religion*

Of the forty-eight states in the Union before 1950, approximately nineteen neither rendered atheists incompetent nor allowed questioning to affect their credibility.<sup>68</sup>

Several states entered the Union with their positions on the question of atheist testimony established in their constitutions. Not surprisingly, the majority of these states are Western and entered the union in the latter part of the nineteenth century when the tide of argument against testimonial exclusion rules was rising. While the constitutions of Arizona<sup>69</sup> and Washington<sup>70</sup> were clear on both the question of competency and that of impeachment questioning, the majority resolved only the former, leaving the latter for courts to decide. An excellent example of this phenomenon is California, which entered the Union in 1850. Article I, Section 4 of the 1849 California Constitution provided that no person was rendered incompetent to serve as a witness or a juror by her religious belief. Yet, it took until 1887 for the state supreme court to rule explicitly that no witness should be questioned on matters of faith in order to impeach her credibility.<sup>71</sup> Even then, later courts allowed an attack upon a dying declaration<sup>72</sup> with evidence its author was an atheist. Other states in which

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68. As will be clear from the data that follows, some states' positions in 1908 are not precisely clear. Since this Note is an examination (and to a lesser extent, critique) of Fisher, it is necessary that the aggregated data either agree with the extrapolation of the thesis or not. In cases where the data is unclear, a presumption exists in favor of the Fisher thesis as extrapolated. In other words, when the evidence is inconclusive, this Note will presume that the state included atheists at the earliest plausible time. Instances where this presumption is employed will be noted explicitly.

69. Arizona's policy was established by ARIZ. CONST. art. II, § 12, which explicitly sets out that no person shall be rendered "incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony." This rule was confirmed in *Fernandez v. State*, 16 Ariz. 269 (1914), where the Arizona Supreme Court protected the testimony of an Apache-Mohave woman. In *Tucker v. Reil*, 77 P.2d 203 (1938), the court forbade questioning about a witness's membership in a church, even when that church was a party to the lawsuit.

70. WASH. CONST. art. I, § 11 states both that no witness will be disqualified on account of religion and that no witness shall be questioned on matters of religion for purposes of affecting her credibility. This provision was part of the original constitution of 1889 and survived several subsequent revisions. Given its plain, powerful language, it is unsurprising that no Washington cases dealt with it. However, the Washington rule was mentioned in *U.S. v. Miller*, 236 F. 798 (W.D. Wash. 1916), and noted by Biggs, *supra* note 19, at 39.

71. *People v. Copsey*, 12 P. 721 (Cal. 1887).

72. *People v. Lim Foon*, 155 P. 477, 481 (Cal. Ct. App. 1915 (remarking that the author's atheism could "greatly impair" credibility of a dying declaration). Since the dying declaration is properly considered an exception to hearsay, the questioning referred to in this section is not impeachment *per se*, but rather an argument that without the indicia of trustworthiness provided by religious belief, the exception should not apply. See E-mail from Douglas M. Bragg to Paul W. Kaufman (Aug. 29, 2001, 17:12:29 EST) (on file with author). Often the rules for impeaching dying declarants are looser than those impacting the credibility of live witnesses, so *Copsey* should be considered a firm rule as regarded atheist testimony in court.

constitutions resolved competence but left impeachment to later courts are Kansas,<sup>73</sup> Ohio,<sup>74</sup> Oregon,<sup>75</sup> and Texas.<sup>76</sup>

Article II, Section 5 of the Missouri Constitution allowed testimony regardless of religious belief. Impeachment was forbidden by *McClellan v. Owens*<sup>77</sup> in which the Missouri Supreme Court surveyed other states' case law and held that under "great weight of authority," a constitutional

73. *Dickinson v. Beal*, 62 P. 724 (Kan. App. 1900), is the relevant Kansas case. There the court highlighted two provisions of section 7 of the Bill of Rights in the state constitution: "No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election; nor shall any person be incompetent to testify on account of religious belief" and "Nor shall any control of or interference with the rights of conscience be permitted." The court ruled that taken together these provisions constituted a bar on questioning on matters of religion, whether for competence or for credibility. *Id.* at 725. This also provides an example of the trend of courts interpreting general "religious test" or "freedom of conscience" statutes to bar impeachment of atheists firmly rooted in the state constitution.

74. In 1840, the Ohio Supreme Court ruled that a minimal belief in God, although not necessarily in a future state of rewards and punishments, was necessary to render a witness competent to testify. *Brock v. Milligan*, 10 Ohio 121, 125 (1840). This view was overruled by § 1.07 of the Ohio Constitution of 1851, which expressly forbade the exclusion of witnesses based on religious belief. In *Clinton v. State*, 33 Ohio St. 27, 34-5 (1877), the court held that the matter of the defendant's religion was immaterial. There was no broad statement that such inquiry was forbidden, however; the court's limited ruling suggested that it might be appropriate in other cases. No such cases arose. The Advisory Committee notes to Ohio Rule of Evidence 610 (which tracks Federal Rule of Evidence 610, forbidding inquiry into matters of religion for purposes of affecting credibility) state that this rule is not inconsistent with preexisting Ohio precedent. OHIO R. EVID. 610 advisory committee's note. The logical conclusion is that *Clinton* established a rule against impeachment by irreligion in any but the most extreme cases. Such cases never arose.

75. The key Oregonian case is *State v. Estabrook*, 91 P.2d 838 (Or. 1939), in which the court considered whether a constitutional competency provision (Article I, Section 6, which seems to date from the state's 1859 entry into the Union) implicitly barred credibility questioning. After several references to cases discussed herein, the court decided that such questioning would be unconstitutional. The court also cited a dying declaration case, *State v. Yee Gueng*, 112 P. 424 (Or. 1910), a key case in determining whether to date the shift to 1939 or to consider it a much earlier evolution. Generally, the rules regarding using religion to impeach a dying declaration are more permissive than those regarding the impeachment of a live witness. Since *Yee Gueng* held that the speaker's lack of belief in a future state of rewards and punishments did *not* go to the credibility of a dying declaration, *see id.* at 425, it is unlikely that contemporary Oregonian courts would have allowed the impeachment of atheists on grounds of religious defect.

76. Article I, Section 5 of the Texas Constitution of 1876 prohibited the testimonial exclusion of atheists:

No person shall be disqualified to give evidence in any of the Courts of this State on account of his religious opinions, or for the want of any religious belief, but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury.

*See also* *Ake v. State*, 6 Tex. App. 398 (1879) (applying rule). The question of impeachment of credibility was resolved in *Liverpool & London & Globe Ins. Co. v. Ende*, 65 Tex. 118, 121 (1895), which stated, "The [questions referring to the witness's religious beliefs] were not relevant to the issue to be tried, and the court below should not have admitted the evidence complained of." Oddly, this rule was not cited in *Thornley v. State*, 78 S.W.2d 601 (Tex. Crim. App. 1935), in which the court discussed several other states' rules. This oversight is an example of the aforementioned difficulties in researching the incomplete records on these matters. *See supra* Part I.

77. 74 S.W.2d 570 (Mo. 1934).

provision that renders religion irrelevant to competence also makes it impermissible for challenging credibility.<sup>78</sup>

Illinois is a more complex example of this interplay between constitutional mandates and judicial decisions. *Central Military Tract R. Co. v. Rockefeller*, criticized the ancient Coke doctrine as “a rule as narrow, bigoted and inhuman as the spirit of fanatical intolerance and persecution which disgraced his age and country.”<sup>79</sup> Even so, the court’s testimonial allowance extended only to religious persons. In 1870, Illinois’s new constitution, in Article II, Section 3, provided that “no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions, but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations.”<sup>80</sup> In 1890, the Illinois Supreme Court interpreted this provision as abrogating the common law rule and mandating the testimonial qualification of atheists.<sup>81</sup> As to credibility, the definitive case on point is *Starks v. Schlensky*, which cites that constitutional provision as establishing a bar against such questions.<sup>82</sup>

While Minnesota is similar in that its constitution disallowed a religious competence test, there the legislature, not the court, decided the question of credibility impeachment on religious grounds.<sup>83</sup> Section 5658 of the General Statutes of 1894 had allowed impeachment of credibility on religious grounds, but it was repealed by sections 5518 and 5521 of the Revised Laws of 1905, after the passage of which no such questioning was allowed.<sup>84</sup>

Several states addressed both competence and credibility impeachment by statute. Pennsylvania offers a particularly interesting example. Even though Biggs asserts that atheists were disqualified there as witnesses, they had received full testimonial privilege and protection from impeachment when P.L. 140 passed in April 1909.<sup>85</sup> The law stated that

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78. *Id.* at 577. The failure of the state to give a precise backdate to which this holding applied posed the unanswerable question of whether to date the change to the constitution (which dealt only with competence) or to the case (which was considerably later). *McClellan* was a case of first impression in Missouri, so by definition the dating decision must be made without evidence of actual practice. Here, the presumption favors Fisher. *See supra* note 68.

79. 17 Ill. 541, 552 (1856).

80. ILL. CONST. of 1870, art. II, § 3.

81. *See Hroneck v. People*, 24 N.E. 861, 865 (Ill. 1890). In so ruling, the judges never explicitly considered the intention of the framers of that constitution; rather, the judges turned to the definition of “capacity” in a dictionary and decided the case on those grounds. *Id.* at 152. One can thus question whether the change should be dated to 1870 or to 1890, either conforms reasonably to the extrapolation of Fisher’s thesis. The change in doctrine was confirmed by *Henley v. Chicago City R.R. Co.*, 180 Ill. App. 397, 404 (1913).

82. 128 Ill. App. 1, 2 (2d Dist. 1906). Again, the dating question could be raised here but need not be, since 1908 will be the cutoff date this Note uses in compiling its data. *See infra* Part III.E.

83. MINN. CONST. art. I, § 17 expressly disallows any religious test for competency.

84. *See State v. Peterson*, 208 N.W. 761 (Minn. 1926).

85. Pa. Stat. Ann. tit. 28, § 311-12 (1930). Today, the law is 42 Pa.C.S. § 5902 (2002).

religion would no longer affect capacity and that no religious evidence on competency or credibility would be admitted. Prior to this law, the Pennsylvania rule had been that a witness had to believe in a deity who punishes false swearing.<sup>86</sup> In Vermont, the legislature similarly overruled the common law understanding.<sup>87</sup> By contrast, Colorado statutes fully protected atheist testimony from the first, obviating the need for judicial intervention.<sup>88</sup>

In many states the doctrine developed neither constitutionally nor statutorily but as a pure question of common law or a judicial interpretation of very general tolerance provisions, whether statutory or constitutional. The key difference between the states above and those that follow is that the latter had no explicit provisions governing atheists' competence to testify.

