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FIXING WITNESS OATHS: SHALL WE RETIRE THE REWARDER OF TRUTH AND AVENGER OF FALSEHOOD?

*Allan W. Vestal**

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INTRODUCTION

There was a time in our national history when religious bigotry so infused our state constitutions, statutes, and common law as to bar some witnesses from testifying in court based solely on their religious beliefs.[1] As a federal court formulated the rule in 1916: "a person who does not believe in a God who is the rewarder of truth and the avenger of falsehood cannot be permitted to testify."[2]

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1. Allan W. Vestal, *The Lingering Bigotry of State Constitution Religious Tests*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 55, 70–84 (2015). In this discussion the term "religious belief" includes both belief and non-belief on religious matters. I decline to engage in the clever but wholly disingenuous distinction that would exclude atheists and agnostics from legal protections of "religious belief."

2. United States v. Miller, 236 F. 798, 799 (W.D. Wash., 1916). In *Miller* the prosecution called "Mr. Kirkland." The defendant objected to Kirkland's testimony "on the ground that he does not believe in the existence of a God, who is the rewarder of truth and the avenger of falsehood . . ." *Id.* at 798. At a hearing on the motion to exclude, Kirkland was interrogated as to his beliefs on matters of religion:

A: "I believe there is a creator, a cause for all that we see and all that we hear."

The oath by which witnesses qualified to testify was the mechanism of their exclusion. Treated the same as "persons deficient in understanding"—including witnesses who were "hopelessly an idiot, or maniac, or only occasionally insane, as, a lunatic;" "intoxicated;"[3] the "deaf and dumb;"[4] and children[5]—atheists, agnostics, and certain religious minorities were said to be "insensible to the obligations of an oath from defect of religious sentiment and belief," and were deemed incompetent to testify.[6] As one evidence treatise observed, when judges and juries were presented such witnesses—otherwise competent and with relevant testimony—"[t]hey held up their horrified hands and refused to listen to such testimony as the witness might offer."[7]

Our society evolved beyond such bigotry. Over time, bars to testimonial competency based on religious belief were eliminated.[8] Beginning with the Iowa and New York Constitutions of 1846, twenty-one states adopted constitutional prohibitions on religious tests for testimonial competency.[9] There were eleven states that adopted statutory provisions to the same effect, and an additional eight states that rejected

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> Q: "You do not believe that there is a God who rewards truth and avenges falsehood?"
> A: "I think a man gets all his punishment in this world, while he is here. . . ."
> Q: "As a matter of fact, your belief is that the punishment you receive in this world comes from yourself, and from the men in the world."
> A: "Yes."
> Q: "And not from God?"
> A: "No; I don't think it comes from God . . . I think I could tell the truth if I never took an oath."

Id. at 799. On the basis of his religious beliefs, Kirkland was not allowed to testify. *Id.* at 801.

3. SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 409, § 365 (Boston, Little, Brown & Co. 1842).

4. GREENLEAF, *supra* note 3, at 410, § 366 (noting that the established "presumption of law they are idiots" had become rebuttable).

5. *Id.* at 410–11, § 411, § 367.

6. *Id.* at 412–13, § 413, § 368 (noting requirement that witness believe "in the existence of an omniscient Supreme Being, who is 'the rewarder of truth and avenger of falsehood . . .'" (citing Omychund v. Barker, 26 Eng. Rep. 15 (1744))).

7. 5 JAMES M. HENDERSON, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES BASED UPON THE WORK OF BURR W. JONES (San Francisco, 1926), v.4. at 3910 n.8, § 2089 (2d ed. 1926).

8. Vestal, *supra* note 1, at 73–77. Dean Emeritus Eugene Milhizer of Ave Maria School of Law notes this history in his work on oaths. Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1, 24–33 (2009).

9. Vestal, *supra* note 1, at 75–76 (Constitutions of Arizona, Arkansas, California, Florida, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Dakota, Ohio, Oregon, Texas, Utah, Washington, Wisconsin, and Wyoming).

such tests as a matter of common law.[10] Although two states, Arkansas and Maryland, adopted constitutional testimonial exclusions based on religious belief—and retain them even today[11]— such bars to testimonial competency are no longer enforceable.[12] Lack of belief in the rewarder of truth and avenger of falsehood no longer renders a witness incompetent.

Eliminating the competency exclusions did not end testimonial discrimination based on religious belief. Well into the twentieth century, after state constitutional and statutory changes and the evolution of the common law had overturned competency bars to testimony by atheists, agnostics, and religious minorities, some courts still permitted challenges to testimonial credibility based solely on religious belief.[13] As with competency bars, we evolved beyond such bigotry. Eventually, such credibility challenges were prohibited in all jurisdictions.[14] Lack of belief in the rewarder of truth and avenger of falsehood no longer opens a witness to attacks on credibility.

But today, although testimonial incompetency based on religious belief is a thing of the past and frontal challenges to testimonial credibility

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10. *Id.* at 76.

11. ARK. CONST. of 1874, art. XIX, § 1 ("No person who denies the being of a God shall . . . be competent to testify as a witness in any court."); MD. CONST. of 1867, Declaration of Rights, art. XXXVI.

> [36 ("no] person otherwise competent shall be deemed incompetent as a witness or juror on account of his religious belief, provided that he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and will be rewarded or punished therefor either in this world or the world to come.

Id. The Maryland religious test for jurors was declared unconstitutional only fifty years ago. Schowgurow v. State, 213 A.2d 475 (Md. 1965); State v. Madison, 213 A.2d 880 (Md. 1965).

12. Vestal, *supra* note 1, at 73–77. Rule 601 of the Federal Rules of Evidence provides a general assumption of witness competency that abolished competency bars based on religious belief or opinion. FED. R. EVID. 601 ("Every person is competent to be a witness unless these rules provide otherwise.").

13. In upholding the treason conviction of Mildred Gillars, the Maine native who, as "Axis Sally," assisted the Nazis against the United States in WWII, the District of Columbia Circuit in 1950 indicated that a witness' atheism went to credibility, not competence. Gillars v. United States, 182 F.2d 962, 966, 970, 983–84 (D.C. Cir. 1950).