An excellent example is Kentucky, where *Bush v. Commonwealth* determined both competence and impeachment by interpreting constitutional provisions guaranteeing a general freedom of conscience and preventing imposition on civil rights.<sup>89</sup> The *Bush* court was careful to situate itself within the ideological mainstream:

The unquestioned tendency of modern legislation, as well as of judicial interpretation, is to the exclusion of inquiry into religious belief as a test of the competency of a witness. In this state, legislation in civil cases at least has kept pace with this tendency, so that, by virtue of the provisions of the Civil Code, no religious test can be applied.<sup>90</sup>

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86. See *Commonwealth v. Tresca*, 45 Pa. Super. 619 (1911).

87. In 1842, the case of *Scott v. Hooper* held that a belief in God was necessary for a witness to testify in court. Such was the opinion, so far as the bench saw, of "the common law, the laws of our sister states, and most other civilized countries." 14 Vt. 535 (1842). On November 19, 1851, the Vermont General Assembly passed Resolution No. 12, which stated in relevant part, "No person shall be deemed to be incompetent as a witness in any court, matter, or proceeding, on account of his opinions on matters of religious belief; nor shall any witness be questioned, nor any testimony taken or received, in relation thereto." This law became VT. STAT. REV. tit. IX, ch. 84, § 1739 (1947) and today is 12 VT. STAT. ANN. § 1606 (2002). Biggs confirms that by 1929 there was no exclusion of atheists. Biggs, *supra* note 19, at 39.

88. In Colorado, for example, § 13-90-110 reads, "No person shall be deemed incompetent to testify as a witness on account of his opinion in relation to the Supreme Being or a future state of rewards and punishments; nor shall any witness be questioned in regard to his religious opinions." COLO. REV. STAT. § 13-90-110 (1997). This statute is based on a string of laws which go back as far as 1872, four years before Colorado joined the Union, and which appear to have been similar or identical. See COLO. REV. STAT. § 154-1-10 (1963); COLO. REV. STAT. § 153-1-10 (1953); COLO. STAT. ANN. ch. 177, § 7 (1935); COLO. COMP. LAWS § 6561 (1921); COLO. REV. STAT. § 7272 (1908); COLO. GEN. STAT. § 3646 (1883); COLO. LAWS p. 95, § 1 (1872). Biggs's article confirms that by 1929 Colorado was not excluding atheist witnesses. Biggs, *supra* note 19, at 39.

89. 80 Ky. 244 (1882).

90. *Id.* at 248. It is interesting to note in hindsight that the fact that the criminal law lagged behind the civil fits neatly in with the pattern Fisher describes and England followed.

The court examines the arguments that supported inclusion, rehearsing many of the theories Allen discusses.<sup>91</sup> The court also says in dicta that Kentucky courts should not allow questioning to affect credibility.<sup>92</sup> This suggestion was followed in *Louisville & N.R.R. Co. v. Mayes*,<sup>93</sup> an unpublished opinion from 1904. Similar judicial interpretation of statutory and constitutional trends was the foundation of the doctrine in Michigan,<sup>94</sup> while in Louisiana, the courts waffled on the question of whether a general competency provision was enough to overturn the common law rule against atheist testimony.<sup>95</sup>

In at least three states, decisions regarding atheist competence and the propriety of impeachment were completely judge-made, without explicit reference to either statutory or constitutional provisions. In Maine, the judges produced an extremely muddled doctrine. In 1841, *Smith v. Coffin* held that atheists could be disqualified, but that there could be no impeachment of witnesses on religious grounds once they were ruled competent.<sup>96</sup> This latter principle was affirmed in dramatic fashion a year later, when in *Halley v. Webster*, the court held that questions about a witness's Satanism should not have been allowed.<sup>97</sup> No further constitutional, statutory, or case law change is apparent, but in his 1929 article, Biggs lists Maine as a state that does not require a religious belief.<sup>98</sup> It is possible that Biggs is mistaken, but no evidence supports this

91. See *supra* Part II.

92. 80 KY at 251.

93. 80 S.W. 1096 (Ky. 1904).

94. Michigan has one of the oldest "neither" pedigrees of all these states. *People v. Jenness*, 5 Mich. 305 (1858), held that MICH. CONST. art vi, § 34 and MICH. COMP. LAWS §4336 (1857) make atheists competent to testify and prohibit the questioning of a witness on matters of religious belief. §4336 was similar to a prior law, MICH. REV. STAT. c. 102, § 96 (1847). Although it is not clear how retroactive this holding was intended to be, it is certain that by 1858 Michigan was fully protecting atheist testimony and may have already been doing so for some time. The holding in *Jenness* was codified in MICH. COMP. LAWS § 5963 (1872). The modern rule is MICH. COMP. LAWS § 600.1436 (1996).

95. In 1897, in *State v. Washington*, the Louisiana Supreme Court held that a belief in a supreme being was indispensable and that a general competency law passed in 1886 was insufficient to overturn the common law rule. 22 So. 841 (La. 1897). A mere six years later, *State v. Williams*, 35 So. 505 (La. 1903), overturned this decision, interpreting the same law in exactly the opposite way. The Court held that "in Louisiana, so far as we are informed, save in the case thus reported and annotated, it has never been held that a witness was incompetent to testify on account of his religious belief or disbelief." *Id.* at 507. Louisiana's doctrine with respect to credibility questioning is not nearly as clear. The principal case on that question seems to be *State v. Dyer*, 97 So. 563 (La. 1923), where the court makes the puzzling comment that "[I]t is of course improper to ask a witness to what religion he belongs merely for the alleged purpose of thereby alone affecting his credibility. . . ." *Id.* at 564. No law (either statutory or judge-made) is cited to support this conclusion. In the absence of any data to the contrary, it is best to presume in Fisher's favor that after 1903, impeachment on religious grounds was forbidden. See *supra* note 68.

96. 18 Me. 157, 164 (1841). The Court limited the disqualification to avowed atheists, which was not unusual. See *supra* note 25.

97. 21 Me. 461 (1841).

98. Biggs, *supra* note 19, at 39.

conclusion. However, given that even Satanists were allowed to testify, it is possible that the doctrine as practiced treated religion as irrelevant.<sup>99</sup>

Two additional states neither excluded atheists nor allowed their impeachment: Virginia and West Virginia. The 1846 case, *Perry v. Commonwealth*, is the determinative formulation of Virginia doctrine on atheist testimony.<sup>100</sup> *Perry* reviews the history of the common law doctrine and, taking the moral high ground and a realistic view of the legislature's views on religious tolerance, lays out the rationales for including atheists and precluding impeachment on religious grounds. The court ultimately finds these arguments persuasive.<sup>101</sup> West Virginia's Supreme Court spoke definitively on the question of atheist exclusion in *State v. Hood*, which held that the West Virginia Bill of Rights' general language against religious tests was intended to abrogate common law exclusion.<sup>102</sup> In reaching this conclusion, however, it merely followed Virginia's case law (principally *Perry*) and Virginia's Bill of Rights. This is hardly surprising, since West Virginia was part of Virginia when *Perry* was decided and had lived under the *Perry* rule for twenty years before seceding during the Civil War.

### *B. Competent but Not Credible: The Impeaching States*

Nine states concluded that while atheists should be competent to testify, they should be subjected to examination for purposes of disputing their credibility. This doctrine seems to have paralleled the rule in English courts, in which significant disapprobation was still attached to the open declaration of atheism.<sup>103</sup>

As noted above,<sup>104</sup> several states' judiciaries held that constitutional provisions rendering atheists competent to testify prevented their impeachment. In at least one case, however, constitutionally sanctioned competence was no shield from the judicial allowance of credibility attacks. The Mississippi Supreme Court held in *R.J. Hill v. State* that the religious opinions of a dying declarant can go to the credibility of her

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99. Even after the fall of religious testimonial exclusion, courts still rendered incompetent those whose religions required them to lie. While there is no evidence that Satanism is such a religion, the common law understanding of the deity as truth guarantor is nonsensical as regards a worshipper of the "Prince of Lies." If a devotee of a god who would not punish falsehood was allowed to testify, one wonders if in practice believers in no god were as well. For purposes of aggregating the data, the presumption of conformity with Fisher's thesis obtains. See *supra* note 68.

100. 44 Va. (3 Gratt.) 632.

101. This opinion serves as an excellent summary of the contemporary arguments against the exclusion of atheists.

102. 59 S.E. 971 (W.Va. 1907).

103. See ALLEN, *supra* note 35, at 65, for the story of a witness so declaring being hissed out of court, even by members of the jury. One suspects that similar prejudices existed in America, particularly during the periodic religious Awakenings.

104. See *supra* pp. 423-24.

declaration.<sup>105</sup> *Gambrell v. State* affirmed that decision despite the fact that Mississippi did not disqualify atheists after 1880.<sup>106</sup> The *Hill-Gambrell* doctrine was extended to live witnesses in 1924.<sup>107</sup>

In three states, the legislatures made it clear that constitutional competence did not immunize atheists from impeachment. Despite a constitutional provision prohibiting disqualification based on religion, Indiana passed a law in 1838 allowing credibility impeachment on religious grounds.<sup>108</sup> Iowa experienced a similar doctrinal evolution.<sup>109</sup>

Idaho presents a more complicated situation than the other two. The first key Idaho case was *State v. Williams*, which held that since an Idaho statute prohibited disqualification, it also prohibited the exclusion of an atheist's dying declaration.<sup>110</sup> This law, which dates from before Idaho became a state,<sup>111</sup> survives in the same form to this day.<sup>112</sup> In force under various names since 1881, the law clearly states that persons shall not be rendered incompetent on account of religious belief, but that:

in every case the credibility of the witness may be drawn in question, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or his motives, or

105. 1 So. 494 (Miss. 1886)

106. 46 So. 138 (Miss. 1908). The court cites MISS. CODE OF PUB. STAT. LAWS, ch. 46, § 1919 (1906) for this proposition. However, section 1919 was merely an iteration of the MISS. REV. CODE ch. 58, § 1604 (1880), which stated, "No person shall be incompetent as a witness because of defect of religious belief." This 1880 version was apparently the first code to have this provision, as the Code of 1857 does not lay out explicit rules for witness competence. MISS. REV. CODE ch. 58, § 1604 (1880) would become MISS. CODE OF GEN. STAT. § 1742 (1892) before becoming MISS. CODE OF PUB. STAT. LAWS ch. 46, § 1919 (1906).