14. Vestal, *supra* note 1, at 84–85 (noting FED. R. EVID. 610 ("Evidence of a witness' religious beliefs or opinions is not admissible to attack or support the witness' credibility.") and states evidentiary rules which reach the same result). Three states—Arizona, Oregon, and Washington—have constitutional prohibitions on inquiries into religious belief to challenge credibility. ARIZ. CONST. of 1912, art. II, § 12; OR. CONST. of 1859, art. I, § 6; WASH. CONST. of 1889, art. I, § 11. With the adoption of FED. R. EVID. 610 and its progeny the universal modern rule is that "[e]vidence"Evidence of a witness' religious beliefs or opinions is not admissible to attack or support the witness' credibility." FED. R. EVID. 610. All of the states have rules that either track FED. R. EVID. 610 or achieve the same result. Vestal, *supra* note 1, at 85 n.153.

based on religious belief are not allowed, some jurisdictions continue to discriminate in the testimonial setting based on religious belief. Once again, the witness oath is the mechanism of discriminatory treatment. This is seen in three ways.

First, although frontal credibility challenges based on religious belief have been eliminated, our oath and affirmation practices allow religious prejudice to improperly influence credibility determinations.

Second, although we have adopted well-meaning accommodations of varying religious beliefs, the oath and affirmation practices of some states improperly grant preferential status to some religious communities over others, and impinge on the religious free exercise of some witnesses.

Third, the oath and affirmation practices of some states unnecessarily conflict with the privacy interests of witnesses.

The nation has evolved a great deal since witnesses were excluded or had their credibility challenged based on religious belief. It is time to complete that evolution either by reforming our witness oath and affirmation practices to remove the last vestiges of religious prejudice, or by eliminating witness oaths altogether.

This discussion starts with a brief inventory of the state provisions, constitutional, statutory, and rule-based, governing witness oaths and affirmations. We then turn to the credibility problem. We conclude with an analysis of two alternatives for the final evolutionary reform of witness oaths and affirmations.

I. State Witness Oaths and Affirmation Provisions

The history of witness oaths is one of prejudice and exclusion. For half a millennium, from the Fourth Lateran Council in 1215 to *Omychund v. Barker* in 1745, the witness oath was the mechanism by which all non-Christians were deemed unworthy of belief and barred from testifying.[15] After 1745, for a century in England, and for at least a century and a half in parts of the United States, the witness oath was the mechanism by which disfavored religious groups, agnostics, and atheists were deemed unworthy of belief and barred from testifying.[16]

The language of some state provisions on testimonial oaths and

15. Vestal, *supra* note 1, at 71–73. Dean Milhizer's characterizations, that the exclusion of all non-Christian witnesses represented only a "rather narrow view of who could swear oaths," and that the post-*Omychund* exclusion of members of some disfavored religions, agnostics, and atheists represented "greater multicultural tolerance," might be seen as somewhat saccharine. Milhizer, *supra* note 8, at 19.

16. Vestal, *supra* note 1, at 73–77; United States v. Miller, 236 F. 798, 799 (W.D. Wash. 1916). Dean Milhizer's characterization is merely that, by virtue of the exclusion of adherents of disfavored religions, agnostics, and atheists, "Christians would enjoy a favored status in the oath taking regime . . ." Milhizer, *supra* note 8, at 20.

affirmations is redolent of that prejudiced and exclusionary past.[17] For example, the statutory deity of Illinois is declared to be the "ever-living God,"[18] while the statutory God of North Carolina is "the omniscient witness of truth and the just and omnipotent avenger of falsehood," to whom the witness "shall answer . . . at the great day of judgment, when the secrets of all hearts shall be known."[19] The official God of Pennsylvania is "Almighty God, the searcher of all hearts" to whom the person taking the oath promises to "answer . . . at the last great day."[20] Just to the north, Delaware's deity is "the ever living God, the searcher of all hearts" who will be answered to "at the Great Day."[21]

Some of the rituals associated with witness oaths are reminiscent of our discriminatory heritage. North Carolina thus requires "the party to be sworn to lay his hand upon the Holy Scriptures, in token of his engagement to speak the truth and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of that holy book and made liable to that vengeance which he has imprecated on his own head."[22] If the party swearing the oath is "conscientiously scrupulous" of taking the oath while touching the Holy Scriptures, North Carolina provides an alternative:

> When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the Holy Gospel; and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth he would draw down the vengeance of heaven upon his head, and shall introduce the intended oath with these words, namely: I, A.B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of

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17. The state law of testimonial oaths and affirmations is almost exclusively found in their statutes and rules, not in their constitutions. Only seven states have constitutional provisions on oaths and affirmations that appear to apply to testimonial oaths and affirmations. All are provisions calling for the form or administering an oath or affirmation to be such as will be consistent with and bind the conscience of the person taking the oath or giving the affirmation. None is limited or narrowly applicable only to testimonial oaths and affirmations. *Infra* app. A, items 1–7. In contrast, 47 states have state constitution oath of office provisions. *Infra* app. B, items 2–48.

18. *See infra* app. B, item 14a.

19. *See infra* app. B, item 34a.

20. *See infra* app. B, item 39a.

21. *See infra* app. B, item 9a.

22. *See infra* app. B, item 34a.

all hearts shall be known (etc., as the words of the oath may be).[23]

But if one looks to the substance of the broad range of the oath and affirmation provisions and not simply to the discriminatory history of witness oaths in general and to the quaint language and ceremonies of a few statutes, it can be argued that these rules are in the process of evolving toward compatibility with religious pluralism. There is broad agreement among the states as to the underlying policy and basic structure of the way in which witnesses are qualified to testify. All fifty states provide for both a religious-based oath and an alternative affirmation.[24] There are variations in wording, but forty-four of the states provide that the mode of administering the oath or affirmation should be one essentially calculated to awaken the conscience of the witness and impress upon the witness the duty to tell the truth.[25]

The picture is further complicated because the universe of state testimonial oath and affirmation provisions is less uniform than might appear at first review, and courts have overridden some statutory oath and affirmation provisions based on constitutional and common law considerations.

As to uniformity, some of the common statutory provisions on testimonial oaths and affirmations entered the various state statutes as part of larger bodies of rules on broader topics. Thus many states have adopted rules of civil procedure based on the Federal Rules of Civil Procedure, including the oath or affirmation language of Rule 43(b): "When these rules require an oath, a solemn affirmation suffices."[26] And

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23. *See infra* app. B, item 34. In a concession to religious liberty, if the individual "shall have conscientious scruples against taking an oath in the manner prescribed . . . he shall be permitted to be affirmed." *Id.* ("In all cases the words of the affirmation shall be the same as the words of the prescribed oath, except that the word 'affirm' shall be substituted for the word 'swear' and the words 'so help me God' shall be deleted."). The statute does not specify the ceremony with which the affirmation is done. Presumably the party making an affirmation in North Carolina is not required "to lay his hand upon the Holy Scriptures" as in the first option, or to "stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God," as in the second.

24. *See infra* app. B, items 2a, 2b, 3a, 3b, 4a, 4b, 5b, 5c, 6b, 7a, 7b, 8b, 9b, 9c, 10b, 11a, 11b, 12a, 12b, 13a, 13b, 14a, 14b, 15b, 16a, 17a, 18a, 18b, 19a, 19b, 20b, 20c, 21a, 21b, 22a, 22b, 22c, 23a, 23b, 24a, 24b, 24c, 25a, 25b, 26a, 27a, 27b, 27c, 28a, 29a, 29b, 29c, 30a, 30b, 31a, 32a, 32c, 33a, 34a, 34b, 35a, 35b, 36a, 37a, 37c, 38a, 39a, 39b, 39c, 40a, 40b, 41a, 41b, 42a, 42b, 43a, 44a, 45b, 46a, 46b, 47a, 47b, 48a, 48b, 49a, 50a, 51a & 51b.

25. *See infra* app. B, items 2a, 2b, 3b, 4a, 4b, 5a, 5c, 6a, 7b, 8b, 9a, 9c, 11a, 11b, 12b, 13b, 14b, 15a, 15b, 16a, 18b, 19a, 19c, 20a, 21b, 22c, 23b, 24c, 25b, 27c, 28b, 30a, 30b, 32c, 33a, 34b, 35b, 36a, 37c, 38a, 39c, 41b, 42b, 43a, 44a, 45b, 46b, 47b, 48b, 49b, 50a & 51b.

26. FED. R. CIV. P. 43(b). In the original, 1938 version of the Federal Rules of Civil Procedure, this rule appeared as FED. R. CIV. P. Rule 44(d) (1938): "Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof." In the current version, the rule appears as Rule 43(b): "Affirmation Instead of an

many states have adopted rules of evidence based on the Federal Rules of Evidence, including the oath or affirmation language of Rule 603: "Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience."[27]

Often, states that adopted oath and affirmation language included in the Federal Rules of Civil Procedure and the Federal Rules of Evidence did not at the same time revise their pre-existing idiosyncratic oath and affirmation provisions to conform to the newly adopted language. In some jurisdictions, the statutory and rules provisions governing testimonial oaths and affirmations are internally inconsistent.[28]

As to the constitution and common law, courts have supplanted statutory oath and affirmation provisions based on constitutional[29] and common law[30] considerations. It may be that we are not as far down the evolutionary path as the broad brushstrokes would suggest. For example, eighteen states retain threshold tests for witnesses who wish to affirm and not swear.[31] Only a few states affirmatively make the affirmation form

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Oath. When these rules require an oath, a solemn affirmation suffices."

27. FED. R. EVID. 603. The various state enactments of FED. R. EVID. 603 follow two versions of the rule. Prior to 2011, Rule 603 read: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." In 2011, Rule 603 was amended for stylistic consistency to read as set forth in the text.

28. For example, Minnesota adopted both FED. R. CIV. P. 43(b) (in MINN. R. CIV. P. 43.04) and FED. R. EVID. 603 (in MINN. R. EVID. 603). But Minnesota did not alter its pre-existing statutory provision on testimonial oaths and affirmations to conform to the new rules, and the statutory form is potentially inconsistent with the new provisions in that it specifies a narrow form of oath which may as to some witnesses not be "in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so," and it makes the alternative affirmation available only to witnesses who "claim religious scruples against taking the" oath. MN. STAT. § 358.07 (2016).

29. Ferguson v. Commissioner, 921 F.2d 588, 589 (5th Cir. 1991) (free exercise guarantee requires court to fashion accommodation when witness' sincerely held religious beliefs conflict with oath and affirmation procedures); Society of Separationists, Inc. v. Herman, 939 F.2d 1207, 1219 (5th Cir. 1991) (when juror refuses to take statutory oath based on protected beliefs, judge should either allow juror to withdraw or should fashion alternative "serious public commitment to answer truthfully that does not transgress the prospect's sincerely held beliefs.").

30. United States v. Looper, 419 F.2d 1405, 1407 (4th Cir. 1969)

> If defendant's religious beliefs made repugnant or impossible to him an appeal to God or the raising of a hand as part of an oath or affirmation . . . all the district judge need do is to make inquiry as to what form of oath or affirmation would not offend defendant's religious beliefs but would give rise to a duty to speak the truth.

United States v. Ward, 989 F.2d 1015, 1019 (9th Cir. 1992).

31. *See infra* app. B, items 5a, 8a, 9a, 14a, 17a, 18a, 22a, 23a, 24a, 30a, 34a, 37a, 42a, 46a, 47a, 48a, 50a & 51a.

available to every witness without any threshold showing.[32] There are twenty-two states that mandate a form of oath, or a form of affirmation, or both.[33] There are fifteen states that mandate rituals for the oath or affirmation, ranging from the simple to the baroque.[34] As we shall see in the following discussions of the credibility problem, the free exercise problem, and the privacy problem, each of these provisions creates potential impediments to religious pluralism.