107. *Hunter v. State*, 102 So. 282 (Miss. 1924)

108. *See* IND. CONST. art. I, § 7 and *Snyder v. Nations*, 5 Blackf. 295 (1840) (citing IND. REV. STAT. of 1838, p. 275). This rule was carried forward as STAT. IND., VOL. II, PART II, ch. I, §243 (1862), IND. CODE ANN. §513 (1894), IND. CODE ANN. §529 (1908), IND. CODE ANN. §560 (1929), and IND. CODE ANN. §2-1724 (1963). Indiana Rules of Evidence 610, which would seem to end the impeachment of witnesses on religious grounds, was adopted in 1994. However, IND. R. EVID. 610 conflicts with IND. CODE § 35-1-14-13 (1999) (IND. CODE ANN. § 34-45-2-12 (1999)), which states, "Lack of belief in a Supreme Being or in the Christian religion does not render a witness incompetent. However, lack of religious belief may be shown upon the trial."

109. When Iowa entered the Union in 1846, IOWA CONST. art. I, § 4 established that no material witness would be rendered incompetent on the basis of her views on matters of religion. *State v. Elliot* established that credibility was examinable in the context of a dying declaration. 45 Iowa 486 (1877). In allowing impeachment of a live witness, *Searcy v. Miller*, 10 N.W. 912 (1881), cited in IOWA CODE § 3637 (1873), provided that "facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility." This statute had existed in some form since 1851 and has enjoyed continuous existence up through modern times. *See Searcy*, 10 N.W. at 915; *see, e.g.*, IOWA CODE §11255 (1939); IOWA CODE § 622.2 (1998); and IOWA CODE ANN. §622.2 (1950). However, in 1983, IOWA R. 5.610 (2002) went into effect, eliminating credibility impeachment on religious grounds.

110. 209 P. 1068 (1922) (discussing IDAHO COMP. STATS. § 7935 (1919)).

111. *See* IDAHO TERRITORY COMP. & REV. LAWS § 617 (1875).

112. IDAHO CODE § 9-201 (2003).

by contradictory evidence; and the jury are the exclusive judges of his credibility.<sup>113</sup>

Although section 9-201 is grammatically ambiguous, at least one other issue beyond those listed has been allowed as the subject of credibility examination.<sup>114</sup> Thus, the best conclusion is that credibility impeachment on religious grounds was allowed in Idaho beginning in 1881 at the latest.

In two states, the legislatures overruled case law with statutes permitting the impeachment of atheist testimony. In Massachusetts, the Supreme Court limited religious inquiries to a question of credibility in *Hunscomm v. Hunscomm*,<sup>115</sup> but declined to so protect atheists in *Thurston v. Whitney*.<sup>116</sup> Twelve years later, the legislature overturned *Thurston* by passing Mass. Gen. Laws ch. 131, §12, which reduced atheism to a question of credibility.<sup>117</sup> Similarly, in 1895, the Tennessee legislature replaced a judicial rule of atheist incompetence with one allowing credibility impeachment on religious grounds.<sup>118</sup>

In two states, the credibility impeachment doctrine was developed entirely by judges. *Gantz v. State*, laid out Georgia's law clearly.<sup>119</sup> *Gantz* evaluated the competence of a Chinese man who was unsure of his views on the afterlife. On the question of exclusion, the court held, "There is no statute of this state that renders a witness incompetent to testify because of religious belief or the lack of it; such a test would be inconsistent with our law and with the spirit of our institutions."<sup>120</sup> The court was correct: in

113. *Id.*

114. In *State v. Fong Loon*, 158 P. 233 (Id. 1916), the Supreme Court allowed questioning as to whether the witness was addicted to narcotics that could have affected his mind. Narcotics are not mentioned specifically in the list of possible sources of credibility examination in section 9-201 of the Idaho Code, IDAHO CODE § 9-201 (2003), or its antecedents. Note that *Fong Loon* preceded *Williams* by six years.

115. 15 Mass. (14 Tyng) 184 (1818).

116. 56 Mass. (2 Cush.) 104 (1818).

117. In 1925, the Supreme Court of Massachusetts confirmed that the credibility only doctrine was still the law of the state in *Allan v. Guarante*, 148 N.E. 461 (Mass. 1925).

118. The earliest case on point is *State v. Cooper*, 2 Tenn. (2 Overt) 96 (1807), which tracked *Omychund* rule. *Bennett v. State* revised the law by holding that any believer in God can testify, regardless of her belief in a future state of rewards and punishments. 31 Tenn. (1 Swan) 411 (1852). The next case on point is *Anderson v. Maberry*, 49 Tenn. (2 Heisk.) 653 (1871), which relies heavily on *Harrel v. State*, 38 Tenn. (1 Head) 125 (1858). *Anderson* holds that atheists are incompetent as witnesses and may be attacked either collaterally or directly. 49 Tenn. (2 Heisk.) at 657-58. This rule was confirmed a year later in *Odell v. Koppee*, 52 Tenn. (5 Heisk.) 88 (1871). This rule was implicitly upheld by TENN. CODE § 4521-23 (1884), which provided for an affirmation which included an appeal to God as a punisher of wrongs but alternately allowed people to be sworn according to the form of their "own country, or particular religious creed" when required. (emphasis added). The key change in Tennessee law came with the passage of TENN. ACTS ch. 10, § 1 (1895) which allowed atheists to testify but allowed impeachment on religious grounds. This law was later known as TENN. CODE § 5593 (1896), TENN. CODE § 5593 (1918), TENN. CODE § 9775 (1932), TENN. CODE ANN. §24-102 (1955), and TENN. CODE ANN. § 24-1-102 (1980). In 1990, Tennessee did away with credibility impeachment on religious grounds. See *State v. Young*, 1990 WL 45694. The old law was officially repealed by the legislature in 1991. See 1991 TENN. PUB. ACTS. 456.

119. 88 S.E. 993 (Ga. App. 1916).

120. 88 S.E. at 994.

*Nesbit v. State*, it had allowed into evidence the dying declaration of an atheist but had permitted impeachment of the statement based on the irreligion of the declarant.<sup>121</sup> From that point, Georgia courts obliquely suggested that an atheist's credibility was questionable.<sup>122</sup> Oklahoma followed a similar typology.<sup>123</sup>

The final state that allowed atheists to testify but also allowed their impeachment is New York, the case history of which presents a thorny mass of legal issues. The question of competence is fairly simple: the Constitution of 1846 abrogated the common law principle with the phrase, "no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief."<sup>124</sup> *Stanbro v. Hopkins* held that this provision did not preclude religious examination for purposes of credibility.<sup>125</sup> The doctrinal confusion begins in 1891, with *People v. Most*.<sup>126</sup> In determining whether an objection should have been sustained to questions about a defendant's atheism, the court held that the objections were frivolous. Twelve years later, in *Brinks v. Stratton*, the same issue arose, and a minority of justices spoke for the Court, declaring themselves bound by *Most*.<sup>127</sup> Since the trial-level records are so poor, it is impossible to know how the state's bar actually treated the holding.<sup>128</sup>

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121. 43 Ga. 238 (1871).

122. For example, as late as 1963 the Supreme Court of Georgia held that while it was "not necessary" for a witness to know of God, it was "desirable." *Jones, Alias Goolsby, v. State*, 132 S.E.2d 648, 649 (Ga. 1963).

123. A dying declaration was also at issue in *McClendon v. State*, the only Oklahoma case to touch on these issues directly, which held that any evidence admissible against a witness can be admitted against a dying declarant. 251 P. 515, 516 (Okla. Crim. App. 1926). Thus, the declarant's atheism could be introduced to challenge the credibility of the declaration. *McClendon* does not cite any Oklahoma authority. Although *McClendon* concludes that the questioning was too unimportant to cause any real prejudice, it strongly suggests that in 1926 atheism was still the subject of impeachment in Oklahoma. *Id.* Although the question is a close one, this evidence suffices to overcome the presumption for Fisher's thesis as extrapolated. See *supra* note 68.

124. N.Y. CONST. of 1846 art. 1, §3 (1847).

125. 28 Barb 265 (N.Y. Sup. 1858).

126. 27 N.E. 970 (N.Y. 1891).

127. *Brinks*, 68 N.E. 148 (N.Y. 1903). In *Most*, *supra* note 123, more justices join the concurrence than the opinion of the court. However, only two issues were addressed, and all the justices concurred on one of them. One would suspect, then, that the opinion would come from one of the justices in the majority on both issues. Nevertheless, the minority view apparently wrote the opinion of the court. To further muddle matters, the justices unanimously agreed to reverse and remand on the first ground, meaning the relevant portion of the holding might be dicta (which could explain why a minority justice wrote it). This history seems to have baffled the court in *Thornley v. State*, which cited the concurrence as the holding. 78 S.W.2d 601 (Tex. Crim. App. 1935). See also the West headnote: "For the purpose of affecting the credibility of a witness he cannot be interrogated as to his belief in the existence of a Supreme Being, who would punish him for false swearing." This is the suggestion of the concurrence in *Brinks*, but it is not the holding of the opinion. Rather, it holds the exact opposite: that the defendant's objections are frivolous.

128. For aggregation purposes, while the presumption usually accords with Fisher's thesis as extrapolated, *supra* note 68, in this case the opinion should obtain as published. Two later cases also suggest this conclusion. In 1939, the Appellate Division stated that religious imputations are highly prejudicial and, in 1956, it held that in all but the rarest cases religious faith is irrelevant. See *Bowen v. Mahoney Coal Corp.*, 10 N.Y.S.2d 454 (1939) (the former); *Toomey v. Farley*, 138 N.E.2d 221 (N.Y.

### C. The Disqualifying States

Several states maintained rules disqualifying atheists well into the twentieth century, defying the extrapolation of Fisher's thesis. In Arkansas, the exclusion rule was constitutional, which might account in part for its longevity.<sup>129</sup> Maryland's common law exclusion of atheists was only challenged and abrogated in the mid-twentieth century.<sup>130</sup> In 1931, the Alabama Supreme Court engaged in a protracted debate over whether a general religious toleration provision passed in 1901 invalidated the common law rule.<sup>131</sup> They eventually agreed that it did so, but this change in the law dates to 1931.<sup>132</sup>

North Carolina had not settled the question of atheist exclusion by 1929, which prompted Biggs to write the law review article upon which this

1956) (the latter). Had *Brinks* really established a categorical exclusion for religious impeachment, these cases would have been extraneous or would have been resolved in a much firmer fashion.