Finally, statutory and rules provisions on oaths and affirmations in thirty-one states exist against the backdrop of constitutional prohibitions against the state favoring one religion over another, such as the Mississippi guarantee that "no preference shall be given by law to any religious sect or mode of worship . . ."[35]

II. WITNESS OATHS AND CREDIBILITY

In the late summer of 2011, Dr. Abbas Husain, a Merchantville, New Jersey family practitioner, was a defendant in a sexual harassment claim brought by Tomikia Davis, a former employee.[36] During the course of the trial Abbas, who is of Indian descent but whose religion is not disclosed in the reported decisions, was called to testify.[37] He raised his right hand and spoke the oath but did not place his left hand directly on the Bible.[38]

At the conclusion of the trial, the jury found in favor of the plaintiff and awarded her $12,500 in damages.[39] Thereafter, the judge had an *ex parte* conversation with the jurors, and "one juror noted during that discussion that she was surprised that the defendant had not placed his hand on the Bible before he testified."[40] The judge disclosed the juror's comment to counsel, but "took no steps to ascertain whether the juror's observation improperly influenced the jury's verdict nor did he make a

32. *See infra* app. B, items 27a & 39a.

33. *See id.* items 5a, 6a, 7a, 8a, 9a, 9c, 10a, 14a, 17a, 20a, 23a, 24a, 26a, 27a, 29a, 29c, 30a, 32a, 32b, 34a, 38a, 42a, 45a, 46a & 50a.

34. Nine states require raising a hand. *Id.* items 8a, 14a, 20a, 22a, 23a, 30a, 38a, 50a & 51a. Two states require raising a hand or placing a hand on the Bible. *Id.* items 17a & 39a. Four states—Arkansas, Delaware, North Carolina, and Virginia—have oath and affirmation provisions that are much more complicated and much less compatible with religious pluralism. *Id.* items 5a, 9a, 34a & 47a.

35. *Infra* app. C, items 1–31. The Mississippi provision is item 15.

36. Davis v. Husain, 2013 WL 949496 (N.J. Super. Ct. App. Div. 2013); Davis v. Husain, 106 A.3d 438 (N.J. 2014).

37. *Davis*, 2013 WL 949496, at *2, *6.

38. *Davis*, 106 A.3d at 441.

39. *Davis*, 2013 WL 949496, at *2; *5; *Davis*, 106 A.3d at 441.

40. *Davis*, 106 A.3d at 441; *Davis*, 2013 WL 949496, at *2, *5. One juror commented that Husain had not touched the Bible when he took the oath before testifying."

record with respect to the incident."[41] Abbas appealed, asserting error in the trial court "failing to declare a mistrial on the basis of the juror's comment about Husain and the Bible."[42] Abbas represented that his action was based on his "religious belief that the left hand should never be placed on a holy book."[43]

The intermediate appellate court majority declined to order a new trial, but the dissent spoke of "information from a juror that suggested she may have assessed defendant's credibility on an irrelevant factor, defendant's apparent unwillingness to place his hand on the Bible when swearing to tell the truth."[44] The dissent observed:

> There is no doubt that defendant was properly sworn. Notwithstanding, we interpret . . . that this juror may have mistakenly thought defendant's reticence when confronted with a Bible was a sign of unwillingness to tell the truth. . . there is no way of dismissing the possibility that the jury may have decided the credibility contest in favor of plaintiff by relying on a circumstance that had no bearing on defendant's credibility.[45]

The New Jersey Supreme Court, having declared that "[w]e are reluctant to engage in a presumption of prejudice under these circumstances," nevertheless reversed and remanded for further proceedings to allow an inquiry into the juror's observation and the effect, if any, on the jury verdict.[46]

The case of Abbas Husain illustrates the credibility problem caused by some contemporary oath and affirmation procedures. Although the plaintiff could not have frontally challenged his credibility based on his religious beliefs, New Jersey's oath and affirmation practices made it possible for religious prejudice to improperly influence the credibility determination of a juror.[47]

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41. *Davis*, 2013 WL 949496, at *9, *24; *Davis*, 106 A.3d at 448.

42. *Davis*, 2013 WL 949496, at *7 (N.J. App., 2013); Davis v. Husain, 106 A.3d at 438.

43. *Davis*, 106 A.3d at 441 n.1. Dr. Husain also ascribed his action in not touching the Bible to "his cultural upbringing was that the left hand should not be placed on holy books," and represented that "because the courtroom had a Bible and a Koran, he was confused and not sure which was being offered to him." *Davis*, 2013 WL 949496, at *13, *22 n.3

44. *Davis*, 2013 WL 949496, at *32 (Fisher, P.J.A.D., dissenting).

45. *Id.* at *32–33.

46. *Davis*, 106 A.3d at 448–49.

47. The record in the *Davis* case leaves open two possible inappropriate influences on the credibility determination from the oath ceremony. The first is that the juror might have taken Dr. Husain's unwillingness to touch the Bible as an indication that he was not a Christian, allowing an adverse credibility determination based on religious prejudice. The second is that the juror might have taken Dr. Husain's unwillingness to touch the Bible as an indication that he was not telling the truth, allowing an adverse credibility determination based on religious belief. Contemporaneous reports support the religious prejudice interpretation. Brent Johnson, *N.J.*

The evolution from prejudice to fair treatment with respect to witness competency and credibility was based on an understanding that religious belief is not a valid predictor of competence or credibility, and a concern that some finders of fact would allow religious prejudice to influence their credibility determinations.[48]

But removing competency bars and credibility challenges based on a witness' religious beliefs did not completely eliminate the possibility of discrimination against witnesses based on religion. Any time the finder of fact is aware of the religious beliefs of a witness there is a possibility of prejudice influencing the credibility determination.

Of course, as a practical matter it may be unavoidable that some credibility determinations are open to be influenced by religious prejudice. Some witnesses may be religiously identifiable by their dress or appearance, by their names or patterns of speech. But having religious prejudice influence credibility determinations can be avoided where the witness' religion is disclosed only by the manner in which the witness is qualified to testify.