129. ARK. CONST. art. 19, § 1 reads, "No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any court." This provision was part of the Constitution of 1874. ARK. CONST. of 1874, art. XIX, § 1. One recent challenge to the law on equal protection grounds failed for lack of standing. See *Flora v. White*, 692 F.2d 53 (8th Cir. 1982). After the *Torasco* decision, see *infra* note 130, this provision is probably a dead letter. KAY GOSS, *THE ARKANSAS STATE CONSTITUTION: A REFERENCE GUIDE* 106 (Greenwood Press 1993). Nevertheless, the provision does not seem to have been overruled by any explicit decision or decree.

130. Maryland's Declaration of Rights contains an express provision precluding atheists from testifying. MD. CONST. § 36 (1879). This provision had existed in some form since the original Declaration of Rights in 1776. MD. CONST. § 36 (1776). Maryland's exclusion of atheists from offices of public trust was challenged in *Torasco v. Watkins*, where the Maryland Supreme Court held that the state constitutional provision precluding religious tests for office did not protect atheists. 162 A.2d 438, 443 (Md. 1960). On appeal, the U.S. Supreme Court held that this provision (as interpreted) violated the federal constitution. *Torasco v. Williams*, 367 U.S. 488, 496 (1961). In 1967, the Maryland Supreme Court applied the High Court's logic and decided that the state's atheist exclusion rule had to fall for the same reasons. *White v. State*, 223 A.2d 259 (Md. 1966). Although Maryland allowed affirmation in lieu of oath, MD. REV. CODE OF PUB. GEN. LAWS art. 1, § 8 (1879), those oaths were still accompanied by an oral declaration of the belief in God. MD. REV. CODE OF PUB. GEN. LAWS art. 23, § 8. See MD. REV. CODE OF PUB. GEN. LAWS art. 1, § 39 (1879) ("the manner of administering an oath or affirmation to any person, ought to be . . . the most effectual confirmation by the attestation of the Divine Being"). This general requirement of a belief in God survived until the *Torasco* decisions. See *Torasco*, 162 A.2d at 440; *White*, 223 A.2d at 261.

131. See *Wright v. State*, 135 So. 636, 636-37 (1931) (discussing *Marshall v. State*, 121 So. 72, 75 (Ala. 1929), in context of dying declaration., which skirts the question of whether Section 3 of the Constitution of 1901 effected a change in the law or not). In *Wright*, the Court initially adopted Lord Hale's ancient formulation about future rewards and punishments. On rehearing, two of the three judges defected to the view that atheists are competent to testify, leaving a rich record of the judges' running debate over the merits of religion and of the divinely-assured oath. Like *Marshall*, *Wright* claims to be interpreting the Constitution of 1901, but in 1902 the Court ruled in *Beeson v. Moore*, 31 So. 456 (Ala. 1902), that the belief in a future state of rewards and punishments was *not* necessary, so long as a witness believed in some divine punishment for iniquity in *this* world. This holding seems to contradict both the initial holding of *Wright* and the holding after rehearing.

132. Several factors militate in favor of this later date. First, the decision in *Beeson* disqualifies atheists and it came right after the 1901 constitution. See *supra* note 132. Second, it seems more likely that the initial decision reflected the status quo and that the rehearing decision reflected a change, rather than the reverse. Most importantly, in 1929, J. Crawford Biggs lists Alabama as disqualifying atheists. See Biggs, *supra* note 19, at 39. The best interpretation of the data, then, is that 1931 was the watershed year for Alabama on this question.

Note frequently relies.<sup>133</sup> The historical rules in that state, however, made it fairly clear that atheists would be disqualified. In *Shaw v. Moore*, the Supreme Court of North Carolina held that a belief in God and in a future state of rewards and punishments were both necessary to render a witness competent.<sup>134</sup> Several later cases cite this rule, including two during the time at issue.<sup>135</sup> *State v. Beal* artfully dodged questions of both competence and impeachment.<sup>136</sup> Thus, given that the doctrine was at best “unsettled”<sup>137</sup> and that indications point toward exclusion, one can likely accept Biggs’s conclusion that North Carolina would have excluded atheists from testifying.

Finally, in Delaware, New Hampshire, New Jersey, and South Carolina, atheist disqualification was purely a matter of case law. The traditional common law exclusionary rule lasted until the passage of Rule 610 in modern times in both Delaware<sup>138</sup> and New Hampshire.<sup>139</sup> Although exclusion of atheists in New Jersey lasted until Biggs’s time, it was eliminated shortly thereafter.<sup>140</sup> South Carolina’s position remains unclear. Some case law suggests that atheists would not have been allowed to

133. Biggs, *supra* note 19, at 36. Although Biggs does not say why he is writing, the *Beal* case was decided the next year by the state supreme court. It seems likely Biggs was writing a prediction of the outcome based on his observation of the lower level proceedings and on his knowledge of North Carolina law.

134. 49 N.C. (4 Jones) 25 (1856).

135. See *Lanier v. Bryan*, 114 S.E. 6 (N.C. 1922); *State v. Pitt*, 80 S.E. 1060 (N.C. 1914). For a fuller discussion of these cases, see Biggs, *supra* note 19, at 30-36.

136. 154 S.E. 604 (N.C. 1930).

137. See Committee Notes to the eventual N.C. R. EVID. 610.

138. The Delaware doctrine runs back to *State v. Townsend*, 2 Del. (2 Harr.) 543 (1837). In *Townsend*, a split Delaware Supreme Court held that atheists were incompetent to testify under the traditional common law rationale that their truth-telling was not guaranteed. This remained the rule in Delaware until the passage of Rule 610. As of 1929, Delaware was an atheist disqualifying state according to Biggs. Biggs, *supra* note 19, at 39.

139. In 1828, *Norton v. Ladd*, 4 N.H. 444, held that no atheist would be allowed to testify on the grounds that no religious tie would bind her to tell the truth. In 1879, *Free v. Buckingham*, 59 N.H. 219, established that both a belief in God and in divine rewards and punishments was required to be competent. However, the same case asserts that it “is not customary to inquire” into matters of religion and that trial judges making decisions on these questions will rarely be second-guessed. 59 N.H. at 225. In 1929, Biggs reported the same rule still in place. Biggs, *supra* note 19, at 39. Significant modification of the common law rule was not judicially acknowledged until 1974, in *State v. Keyes*. 322 A.2d 615, 618. The later passage of Rule 610 did not change the modern rule laid down in that case.

140. According to *Donnelly v. State*, the rule in New Jersey also required complete belief in a future state of rewards and punishments. 26 N.J.L. 463, 506-07 (1857). Biggs indicates that this rule lasts through 1929, but according to *Marshall v. State*, the rule had been abrogated by 1929. 121 So. 72, 75 (Ala. 1929). See also Biggs, *supra* note 19, at 39. By 1954, at the latest, the rule was dead in New Jersey. See *State v. Huff*, 102 A.2d 8 (N.J. 1954). The doctrine’s demise can be estimated fairly well, however, by examining the case of *State v. Weiss*, 31 A.2d 848 (N.J. 1943), which held that the defense cannot ask prospective jurors about their religious views on birth control. The *Weiss* court cites *State v. Longo*, 3 A.2d 127 (N.J. 1938), a case about asking jurors their political affiliation. If asking witnesses about their religion was already held improper, one would expect the court to have cited that instead (or at least as well). In any case, unless Biggs is badly mistaken, it seems that New Jersey maintained the common law doctrine through the early 1920s at the earliest, a time more than sufficient to make New Jersey an aberrant for this study’s purposes.

testify in South Carolina courts,<sup>141</sup> but the scholar must rely largely on Biggs's conclusion that in 1929, South Carolina still required a belief in God for a witness to be competent.<sup>142</sup>

*D. The Question Marks: States in Which the Position on Credibility is Unclear*

In eleven states the records are too fragmentary to support even a meaningful guess as to their impeachment rules. While for the purposes of tallying the empirical results, the states that follow will be presumed to have followed the extrapolation of Fisher's thesis, it is important to distinguish them from those states about which more information is available.<sup>143</sup>

For six states, the constitutional provisions rendering religion irrelevant to witness competence are the only indication of state doctrine. Article I, Section 4 of the Nebraska Constitution of 1875 provides that there will be no exclusion of witnesses on the basis of religion.<sup>144</sup> Despite this prohibition, five years later the case of *Priest v. State* held that an Indian was incompetent to testify because his oath was not backed by fear of the Great Spirit.<sup>145</sup> *Priest* was cited favorably in 1909 in *Pumphrey v. State*.<sup>146</sup> Nevertheless, Biggs confirms that by 1929, Nebraska was including atheists.<sup>147</sup> Since one must assume that the majority of judges followed the state's constitution, it seems most likely that, despite *Priest* and *Pumphrey*, atheists were allowed their constitutional right to testify. There seems to be no law on the question, nor any at all on the question of

141. See *State v. Abercrombie*, 126 S.E. 142 (S.C. 1925) (precluding the testimony of an eight year old witness because he had not satisfactorily expressed a belief in God and His providence); *State v. Belton*, 24 S.C. 185 (1886) (holding that it was insufficient that the twelve year old prospective witness knew that a "bad man" hurt those who lied; rather, a baseline theological understanding was required).

142. By 1971, an agnostic who "respect[ed] the idea" of God was admitted; it was held that the question of his religion should go to his credibility, rather than his competency. *State v. Hicks*, 185 S.E.2d 746 (S.C. 1974).

143. In fact, the patterns of data described above and analyzed below will suggest that some of these states likely had positions. Those indicia will be examined further below.

144. NEB. CONST. of 1875, art. 1, § 4.

145. 6 N. W. 468, 469 (Neb. 1880).

146. 122 N.W. 19, 20 (Neb. 1909). Although this case supported the inclusion of the witness's testimony, it seems to have been because insufficient foundation had been laid to disqualify the witness than because such disqualification was impossible.

147. See Biggs, *supra* note 19, at 39.

credibility examination.<sup>148</sup> A similar void exists in Nevada,<sup>149</sup> North Dakota,<sup>150</sup> Utah,<sup>151</sup> Wisconsin,<sup>152</sup> and Wyoming.<sup>153</sup>

Connecticut and Montana had statutes rendering atheists competent. In the former, the legislature overruled the common law disqualification of atheists in 1875, but it did not resolve the question of credibility at that or any other time in the relevant range.<sup>154</sup> The Montana legislature allowed atheist testimony even in territorial times,<sup>155</sup> but it passed its first law

148. Unlike some other states, when Nebraska passed Rule 610, there were no advisory committee notes tracing the history of the state's doctrine.

149. NEV. CONST. of 1864, art. I, § 4 provides for the competence of its citizens regardless of their religious beliefs. In 1971, Nevada's legislature added a provision like Rule 610, NEV. REV. STAT. § 50.105 (1971), but did not go into detailed legislative history at that time. Apart from §50.105, there seems to have been no statutes or case law on the question.

150. North Dakota also entered the union with a constitutional provision forbidding the exclusion of witnesses on the basis of their religion. N.D. CONST. of 1889, art. 1, § 4. Like Nevada, North Dakota has no relevant case law or statutory history until the passage of Rule 610 in 1975. N.D. R. EVID. 610. As with the others, the committee notes are silent. There seems to have been no other statutory law on point; the only laws near point are those defining the oath, which allow a witness to affirm without reference to God but which do not give any indication of the state's position on credibility impeachment. See CODE OF CIV. P., ANN. REV. CODE OF TERRITORY OF DAKOTA § 462 (1883); N.D. REV. CODE §31-0122 (1943). Biggs confirms that North Dakotan atheists were competent to testify in court. See Biggs, *supra* note 19, at 39.

151. UTAH CONST. of 1896, art. 1, § 4 is more explicit than its cousins, as its language includes not only those with a religion but also those with a "lack thereof." Otherwise, Utah is typical. UTAH R. EVID. 610 was enacted in its earliest iteration in 1971. Other than *State v. Zeezich*, 210 P. 927 (Utah 1922), which merely confirmed that there is no religious test for bearing witness, there seems to have been no real case law on the extant questions.

152. Wisconsin's Article I, Section 19, a provision of the original constitution that has not been litigated, parallels the language of other states in its abrogation of witness exclusion. WIS. CONST. of 1848, art. 1, § 19 (1848). The Judicial Committee's Notes to WIS. STAT. § 906.10 (2000) (Wisconsin's version of Rule 610, originally passed in 1974) do not mention any case or statutory history in Wisconsin.

153. Article I, Section 18 of Wyoming's original constitution contained a rule against excluding atheists. WYO. CONST. of 1890, art. 1, § 18. There have been no judicial determinations made with respect to this Article. See ROBERT B. KEITER AND TIM NEWCOMB, THE WYOMING STATE CONSTITUTION: A REFERENCE GUIDE 318 (1993). This fact is confirmed by my research. It seems that until Rule 610 was passed in Wyoming in 1977, there was no rule regarding the credibility examination of atheists.

154. The earliest case in Connecticut is *Curtiss v. Strong*, 4 Day 51 (Conn. 1809), which cited the *Omychund* rule that a belief in a future state of rewards and punishments was necessary to qualify a witness. *Atwood v. Welton*, 7 Conn. 66 (1828), followed this decision and explicitly ruled that atheism was a disqualification. Under CONN. GEN. STAT. tit. 1, § 140 (1849), a witness had to believe in some Supreme Being. Annotations to this provision suggest that this statutory rule dated from 1830. *Id.* Both this provision and that annotation were carried forward through the middle of the nineteenth century. See CONN. STAT. tit. 1, § 140 (1854); CONN. GEN. STAT. tit. 1, § 175 (1866); CONN. GEN. STAT. tit. 19, ch. 11, § 35 (1875). In 1886, however, the Connecticut legislature reversed these rules and allowed atheists to testify. 1886 Conn. Pub. Acts 588. The new rule was confirmed in *Ruocco v. Logiocco*, 134 A. 73 (Conn. 1926), although by then the relevant rule was named CONN. GEN. STAT. § 5705 (1918). Today this rule is CONN. GEN. STAT. § 52-145 (1991).

155. See LAWS OF MONT. TERRITORY, Civ. P. Act, § 444 (1872); MONT. REV. STAT., Code Civ. P. § 626 (1881); MONT. COMP. STAT., Code Civ. P. § 647 (1887). This line of statutes was eventually superceded by MONT. R. EVID. 601. Biggs confirms that in 1929 Montana was not disqualifying witnesses on religious grounds. See Biggs, *supra* note 19, at 39.

regarding credibility impeachment on religious grounds in 1976, when it adopted Rule 610.<sup>156</sup>

In Florida, both a statute and a constitutional provision delineated a rule supporting atheist competence.<sup>157</sup> However, credibility seems not to have been addressed squarely. The Law Revision Council notes to Fla. Stat. Ann. § 90.611, the current provision that prohibits credibility impeachment by religious questioning, date the change in the law to *Taylor v. State*.<sup>158</sup> That case listed a variety of queries that could be used to impeach credibility, but it did not mention religion. The Law Revision Counsel interpreted this silence as a change in the law.<sup>159</sup> This argument is flawed, however, since the list in *Taylor* does not claim to be exclusive. A plain reading of *Taylor* does not suggest that it was consciously changing the law, which leaves the scholar without any solid evidence of the pre-§90.611 rule.<sup>160</sup>

Rhode Island's courts ruled in 1916 that atheists were competent to testify based on the statutory allowance of affirmation in lieu of oath.<sup>161</sup> There appears to be no Rhode Island case or statutory law governing impeachment on religious grounds.<sup>162</sup>

156. The Commission Comments to Rule 610 note that "there is no Montana law on th[e] subject" of questioning for credibility. Commission Comments to MONT. R. EVID. 610 While the text of Rule 610 is almost identical to the comparable law in neighboring Idaho, *see supra* text accompanying notes 111-13, in Idaho the subsequent law allowed an educated guess as to the position on credibility impeachment. Here, no such subsequent law exists. Thus, even though the Commission Comments assert there is no contrary law, it is not possible to conclude either way on the question of credibility impeachment.

157. Florida's common law rule of exclusion was abrogated in 1887, when section 5 of the Declaration of Rights of the state constitution of 1885 went into effect. FLA. CONST. OF 1887, DECL. OF RIGHTS § 5. In 1891, the Florida legislature passed an act explicitly allowing atheists to testify. 1891 Fla. Laws ch. 4036. That law became REV. STAT. FLA. ch. 4036 (1892) and later GEN. STAT. FLA. §1503 (1906). *See* *Clinton v. State*, 43 So. 312 (Fla. 1907). *Clinton* was cited as the rule in *Thomas v. State*, 74 So. 1 (Fla. 1917). 1976 Fla. Laws ch. 76-237 replaced the final iteration of these acts, FLA. STAT. § 90.06 (1941) with FLA. STAT ANN. §90.611, which tracks FED. R. EVID. 610.

158. 190 So. 691 (Fla. 1939).

159. *See* the Law Revision Council notes to FLA. STAT. ANN. § 90.611.

160. This leaves the troublesome question of whether to use 1887, the date *Clinton* describes for the initial preclusion of religious impeachment, or whether to locate that change in the *Taylor* decision a half century later. Even though the Committee considered 1939 the date the law changed, it seems 1887 is as likely to have been the moment exclusion ended. Thus the presumption in favor of Fisher obtains for purposes of counting Florida's position. *See supra* note 68.

161. *State v. Riddell*, 96 A. 531 (R.I. 1916). *Riddell* cites R.I. GEN. LAWS ch. 32, § 10 (1909), which construed all uses of the word "oath" to include "affirmation." This rule dates back to at least 1822. *See* R.I. LAWS 96 § 17, 97 § 19, 131 §31 (1822) (examples of oaths that included an option to affirm); R.I. GEN. LAWS ch 22, § 10 (1872); R.I. GEN. LAWS ch. 24, § 10 (1882); R.I. GEN. LAWS ch. 26, § 10 (1896). Nothing in the decision suggests that allowing atheist testimony was an innovation, but it is worth considering that the allowance of affirmation was originally intended to grant Quakers and Separatists the right to testify and that affirmation did not always allow atheists into the witness chair. *See supra* notes 47-53 and accompanying text. Nevertheless, in the case of granting atheist testimony, the "dog does not bark" reasoning is strong and one should presume Rhode Island allowed atheists to testify by 1908. This also accords with the presumption in favor of the extrapolated Fisher thesis. *Supra* note 68. Neither *Riddell* nor the R.I. GEN. LAWS address credibility impeachment.

162. *See* R.I. R. EVID. 610 advisory committee's note (stating that "[n]o Rhode Island decision has dealt squarely" with the issue of credibility). The only case the notes cite is *Riddell*.

Regarding New Mexico, Biggs asserts that by 1929, the state had abrogated the common law rule with respect to competence,<sup>163</sup> but the only apparent New Mexico opinion on point is *Territory v. Yee Shun*, which suggests that an atheist *could* be excluded.<sup>164</sup> Thus, if Biggs is correct, New Mexico switched its position on the merits of atheist exclusion between 1884 and 1929. However, there is no record of this change. Furthermore, no evidence addresses the question of credibility impeachment.

#### *E. Preliminary Empirical Conclusions: Trends in the Data*

Before examining this data in depth, it is worthwhile to summarize and highlight some key points. As noted above, it is necessary to set a date after which a state that is excluding or impeaching atheists will be said not to conform to Fisher's thesis as extrapolated.<sup>165</sup> Of the dates that could reasonably have been chosen for this role, in 1908 the greatest number of states' positions are clear. At this point in history, nine states still excluded atheists from testifying.<sup>166</sup> Of these nine, all but Alabama and Arkansas were original colonies. This means not only that over 75% of the excluders were original colonies, but also that over half of the original colonies were still excluding. All nine excluding states were in the Union before 1840, and all but Arkansas joined prior to the Missouri Compromise of 1820.<sup>167</sup> A third were Northern states, four joined the Confederacy, and Delaware and Maryland were considered "border states" during the Civil War.<sup>168</sup>

A more diverse group of nine states did not disqualify atheists but definitely allowed impeachment New York and Massachusetts comprised the Northern contingent. Georgia, Mississippi, and Tennessee seceded.

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163. See Biggs, *supra* note 19, at 39.

164. 2 P. 84 (N.M. 1884). Dispositive in that case was the fact that the record did not disclose what the Chinese man's religion espoused about a future state of rewards and punishments. *Id.* at 85.

165. See *supra* p. 415.

166. This tally includes Pennsylvania, which was listed in the "Neither" section above because that section was benchmarked to 1929, the year of Biggs's study and thus the point at which the data surrounding the states in question is most clear. However, 1929 is too far removed from Reconstruction to meaningfully test Fisher's thesis as extrapolated, so the analysis *infra* will use 1908 as the benchmark date.

167. The Missouri Compromise is an important touchstone here because it was the beginning of a movement toward what Bailey and Kennedy call "sectional nationalism." THOMAS A. BAILEY & DAVID M. KENNEDY, *THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC* 221 (8th ed. 1983). It was also the first time since the drafting of the Constitution that the issue of slavery came before Congress in a meaningful way. Furthermore, after Missouri in 1821, no state entered for over fifteen years. Those states that joined after 1836 did so in pairs of free and slave until California in 1850.