In a sense, this problem is ironic. The oath that once excluded all non-Christians and then excluded disfavored religious minorities and all non-believers, has come back to open the door to further religious prejudice because of well-meaning attempts to accommodate different religious beliefs. Take, for example, the witness-belief accommodation clause of the Federal Rules of Evidence. The applicable rule starts by requiring that a witness be qualified by giving an oath or affirmation.[49] It then sets the predicate for accommodation: "It [the oath or affirmation] must be in a

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Supreme Court bans judges from speaking with jurors after verdict, NJ.com, Dec. 24, 2014 (updated Dec. 29, 2014), http://www.nj.com/politics/index.ssf/2014/12/nj_supreme_court_bans_judges_from_speaking_with_jurors_after_verdict.html ("there wasn't enough information to decide whether the verdict was tainted by religious bias." "[A] new judge will consider . . . whether prejudice occurred . . ."). "[Husain's] attorney . . . said in oral arguments before the high court in September that the trial took place in late 2011, just after the 10th anniversary of the Sept. 11 attacks. That, she said, may have caused the jury to discriminate against Husain."). *Id.* Jim Walsh, *High Court: Camco Judge's Meeting Improper*, SOUTH JERSEY COURIER-POST (Dec. 23, 2014), http://www.courierpostonline.com/story/news/local/south-jersey/2014/12/23/high-court-camco-judges-meeting-improper/20823483/ ("juries are not allowed to consider 'improper information' during deliberations, including 'comments in the jury room (that) manifested unlawful bigotry."). For our purposes it is sufficient that the oath ceremony allowed the first possibility.

48. Brink v. Stratton, 68 N.E. 148, 148–53 (N.Y. 1903) (Cullen, J., concurring); Vestal, *supra* note 1, at 86–90; *see also* Lucien J. Dhooge, *Public Accommodation Statutes, Sexual Orientation and Religious Liberty: Free Access or Free Exercise*, 27 U. FLA. J.L. & PUB. POL'Y 1, 34 (2016) (stating that neutrality concerns are raised when religious beliefs are not treated similarly).

49. FED. R. EVID. 603 ("Before testifying, a witness must give an oath or affirmation to testify truthfully.").

form designed to impress that duty on the [witness'] conscience."[50] The rule is intended to provide flexibility in dealing with a variety of witnesses, as the notes of the advisory committee rather undiplomatically confirm: "[t]he rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children."[51]

These accommodations suggest a commendable sensitivity to variations in religious belief, and a commitment to religious pluralism. But the variations in the oath or affirmation inherent in accommodation mean that the trier of fact may gain information about a witness' religious beliefs from the manner in which she is qualified. This in turn makes it possible for the credibility determinations of jurors and judges to be influenced by religious prejudice, a possibility illustrated by the case of Abbas Husain.

Simply administering the oath or affirmation out of the presence of the judge and jury could solve this problem.[52] In this way the ceremonial importance of the oath or affirmation—to impress upon the witness the importance of telling the truth—could be maintained and no alterations of any oath or affirmation forms would be required.

Simply moving the venue for oaths and affirmations would solve the credibility problem. It would not solve either the preference and free exercise problem, to which we now turn, or the privacy problem.

III. WITNESS OATHS, PREFERENCE, AND FREE EXERCISE

In the winter of 2014, Rawda Musaitef was involved in a custody dispute with her former husband, Abdul Musaitef, in a Philadelphia family court.[53] Rawda and Abdul are Muslims. During the course of the trial Abdul was called to testify. He was qualified by placing his hand upon the Bible and reciting the Pennsylvania statutory oath.[54] When Rawda took the stand she requested to be sworn by taking an oath on a Quran instead of a Bible.[55] Abdul objected and the court held a hearing

50. *Id.*

51. FED. R. EVID. 603, Notes of Advisory Committee on Proposed Rules.

52. Depending on the jurisdiction, the oath or affirmation might be administered by a clerk or by a judge other than the presiding judge. It is assumed that in order to insulate the witness from any prejudice, the oath or affirmation would be administered out of the hearing of the judge even in jury cases.

53. James W. Cushing, *Christian Bible or Nothing, Philadelphia Family Court Says*, LEGAL INTELLIGENCER (Dec. 23, 2014), http://www.thelegalintelligencer.com/id=1202713174626/Christian-Bible-or-Nothing-Philadelphia-Family-Court-Says.

54. 42 PA. CONS. STAT. § 5901(a). It is reported that the father used the Christian Bible. Cushing, *supra* note 53.

55. Cushing, *supra* note 53.

to consider arguments from opposing counsel.[56] Pennsylvania gives witnesses the right to affirm rather than swear an oath.[57] But if a witness wants to swear an oath, the Pennsylvania statute prescribes the form, one that will conflict with some witness' religious opinions and beliefs.

> Every witness, before giving any testimony shall take an oath in the usual or common form, by laying the hand upon an open copy of the Holy Bible, or by lifting up the right hand and pronouncing or assenting to the following words: "I, A. B., do swear by Almighty God, the searcher of all hearts, that I will ________________, and that as I shall answer to God at the last great day."[58]

The arguments of the *Musaitef* parties illustrate several aspects of the preference and free exercise problem. Abdul objected to letting Rawda be sworn on the Quran, arguing that the Pennsylvania statute is clear; Rawda could either swear the statutory oath on the Christian Bible or use the non-religious affirmation.[59]

Rawda's argument was framed in terms of religious liberty. She argued that to be constitutional under the First Amendment, the

56. *Id.*

57. 42 PA. CONS. STAT. § 5901(b) (1978) ("The affirmation may be administered in any judicial proceeding instead of the oath, and shall have the same effect and consequences, and any witness who desires to affirm shall be permitted to do so.").

58. *Id.* § 5901(a). The section concludes with language that is indecipherable: "Which oath so taken by persons who conscientiously refuse to take an oath in the common form shall be deemed and taken in law to have the same effect as an oath taken in common form." *Id.* One Pennsylvania commentator calls this final sentence "curious," and suggests that it might "imply that the statute ought to be read expansively as it appears to allow another form, other than the 'common form,' to have the same effect as the common form." Cushing, *supra* note 53.

59. Abdul also argued that to permit Rawda to be sworn on the Quran would be a form of witness intimidation:

> The father first argued that the mother's request was a pretext for witness intimidation. Evidently, the alleged implication from the mother was that the father's Islamic faith included the belief that oaths taken on religious books outside of Muslim belief would not bind the speaker to tell the truth. Therefore, the witness intimidation was the mother's subtle suggestion that the father's use of a Christian Bible instead of a Quran for his oath, as contrasted by her insistence on using a Quran, indicated that the father was going to lie during his testimony.

Cushing, *supra* note 53. Abdul also observed that the Pennsylvania statute prohibits inquiry into a witness' religious beliefs in order to challenge credibility, "so he cannot explore with her the potential religious and/or other implications for using a Quran over a Bible for the purposes of taking an oath at a hearing." *Id.* 42 PA. CONS. STAT. § 5902(b) (1978) ("No witness shall be questioned, in any judicial proceeding, concerning his religious belief; nor shall any evidence be heard upon the subject, for the purpose of affecting either his competency or credibility.").

Pennsylvania statute must be read broadly enough to permit the use of the Quran instead of the Christian Bible. She noted the affirmation option is for people who object to taking an oath or object to a religiously based oath. Rawda argued that the "obvious purpose of the oath . . . is to impose the significant nature of the proceedings on a witness and to ensure the truth of testimony," and that the "way to impose the significant nature of the proceedings onto a witness is to allow that witness to swear upon something that witness respects and takes seriously, such as her preferred religious text."[60] She observed: "[I]f Christians receive the benefit of, and respect for, their religious beliefs when taking the oath on their Bible, ought not other religionists, in this case Muslims, receive the same benefit and respect and be permitted to take an oath on their Quran?"[61]

Rawda's constitutional argument was straightforward:

> [U]nderstanding 42 Pa. C.S. Section 5901 as restricting oaths to exclusively the Bible (or non-religious affirmation) is unconstitutional. The mother pointed out that by allowing for the use of the Bible but no other religious books for an oath, Pennsylvania impermissibly favors Christianity over other religions and, therefore, serves as an unconstitutional endorsement of Christianity over other religions.[62]

This argument finds support in the anti-preference clause of the Pennsylvania constitution, that "no preference shall ever be given by law to any religious establishments or modes of worship."[63]

The court rejected Rawda's arguments, ruling that the Pennsylvania statute had to be read literally to require either the statutory-form oath on a Christian Bible or a non-religious affirmation. The court ruled that other religious books, sacred to the witness' faith, could not be substituted.[64]

60. Cushing, *supra* note 53.

61. *Id.*

62. *Id.*

63. *See infra* app. C, item 24.

64. Cushing, *supra* note 53. Rawda Musaitef did not appeal the court's ruling. Telephone interview with James W. Cushing, Associate, Faye Riva Cohen, P.C. (May 26, 2015). There are indications that other Pennsylvania judges approach the form of the oath differently. Gabrielle Banks, *Truthfully, Our Court Oath is Elaborate*, PITT. POST-GAZETTE (Aug. 10, 2006), http://www.post-gazette.com/frontpage/2006/08/10/Truthfully-our-court-oath-is-elaborat e.html.

> Some local judges do not require the formal oath . . . Most judges let staffers, who know their preferences on most legal procedures, decide how to give the oath. "If it's a jury trial, I try to keep it as flowery as they like it," said [one clerk]. In nonjury proceedings, "I usually do the quick version, just to keep things going quickly."

Id.

The public reaction to *Musaitef* was sadly predictable. Rawda's request to take an oath on the Quran was described as "an attempt to inject the Quran and Sharia law in these American states," and "yet another example of Muslims using our own laws to try and tear down our system."[65]

Rawda Musaitef faced the preference and free exercise problem caused by some contemporary oath and affirmation procedures. Although under Pennsylvania law she was free to affirm rather than swear an oath, if she elected to swear an oath, she would have been forced to swear a statutorily defined oath that is incompatible with her religious beliefs.

Rawda would have fared better had she lived in North Carolina and not Pennsylvania. In 2003 Syidah Mateen, a Muslim, was to testify at a domestic violence protective order hearing.[66] The North Carolina statute provides that when swearing a witness:

> Judges . . . shall . . . require the party to be sworn to lay his hand upon the Holy Scriptures, in token of his engagement to speak the truth and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of that holy book and made liable to that vengeance which he has imprecated on his own head.[67]

When faced with being sworn in with her hand upon a Bible, Syidah asked to be sworn in with her hand on a Quran.[68] Her request was refused and she elected to affirm instead.[69]

The ACLU of North Carolina and Syidah challenged the statute, arguing in the alternative that either the term "Holy Scriptures" in the statute meant the Bible and also other religious texts, including—but not by way of limitation—the Quran, the Old Testament, and the Bhagavad-Gita,[70] or that if the term "Holy Scriptures" meant only the Bible, then

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65. Leland Ivy, *Muslim Wants to Swear Oath on Quran – Not Bible: Judge in Pennsylvania Slaps Her Down!*, JOE FOR AMERICA (Feb. 12, 2015), http://joeforamerica.com/2015/02/muslim-wants-swear-oath-quran-not-bible-judge-pennsylvania-slaps/.

66. ACLU of N.C., Inc. v. State, 639 S.E.2d 136 (N.C. Ct. App., 2007).

67. *See infra* app. B, item 34a.

68. *ACLU of N.C.*, 639 S.E.2d at 137.

69. *Id.* at 139.