168. These states are borderline geographically, but were Southern culturally. Both voted for Breckinridge over Lincoln and Douglas in the election of 1860, something no Northern state did but that was common in the South. Both were slave states. In fact, Lincoln was so concerned about a Maryland defection that he imposed martial law to keep it in the Union. In the end, neither state seceded, although Bailey and Kennedy suggest that either or both might have done so if the North had fired the first shots of the war. *Id.* at 417.

Iowa and Indiana were free states in the Western territories, and Oklahoma and Idaho achieved statehood long after the Civil War. A third of this group were original colonies, three more were in the Union by 1820, and only three joined subsequently. Of the seven for whom slavery was an issue, four were free states, three slave.

At least nine of the thirteen original colonies (roughly 70%) were either excluding or impeaching atheists in 1908.<sup>169</sup> Among the original thirteen colonies, only Virginia definitively eschewed the attack on atheism. Over 75% (14/18) of the states either excluding or impeaching atheists were in the Union in 1820 and only two joined after 1860. Seven were free states; nine held slaves. Only three were west of the Mississippi River. Thus, the states that afforded atheists less testimonial power than religious citizens were most often older, Eastern states that had fought the Civil War. They were slightly more likely to be Southern than Northern, and those from the South tended to be harsher toward atheists, excluding rather than impeaching.

#### IV. THEORIES OF THE CASES: WHAT TO MAKE OF THE EVIDENCE

The data set lends itself to a variety of interpretations. Although none explains the entire corpus, collectively they offer insight into why the trends noted in Part III.E are so strong.<sup>170</sup>

The first and arguably most impressive theory is Fisher's, which argues that the South preferred a broad exclusionary testimonial scheme and viewed the inclusion of parties as a "Yankee innovation."<sup>171</sup> Fisher contends that the South was forced to abandon these laws when faced with the prospect of blacks testifying against whites who could not take the stand. In light of the general disdain with which religious citizens regarded atheists, concern about a white atheist's right to self-defense would have been an unlikely motivation. Correspondingly, Southerners would be less likely to protect atheists than to protect the "upstanding" whites.<sup>172</sup> Fisher also points out that the South largely maintained its criminal defendant exclusionary rules, which demonstrates the absence of commitment to the theoretical goals of truth-seeking or witness inclusion.<sup>173</sup> While this thesis

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169. This number could be as high as eleven; practices in Connecticut and Rhode Island remain unclear. *See supra* notes 154, 161-62 and accompanying text.

170. In order to be a complete explanation, a theory must explain roughly four things: (1) why the Northern states that excluded or impeached atheists did so, (2) why the Northern states that did not do so did not do so, (3) why the Southern states excluded and impeached at the rate they did, and (4) why the newer, Western states did not. While most of the theories that follow explain (3) and (4) well, none alone can explain all four satisfactorily.

171. *A Field Day in the House*, DAILY CHARLOTTE OBSERVER, Feb. 20, 1881, at 1 (remarks of Mr. Manning), *quoted in* Fisher, *supra* note 1, at 697 n.569.

172. E-Mail from George Fisher, *supra* note 12.

173. *Id.*

suggests that exclusionary laws should have faded sooner than they did, it does not on its face require that all exclusionary laws fall uniformly.

Likewise, Fisher contends that the Northern states cast a far larger net than they needed to achieve their objective of including black witnesses by initiating a theoretical attack on witness exclusion *per se*. While this approach meant that they were making a broad argument, it does not necessarily indicate they were aggressive in prosecuting this line of reasoning.<sup>174</sup> If achieving atheist testimony was not a top priority among Northerners, their enforcement might have lagged behind their rhetoric.<sup>175</sup> While the question of whether blacks could testify resonated deeply with the spirit of the Civil War, atheist exclusion was less significant to any larger political or social movement.<sup>176</sup>

Fisher's theory, however, fails to explain why the Midwestern and Western states so uniformly eschewed atheist exclusion or impeachment rules. Of the thirty-four states in the nation at the beginning of the Civil War, only eleven were traditional Midwestern or Western states.<sup>177</sup> While Fisher does explain why inclusion was the default rule after 1870,<sup>178</sup> this fact alone does not explain the dearth of Midwestern or Western states among those that continued to exclude atheists or impeach their credibility. If anything, extrapolation of Fisher's thesis would suggest that the Midwest was most likely to maintain exclusionary laws, since those states were both old enough to have a common law exclusionary tradition and sufficiently removed from the slavery debate to avoid pressure from

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174. See *id.* ("I don't suggest... that the North aimed to pressure the South to give up all exclusion laws, even if that may have been the thrust of some Northern rhetoric. The North's big concern was the racial exclusion laws. Even if other exclusion laws might have seemed archaic in Northern eyes, it's hard to imagine why Northerners would have been much offended by the persistence in the South of old common law notions that didn't really offend other Northern sensibilities.").

175. E-Mail from George Fisher, *supra* note 17 ("Other exclusionary laws were bound up in the Reconstruction controversy only insofar as they related to the North's attack on Southern racial exclusion rules—that is, only insofar as Northern states' retention of other exclusion laws opened them to countercharges of hypocrisy.").

176. It is theoretically possible that religion was *so* important that neither North nor South was willing to eliminate the exclusion of atheists, but there are at least two reasons to doubt seriously this interpretation. Most importantly, it stretches reason to claim that religion was more important than race, either as a status indicator or a political issue, in the post-bellum South. Second, this theory has even less predictive force than Fisher's. If religion was so important, why would states with wildly disparate religious histories (New Hampshire, New Jersey, Massachusetts, Pennsylvania, and New York) all maintain some form of discrimination against atheists? Why did Massachusetts, arguably the strongest bastion of religion in the country, abandon its rule so early? Why were the strong religious communities in the Midwest unwilling to fight for their rules? It would be quite hard to draw sufficiently fine distinctions amongst the New England states to make sense of the data. Thus, while this remains a theoretically possible explanation, it is a weak one.

177. Some, like Missouri, Mississippi, and Arkansas could be considered geographically Midwestern, but for cultural reasons are most often grouped in the Southeast.

178. Fisher never makes such a broad claim, but examining his thesis in a light most favorable to this question, one could read it to stand for that principle.

Northern anti-exclusionaries.<sup>179</sup> Nor is it simply a matter of religion mattering more in the Southeast than the Midwest.<sup>180</sup> In fact, many of the post-Reconstruction religious movements gained strength in the Midwest, where they tapped into Populist (later Progressive) power bases. Perhaps the Southern Baptist tradition was more deeply exclusionary than the Lutheran/Methodist tradition of the Midwest, which “was simply intolerant of pleasure and dissipation (and drinking).”<sup>181</sup> Nevertheless, there is a very real distinction between tolerating a difference of religion and tolerating the absence thereof.

A deeper problem with Fisher’s thesis as extrapolated is that the central postulate depends in part on the South failing to notice or care about atheist exclusion and the North neglecting to mention it. However, in the encounter Fisher describes between Senators Foster and Sumner,<sup>182</sup> Foster seizes on Massachusetts’s purportedly hypocritical exclusion of atheists as a point of argument. Given the intensity of the British Parliamentary controversy over atheist exclusion, it seems unlikely that Senator Foster was the only person raising the issue in Northern debates.<sup>183</sup> This tends to suggest that explanation of the data and its uneven distributional pattern is not lack of awareness or interest, one of which is necessary to give the Fisher thesis predictive force.<sup>184</sup>

There is a simpler possible explanation: historical inertia. It makes sense that the common law rule would survive longer in those states with historically stronger ties to Great Britain. After 1860, a new state was more than eighty years removed from the colonial relationship. In that time, critiques proposed by Bentham and others had undercut the theory of exclusion rules, and Britain had reversed its position, as had many of the states. The influx of Americans of other religions and the gradual pluralization of American Protestantism probably affected this trend as well. By the time later states entered, the default rule was inclusive. Thus, only those states with a strong preference would exclude atheists. Also

179. There may be a sample size problem, since only New Hampshire and New Jersey among Northern states were still exclusionary. See *supra* notes 139-40 and *infra* note 209 and accompanying text.

180. The way in which a strong religious belief system could result in the maintenance of these laws is discussed *infra*.

181. E-Mail from George Fisher, *supra* note 12.

182. See *supra* p. 412; Fisher, *supra* note 1, at 678.

183. The Fisher thesis as extrapolated tolerates this Northern tendency toward self-censorship. “[The Fisher] thesis is that that North pressed \*itself\* to give up all exclusion laws so that, in pressing the South to give up racial exclusion, it would not be vulnerable to the countercharge of hypocrisy.” E-mail from George Fisher, *supra* note 12. That atheist exclusion was an issue in the internal debates of Northern states as well as in Parliament suggests that it likely arose within North-South contexts.

184. Professor Fisher makes no claim to predictive force for his article; rather, predictive ability is both as a mechanism for evaluating the strength of a given thesis and a way to establish its limits.

predictably, new states opposed to atheist testimony adopted less restrictive means of containing it.<sup>185</sup>

For the older states, the default was the older exclusionary rule. In many states, that rule was on the books in either statutes or judicial opinions. Impetus for change could have derived from either the populace or the judiciary, but neither was forthcoming. Lay citizens were unlikely to reconsider extant provisions *en masse*<sup>186</sup> and the rarity of suits challenging atheist exclusion gave courts few opportunities to alter the case law, had they been so inclined.<sup>187</sup>

While powerful, the inertia theory has serious flaws. First, Fisher has proven that the period in question represents a revolutionary phase in the law of testimonial exclusion, and during such a time, inertia rarely exerts much influence. The deeper flaw is that, like the others, inertia lacks predictive force. It fails to distinguish between those Northern states that did away with atheist exclusion and those that did not. It does not posit any explanation for states like Maine and Virginia that abandoned exclusion very early despite strong common law ties and weak social opposition.<sup>188</sup> It cannot explain why Massachusetts and New York moderated their positions so soon, in seeming defiance of inertial dampening. Further west, defection of older states like Illinois and Ohio from the common law defies the stagnation theory, as does the fact that Oklahoma and Idaho entered the union with credibility impeachment rules solidly in place. In short, inertia fails to explain all of the data in a meaningful way.

The final possibility is that an external social or political movement drove the changes, that a particular contemporary issue colored the thought of the time about atheist exclusion.<sup>189</sup> The seminal force of the era was the conflict between the North and South over racial and economic

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185. The Bentham critique would have provided powerful reasons not to exclude atheists, but it would also suggest that all testimony should come in, including impeachment evidence. Categorical exclusion rules like Rule 610 are not inherently truth-seeking, but only become so when prejudice clearly outweighs probity in all cases.

186. Generally, major revisions of state constitutions or evidentiary codes are uncommon occurrences; unless there is popular pressure, sweeping reforms of these core areas of law happen infrequently. The exception to this is in states just entering the Union, like those in the Midwest and West in the late nineteenth century, which must craft a constitution and an initial set of laws as a part of the statehood process. This partially explains the inclusionary tendencies noted in those areas.

187. *See supra* notes 25-26 and accompanying text (describing why suits covering these issues would be rare). Occasional changes did occur in these older states, but they often happened in the context of the creation of a new evidentiary code or constitution. On these occasions, lawmakers are forced to reconsider the traditional rules, which gives an opportunity for the new, inverse default to take root without the popular movement or judicial impulse normally required. *See, e.g., supra* note 74 (Ohio's new constitution overrules prior doctrine of atheist incompetence).

188. Virginia changed its rule long before the Civil War forced racial exclusion to the forefront of the social agenda.

189. This sub-section captures a number of interlocking social movements, but each of them will be analyzed separately, with consideration given to their interplay.

policy, but other social movements afoot between 1870 and 1900 could have had spillover effects on the debate about testimony and religion.

#### *A. Nativism and Anti-Bolshevism*

Anti-immigrant sentiment spiked during the latter half of the nineteenth century, spurred by one of the great migrations in American history. In each of the three decades between 1850 and 1880, more than two million immigrants came to America. An increasing percentage of these newcomers were Jews, Catholics, or members of Orthodox churches from Southern and Eastern Europe. More established Americans resented and feared these immigrants, whose religious traditions highlighted their difference and seemed to pose a threat to the established Protestant majority.<sup>190</sup> Nativist organizations like the Ku Klux Klan and the American Protective Association, which grew to over one million members soon after its 1887 founding, soon saw their membership and influence rise.<sup>191</sup> These radical racists often targeted the intellectual baggage the new immigrants brought, like theories of socialism, communism, and anarchism. Each of these ideologies is largely atheistic, and all were perceived as vehemently anti-religion.<sup>192</sup> Thus, the popular eye often associated the immigrant with the atheist. One might expect that rising nativism would delay local abolition of competence or impeachment bars to atheist testimony.<sup>193</sup>

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190. Over three-quarters of a million people came in 1882 alone and over half a million per year immigrated to the U.S. during this time. These newcomers generally had higher birthrates than did the resident majority, raising fears that they could one day outnumber and outvote the natives. There was also concern that the newcomers would intermarry with the old blood, leading to "mongrelization." Of course, some of this reasoning masked an economic reason to dislike the immigrants: they were willing to work for far lower wages than more established laborers and drew resentment when businesses hired them or when they broke the backs of nascent trade unions. BAILEY & KENNEDY, *supra* note 167, at 532.

191. In 1856, before the most significant Southern and Eastern European immigrations, the American Party, the political arm of the nativist Know-Nothings, garnered 21% of the popular vote and carried Maryland's electoral votes in the Presidential election, even though their candidate was ex-President Millard Fillmore, whose political career was already waning.

192. The phrase "godless Communist" would not come into vogue until much later, but Marxism and Leninism were long associated with anarchism. Anarchism, while not rejecting a divine presence outright, is certainly not conducive to a belief in an overarching structure of divinely enforced rules.

193. There is also a less direct effect of this nativist fervor. The presence of "the other," a perceived danger to the "American way," often triggers a burst of patriotism. Coming on the heels of a divisive war, such a burst might translate to a boost in sectionalism, but with respect to atheists the effect would be the same. Despite the principles of religious toleration upon which this nation was founded, Americans have long conceived of their enterprise as a religious one. *See, e.g.,* *People v. Ruggles*, 8 Johns 290, 293 (N.Y. Sup. Ct. 1811) (Justice Kent asserted that "Christianity was parcel of the law," summarized a widely-believed doctrine). A century later, this idea would be alive and well, as Justice Spalding of the North Dakota Supreme Court would demonstrate in *State ex rel. Temple v. Barnes*, 132 N.W. 215 (N.D. 1911) ("A number of the courts of the different states have . . . held that this is a Christian nation.") Well into twentieth century, even the United States Supreme Court was still speaking in these terms. *See Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being."). While these sweeping judicial pronouncements do not mean that all Americans considered things in the same light, it seems clear

There seems to be a tenable connection between nativism and the South's resistance to the full inclusion of atheists. Although one might assume that nativism would be strongest in the urban centers where most immigrants settled, anti-immigrant sentiment was strong in the rural South, where organizations like the KKK lumped religion and ethnicity. There is also less evidence of anti-immigrant sentiment in the Midwest, where atheist exclusion laws had trouble taking root.

This theory, however, does not account for the Northern states' decisions to admit atheist witnesses, even in the face of increasing immigration. In fact, the places where anti-immigrant sentiment was demonstrably strongest often changed their laws soonest. The American Party swept the polls in Massachusetts and Delaware and nearly won the New York state elections in 1854.<sup>194</sup> Although New York changed its rule in 1846 before influx began, Massachusetts eliminated atheist exclusion in 1860, as the swell was cresting and just six years after the nativist forces demonstrated their political clout.<sup>195</sup> Although Pennsylvanians, who revealed their anti-immigrant sentiment in 1844<sup>196</sup> but did not change their rules until 1909, fit the projected pattern, the nativist theory fails to explain why other Northern states, whose cities absorbed large numbers of immigrants, did not maintain atheist exclusion longer.

Another weakness of the anti-immigrant thesis is the relative lack of historical evidence to support its connection to the judiciary, which was often solely responsible for abrogation of the common law rule. Although strong political movements were aimed at indoctrinating the new immigrants,<sup>197</sup> the extent to which the judiciary joined in this quest is unclear. Bolshevism, apart from an occasional flare-up, seems not to have been a serious legal issue outside the labor context until the October Revolution in Moscow. Even accepting that the judiciary was simply better at hiding its intentions, state exclusionary rules continued to fall through the 1920s, when anti-Bolshevik fears were rampant. While anti-immigrant sentiments may have been a part of a general dislike of

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from the historical record that by and large, Americans have generally considered themselves religious and have projected this image onto their conception of the ideal citizen. As immigration caused a spike in patriotism, it would not be surprising if that patriotism caused a delay in the abrogation of exclusion rules.

194. See The Columbia Electronic Encyclopedia, *Know-Nothing Movement*, (1994), available at <http://www.infoplease.com/ce6/history/A0827946.html>.

195. These political responses were not Bostonians' only reaction to the immigration: In 1834, an anti-Catholic mob there destroyed a convent. BAILEY & KENNEDY, *supra* note 167, at 320.

196. In 1844, immigrant Irish Catholics fought back against nativists in Philadelphia, sparking two days of flare-ups that left thirteen people dead, fifty wounded, and two churches in ashes.

197. See ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877-1920*, at 57 (1967) (summarizing the efforts to manipulate public school curricula toward traditional American histories and ideologies). Also note the formation of the Grand Army of the Republic and the Daughters of the American Revolution during this time. Wiebe writes, "Like Prohibition, the protection of the common school served as a major line of battle with suspect ethnic groups." *Id.*

atheists,<sup>198</sup> it is unlikely that they were critical in the state decision making.

### *B. Prohibition*

Prohibition may seem an odd choice in a study of atheism, but it exemplifies the various religiously-motivated political and social movements of the later 19<sup>th</sup> century.<sup>199</sup> Prohibition “enjoyed the initial advantage of a traditional Protestant respectability. Uneasy people could turn here, as they had for generations, with assurance that in attacking liquor they fought beyond question for the Lord. . . .”<sup>200</sup> One supporter of the widely hailed “Maine Law” of 1851, which established Prohibition in that state, called it “the law of Heaven Americanized.”<sup>201</sup> The powerful preacher Billy Sunday, who spoke before 100,000 New Yorkers in 1917, began his religious crusades in 1890 by denouncing Darwin and supporting Prohibition. Given their Protestant roots and religious ties, one would expect Prohibition and quasi-religious movements like it to strengthen the efforts against atheism.

However, this was not necessarily the case. Maine, which passed the first statewide Prohibition law, decided a few years earlier that it would not exclude atheists. The Prohibition movement derived its early strength from the region stretching from North Carolina to Texas and Kansas, where “most of the states . . . held at least one general election during which no other issue seemed to matter.”<sup>202</sup> Louisiana may support this thesis, since it waited twenty-five years after the Civil War to change its policy. Mississippi, if the statute of 1906 noted in *Gambrell v. State*<sup>203</sup> was indeed a change in the law, may also support this view. However, Texas did away with atheist exclusion in its original constitution, and the Kansas courts had the opportunity to keep the common law rule in 1900, but instead interpreted two very general provisions of the state constitution as barring atheist exclusion. Even though “Prohibition played an especially important role in the Dakotas, Texas, and Mississippi,”<sup>204</sup> North Dakota’s

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198. It should again be noted that hatred of atheists was nothing new and may well have existed, if perhaps in a less virulent form, without the anti-immigrant impetus. See generally WIEBE, *supra* note 197.

199. I have not been able to discover a major social or religious movement to which the arguments that follow would not apply. Thus, rather than discussing anti-Darwinism, social Christianity, etc. in depth, I have chosen to use Prohibition as an example of this kind of movement.

200. WIEBE, *supra* note 197, at 56.

201. BAILEY & KENNEDY, *supra* note 167, at 335.

202. WIEBE, *supra* note 197, at 56. Wiebe also gives analysis of where Prohibition was strongest and why. *Id.* A more detailed examination of Prohibition’s geographical expansion might reveal a more nuanced trend in this data.

203. *Gambrell*, *supra* note 105, 46 So. at 138.

204. WIEBE, *supra* note 197, at 72.

constitution contains a bar against atheist exclusion that passed during the heart of the Prohibition push.

In addition, the fifteen-year lull in the Prohibition movement after William Jennings Bryan lost the 1896 Presidential election did not affect the atheist exclusion movement.<sup>205</sup> Populists and Democrats had formed the core of the Prohibition support, but Bryan's loss effectively marked the end of populism.<sup>206</sup> Despite this crushing blow to proto-Progressivism, there seems to have been no increase in the elimination of anti-atheist provisions. If the influence of populism and Prohibitionism was supporting anti-atheist provisions, one would expect that when those movements weakened, a significant number of states would modify their provisions. Louisiana again offers the best support of this theory, since it retained its anti-atheist rules for a couple of years after 1896, then abruptly eliminated them. Otherwise, there seems to be little deviation from the standard rate of decline in the number of these provisions at any given time.