70. *Id.* The ACLU based its argument that the term "Holy Scriptures" included texts other than the Bible in part upon a 1985 amendment to the statute which substituted the term "Holy Scriptures" for the term "Gospels." In the declaratory judgment (at 3), the court says "Plaintiffs urge that the term 'the Holy scriptures' appearing in N.C Gen. Stat. § 11-2 should be interpreted to include not just the Christian Bible, but other religious texts, including but not limited to the Quran, the old Testament and the Bhagavad-Gita." *See* ACLU of N. Carolina, Matten v. North Carolina Order, American Civil Liberties Union, at https://www.aclu.org/legal-document/aclu-n-carolina-matten-v-north-carolina-order?redirect=cpredirect/29873 [hereinafter Declaratory Judgment]. The argument is perhaps diminished by the fact that the following section, allowing

the statute violated the Establishment Clause and the Free Exercise Clause of the Federal Constitution and the religious liberty guarantee of the North Carolina constitution.[71]

The North Carolina trial court judge declined to find that the statutory term "Holy Scriptures" included religious texts other than the Bible, or to find the North Carolina oath statute, so narrowly construed, to be unconstitutional.[72] Rather, looking to the 1856 North Carolina case of *Shaw v. Moore*,[73] the judge found a common-law right for witnesses to be sworn using religious texts other than the Bible.[74]

Shaw involved a probate matter in which the competency of one of the witnesses to a will was challenged based on his religious beliefs. The issue involved the witness' belief that God's judgment for lying would be felt in this world and not the world to come:

> Is a person who "believes in the obligation of an oath on the Bible; who believes in God and Jesus Christ, and that God will punish in *this world*, all violators of his law, and that the sinner will inevitably be punished *in this world* for each and every sin committed; but there will be no punishment *after death*, and that in another world all will be happy and equal to the angels"—a competent witness?[75]

Justice Richmond Mumford Pearson, writing for the *Shaw* court, noted that the common-law rule required both a temporal and a religious sanction for violation of the witness oath.[76] He lauded the development

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an alternative mode of taking the oath "[w]hen the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid" provides "he shall be excused from laying hands upon, or touching the Holy Gospel . . ." N.C. GEN. STAT. § 11-3 (2016).

71. *ACLU of N.C.*, 639 S.E.2d at 137 (citing N.C. CONT. art. I, § 13 ("Religious liberty. All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.")). The North Carolina constitution does not contain a religious preference clause. *Id.*

72. In the declaratory judgment (at 13) the court declines to declare the statute unconstitutional, having already fashioned "a less drastic remedy." Declaratory Judgment, *supra* note 71, at 13.

73. Shaw v. Moore, 49 N.C. 25 (N.C. 1856).

74. Declaratory Judgment, *supra* note 70.

75. *Shaw*, 49 N.C. at 26.

76. *Id.*

> The law requires two guaranties of the truth of what a witness is about to state; he must be in the fear of punishment by the laws of man, and he must also be in the fear of punishment by the laws of God, if he states what is false; in other words, there must be a temporal and also a religious sanction to his oath. In reference to the first, no question is made; but it is insisted, that the religious

of the common law:

> One excellence of the common law is, that it *works itself pure*, by drawing from the fountain of reason, so that if errors creep into it, upon reaons, which more enlarged views and a higher state of enlightenment, growing out of the extension of commerce and other causes, proves to be fallacious, they may be worked out by subsequent decisions.[77]

Justice Pearson then gave as an example of such a common law development, the evolution of the law beyond Lord Coke's opinion that non-Christians were incompetent as witnesses: "All infidels are in law *perpetui inimici*; for, between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility."[78] Justice Pearson's characterization of Lord Coke's reasoning was sharp: "This reason, to say the least of it, is narrow-minded, illiberal, bigoted and unsound."[79] He traced the development of the common-law rule that conditioned competency on a belief in a state of rewards and punishments, and addressed the question of whether the rule required belief in a *future* state of rewards and punishments:

> This position is not sustained by the reason of the thing, for, if we divest ourselves of the prejudice growing out of preconceived opinions as to what we supposed to be the true teaching of the Bible, it is clear that, in reference to a religious sanction, there is no ground for making a distinction between the fear of punishment by the Supreme Being in this world, and the fear of punishment in the world to come; both are based upon the sense of religion. . . . The rule of law which requires a religious sanction, is satisfied in either case.[80]

The *Shaw* court rejected the argument that the North Carolina statutory provision on oaths was intended to displace and narrow the common law. "We think it manifest, by a perusal of the Statute that it was not intended to alter any rule of law, but the sole object was to prescribe forms, adapted to the religious belief of the general mass of the citizens, for the sake of convenience and uniformity."[81] The opinion rejected as

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> sanction required, is the fear of punishment in a *future* state of existence.

Id.

77. *Id.* at 27.
78. *Id.*
79. *Id.*
80. *Id.* at 26–27.
81. *Id.* at 29.

indecent the suggestion that the statute was intended to exclude witnesses allowed under the common law:

> We think it indecent to suppose that the Legislature intended in an indirect and covert manner to alter a well-settled and unquestioned rule of law, and in despite of the progress of the age, to throw the country back upon the illiberal and intolerant rule which was supposed to be the law in the time of bigotry . . .[82]

Finally, the *Shaw* court allowed what would have been the outcome had the Legislature so intended to narrow the rights of witnesses:

> If it be admitted, for the sake of the argument, that . . . the Legislature had the purpose of altering the common law, so as to exclude Jews and infidels, who believe in a God, and Christians, who do not believe in future rewards and punishments, from the *privilege* of taking the oaths which are required to enable them to testify as witnesses . . . in other words, to degrade and persecute them for "opinion's sake," then it is clear, that the statute, so far as this purpose is involved, is void and of no effect, because it is in direct contravention of the 19 sec. of the Declaration of Rights: "That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences."[83]

What guidance does Justice Pearson's opinion in *Shaw* provide as to whether Syidah Mateen ought to have been able to swear her testimonial oath on the Quran? As to the proposition that an oath of a Muslim witness must be sworn on a Bible and not a Quran, one can paraphrase Justice Pearson:

> This position is not sustained by the reason of the thing, for, if we divest ourselves of the prejudice growing out of preconceived opinions as to what we supposed to be the true teaching of the Bible, it is clear that, in reference to a religious sanction, there is no ground for making a distinction between sanctions in one Abrahamic religion and another; both are based upon the sense of religion. . . . The rule of law which requires a religious sanction, is satisfied in either case.[84]

As to the proposition that the oath statute was intended to displace and

82. *Id.* at 30.