Conversely, substantial evidence disputes this theory's accuracy in the peak years of Prohibition and populism. Utah entered the Union in 1896, just as the period of populism's great influence was ending, but it had a constitutional provision qualifying atheists. Wyoming and Idaho became states in 1890 and neither excluded atheists, although Idaho did allow questioning on that subject. Montana, North Dakota, and Washington joined in 1889, but none of them excluded atheists.<sup>207</sup> A year after the Anti-Saloon league began its state-by-state Prohibition drive in 1908, Pennsylvania altered its law to include atheists. Prohibition and the attendant social movements may have contributed to the delay in removing testimonial exclusion for atheists, but the evidence is tentative at best. Furthermore, this theory has no predictive power; the correlation between states where prohibition was a major issue and those with atheist exclusion laws is weak.<sup>208</sup>

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205. One reason Prohibition makes a good proxy for Populism is that Bryan's defeat set both causes back significantly. However, one could argue that those Progressive causes that Bryan did not champion could still have influenced the progress of the repeal of atheist testimonial exclusion.

206. Wiebe, *supra* note 197, at 105. Republicans held the Presidency until 1912 and might have continued to do so had Teddy Roosevelt not split the party's votes.

207. Washington disallowed impeachment questioning; the position of the other two is unclear. South Dakota also became a state in 1889, but nothing is known about its policy toward atheist testimony.

208. One final note: there is some data correlating those states that would buy into populism's descendent, Progressivism, and those states that refused atheists the right to testify fully. Wiebe lists the following as states with progressive governors: Wisconsin (Robert LaFollette), Iowa (Albert Cummins), Minnesota (John Johnson), North Carolina (Robert Glenn), Kansas (Walter Stubbs), Alabama (Braxton Bragg Comer), Georgia (Hoke Smith), and later California (Hiram Johnson). Wiebe, *supra* note 197, at 178. The reader will note that North Carolina and Alabama still exclude atheists in 1908. At the same time, Georgia and Iowa are among those states that still allowed impeachment questioning of atheists. Thus, there seems to be a correlation here. It is difficult to reach a statistically-significant conclusion with numbers this small, particularly since there are seven states

Finally, religion itself could have influenced the treatment of atheists. The religious contests of the time were largely dictated by battles over Darwin and over the extent to which Christianity and capitalism can coexist. A careful examination reveals that these movements would have impacted atheist exclusion rules in ways already examined. For example, the undeniably strong anti-Darwin movement would have shared the nativists' anti-atheist sentiment.<sup>209</sup> It would also have increased the general importance of religion, creating universal pressure not to allow atheism into any aspect of society for fear of a slippery slope. However, given the sheer number of Western states that entered the union with constitutional provisions allowing atheists to testify, this force was apparently insignificant. Furthermore, if the anti-Darwinist movement was a key factor preserving discrimination against atheists in court, one would expect that anti-atheism sentiment would be strongest in states where anti-Darwinism was influential. This could explain the trend toward exclusion in the South but would have little predictive force for Northern states.

The second aspect of the late nineteenth-century religious climate was an attempt to reconcile Christianity and capitalism. The story is familiar to modern historians: as industrialism increased, so did its abuse of workers and the disparity in wealth between managers and workers. A crisis of conscience resulted among Christian preachers, some of whom went the way of Social Darwinism and suggested that the wealthy were the most virtuous and some of whom preached the populist gospel of egalitarianism and opposed the inhumane treatment of workers.<sup>210</sup> Those voices that defended the capitalist ethic probably did not have a significant anti-atheist aspect, except insofar as they opposed socialism.<sup>211</sup> Capitalist critics would have been proto-Populists like William Jennings Bryan and thus would have shared the Prohibitionist views already dismissed as insufficiently related to atheist issues.

In conclusion, these theories share the same weakness: each can easily explain the Southern states' preference for exclusion but none can account for the particular Northern states on the list or the near-complete absence of the Midwestern and Western states. The best answer may lie in a synthesis or in a state-by-state explanation privileging one or more of these factors.

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without Progressive governors that excluded atheists in 1908 and seven others that still allowed impeachment questioning. Furthermore, this historical confluence was probably a product of those states with Populist traditions. This correlation is useful as an additional guide to those states that should fit a populist theory, but it does not really expand the theory described above or address any of the theory's salient weaknesses.

209. It would not, however, have affected the Northern areas as much. While this strengthens the nativist theory, however, it also robs the anti-Darwin theory of significant predictive force.

210. Somewhere in the middle were men like Washington Gladden, who tried to pad the abuses of pure capitalism without risking a pseudo-communist state.

211. See discussion of nativism, *supra* text accompanying notes 190-98.

Perhaps, as Fisher suggests, the presence of the two Northern states that still excluded in 1925 is a statistically insignificant anomaly.<sup>212</sup> This “historical accident” theory posits that the rarity of challenges meant that New Jersey and New Hampshire simply never faced the question. However, this approach suggests an essentially random distribution, while in this case the pattern is distinct. There were only seven Northern states in the original thirteen colonies, and as of 1908, three still excluded atheists. No Midwestern, Southwestern, or Western state did so, nor did any state that entered the Union after 1836. Though no single explanation is apparent, this remarkable data indicates some force at work beyond historical accident.

The “statistically insignificant” argument also ignores those states with a credibility impeachment doctrine. It is up to the jury to determine the credibility of a particular witness. In turn-of-the-century courtrooms, credibility impeachment may have been sufficient to act as a *de facto* atheist exclusion rule if juries’ prejudices led them to disregard reflexively any testimony by an atheist.<sup>213</sup> Hence, a state that explicitly allows credibility examination is not as different from an atheist excluding state as one might think.<sup>214</sup> If an atheist’s word will not be credited over that of a religious person, as seems likely in the highly religious South and in certain puritanical Eastern states,<sup>215</sup> then the introduction of credibility

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212. Fisher suggests that the primary reason these states did not change their rules was that the issue rarely arose in court. *See supra* pp. 415-16. He also notes that under these historical and legal conditions, the presence of two states can be explained in many ways, calling into question reliance on two states as a trend. E-mail from George Fisher, *supra* note 12.

213. Here an effective analogy can be drawn to the role of race in the late nineteenth- and early twentieth-century courtroom. *See, e.g.,* U.S. v. Cox, 342 F.2d 167, *cert. denied*, Cox v. Hauberg, 381 U.S. 935 (1965). *Cox* is a case from later in the century, but one representative of the power of the jury to determine credibility. In *Cox*, a black man testified that the white registrar of voters had registered a white citizen but had refused to register him. At trial, the registrar testified that he was merely shaking hands with the white voter. The white jury credited the registrar’s testimony and he was acquitted. The *Cox* case was “merely” about a question of credibility. In *Cox*, no one had to question the complainant about his race, as it was visible. Likewise, no one need ask the defendant about her status as a party to the case. By contrast, a witness’s atheism is not evident from examination of her appearance or her role in the courtroom. A state that wanted to prevent atheists from having an impact on legal proceedings had two options: It could preclude the atheist from testifying or it could allow impeachment and let prejudice run its course.

214. The choice to allow atheists to be examined about their atheism discloses a great deal about a state’s position. If states believed that atheism had no probative value on truth-telling, they would not have allowed questioning on that subject. Those states that consciously decided to allow that kind of questioning did so because they knew that jurors would hold it against atheists, manifesting a belief that atheism is relevant to credibility. Therefore, there is a fundamental distinction between the exclusionary and the impeachment state: In the former, testimony is kept from the jury, while in the latter, it is presented to them. Thus, the modern rule 610 may represent a fundamental judgment about the meaning of religious pluralism and may be an aberration in the historical trend toward jury autonomy. E-mail from George Fisher, *supra* note 17. Alternately, it might represent a society’s pre-balancing of expected probity and prejudice.

215. Certain areas of the Midwest were also deeply religious, but these areas might also have been more tolerant of difference. *See supra* text accompanying note 181.

impeachment is critically important. Thus, for a theory to ignore the latter robs it of analytic force.

#### V. CONCLUSIONS AND SUGGESTIONS FOR FUTURE RESEARCH

The empirical evidence set forth in Part III is significant unto itself. Data compilation is the necessary precursor to the construction of historical knowledge. While by no means is this data all that can be gathered, it outlines the doctrines of the forty-seven states for which evidence is available, thereby facilitating the efforts of other legal, religious and social historians to draw their own conclusions from the patterns.

Moreover, the data calls into question the universality of the Fisher hypothesis. The very states that under Fisher's thesis as extrapolated should have been ridding themselves of these exclusionary rules instead maintained them well into the twentieth century, suggesting that something about religion made it different from race or party status. Fisher established a critical nexus between racial exclusion and party exclusion, but one must avoid the temptation to include atheist exclusion without consideration. Scholars often lump the suspect characteristics of race and religion together, treating them as though they have traveled the same historical paths.<sup>216</sup> In fact, they often move at different paces, as this study and others will show. One hopes projects such as this one will create enthusiasm for the intricate issues religion creates. The centrality of race to American debates over liberty tends to mask the subtle but parallel questions that arise in the religious context. It is important to separate the two and to examine more fully one's relationship to each before crafting a general theory of legal development. Given the importance of religion to this country's politics, from Plymouth Rock to the Moral Majority, and to conceptions of liberty and acceptance, one must not avoid issues of religion in probing our national development.

Scholars should attempt to expand the study of American religion to its relationship to American irreligion. Atheism is an ignored category in studies of religious intolerance, in part because our scholarly categories are insufficient. Future scholarship should address the ways that language and religious scholarship themselves can inappropriately truncate research and inadvertently produce these kinds of gaps. There is a very real difference between freedom of conscience and freedom of religion.

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216. This trend is notable in the scholarship on the Warren Court, for example, which often groups the great civil rights decisions with *Engel v. Vitale*, 370 U.S. 421 (1962), and *Schempp v. Abington Township*, 374 U.S. 203 (1963), ignoring the important judicial work done by earlier free religion cases at the state and federal levels. See, e.g., *People ex Rel Ring v. Board of Education of District 24*, 92 N.E. 251 (Ill. 1910); *Herold v. Parish Board of Education*, 68 So. 116 (La. 1915); *State ex rel Dearle v. Frazier*, 173 P. 35 (Wash. 1918).

Quite possibly there is a theory, individual or synthetic, that will explain some or all of the questions raised in this Note. That theory might only be discovered by an in-depth examination of personal papers or testimonials from the individual states. It might await a detailed examination of legislative transcripts. In short, legal research was necessary but not sufficient to answer the puzzles revealed. The author sincerely hopes that scholars in other areas of social science will endeavor to evaluate these legal findings and that from the combined work of this community, an explanation will emerge for this historical enigma.