83. *Id.*

84. *Id.*

narrow the common law, one need not even paraphrase Justice Pearson: "We think it manifest, by a perusal of the Statute, that I was not intended to alter any rule of law, but the sole object was to prescribe forms, adapted to the religious belief of the general mass of the citizens, for the sake of convenience and uniformity."[85] As the religious beliefs of the "general mass of the citizens" have become more diverse, the forms prescribed should follow.

Finally, if the Legislature did intend to exclude the use of religious texts other than the Bible from use in testimonial oaths, the *Shaw* opinion strongly suggests the outcome. To paraphrase:

> If it be admitted, for the sake of the argument, that . . . the Legislature had the purpose of excluding non-Christians from the privilege of taking the oaths which are required to enable them to testify as witnesses . . . in other words, to degrade and persecute them for "opinion's sake," then it is clear, that the state, so far as this purpose is involved, is void and of no effect, because it is in direct contravention of the 19 sec. of the Declaration of Rights: "That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences."[86]

It is, as Justice Pearson suggested in *Shaw*, that with "more enlarged views and a higher state of enlightenment" we move beyond "narrow-minded, illiberal, bigoted and unsound" reasoning.[87] One can imagine Justice Pearson reading with approval the opinion of the Superior Court Judge Paul Ridgeway, allowing religious texts other than the Bible to be used for witness oaths in North Carolina:

> The highest aim of every legal contest is the search for the truth. To require pious and faithful practitioners of religions other than Christianity to swear oaths in a form other than the form most meaningful to them would be to thwart the search for the truth.[88]

Rawda Musaitef would have fared even worse had she lived in Kansas and not Pennsylvania. As in Pennsylvania, in Kansas every witness is required to swear an oath or make an affirmation.[89] The statute provides

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85. *Id.* at 29.

86. *Id.* at 30.

87. *Id.* at 27.

88. *Judge Says Multiple Religious Texts Must Be Allowed for Swearing-in Proceedings*, ACLU.ORG (May 24, 2007), https://www.aclu.org/news/aclu-north-carolina-applauds-court-ruling-preventin g-religious-discrimination-courtroom.

89. KAN. STAT. ANN. § 60-418 (2016). The oath or affirmation makes the penalties for perjury applicable. KAN. STAT. ANN. § 54-105 (2016).

the oath is to be taken "by laying the right hand upon the Holy Bible, or by the uplifted right hand."[90] The Kansas statutory oath would have offended Rawda's religious convictions, as did the statutory oath in Pennsylvania.

Rawda's additional problem in Kansas would have come from how one opts to make an affirmation. Under Pennsylvania law, any witness can opt to make an affirmation in lieu of taking the statutory oath.[91] Not so in Kansas, where the statute limits the affirmation option to "[a]ny person having conscientious scruples against taking an oath . . . ."[92] This accommodates Quakers, atheists, agnostics, and the like.

The problem is how the Kansas statute treats individuals such as Rawda, who have deeply held religious beliefs that permit them to take an oath but that are incompatible with the particular oath form specified in the statute. Under the Kansas statute, she would not qualify to avoid the oath, as she is not a "person having conscientious scruples against taking an oath." [93] After all, her religion provides for oaths.[94] But if she does not qualify for the statutory exemption, the Kansas statute requires her to make an oath which conflicts with her religious beliefs.

Faced with the Kansas statutes, what should Rawda do? Should she violate her religion's prohibition on lying by saying that she has conscientious scruples against taking an oath—thus allowing her to avoid the statutory oath form which conflicts with her religious beliefs—when in fact she does not? Or should she violate her religious beliefs by taking the statutory oath? It is a difficult choice, one that we should not compel any witness to make.

Nor under its own constitution is it a choice that Kansas can force a witness to make. The same provision of the Kansas Bill of Rights which guarantees that no person shall be rendered incompetent to testify on account of religious belief also guarantees that no preference can be given to one religion over another—exactly what the Kansas statutory oath does:

> The right to worship God according to the dictates of conscience shall never be infringed . . . nor any preference be given by law to any religious establishment or mode of worship . . . nor shall any person be incompetent to testify on account of religious belief.[95]

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90. KAN. STAT. ANN. § 54-102 (2016).

91. *See infra* app. B, item 39a.

92. *Infra* app. B, item 17a. Seventeen additional states have a test for a witness to affirm. *Id.* items 5a, 8a, 9a, 14a, 18a, 22a, 23a, 24a, 30a, 34a, 37a, 42a, 46a, 47a, 48a, 50a & 51a.

93. KAN. STAT. ANN. § 54-103 (2016); *infra* app. B, item 17a.

94. Milhizer, *supra* note 8, at 47–58.

95. KAN. CONST. Bill of Rights § 7.

In Pennsylvania, Rawda Musaitef was faced with a simple preference and free exercise problem—she was prevented from swearing an oath compatible with her religious beliefs while others were allowed to swear an oath compatible with their beliefs, although she could have affirmed. In Kansas, she would have been faced with a heightened preference and free exercise problem—she would have been forced to swear an oath incompatible with her religious beliefs because she did not meet the test for affirming. Either way, she would have been discriminated against because of our incomplete evolution from our exclusionary past.

Surely it is inappropriate to allow some witnesses to swear an oath consistent with their sincerely held religious beliefs while denying others the same opportunity. Indeed, in the thirty-one states that have constitutional guarantees against religious preferences, such differential treatment ought to be held unconstitutional.[96]

The solution to the credibility problem—to administer oaths and affirmations out of the presence of the judge and jury—does not address the preference and free exercise problem. But it could be addressed by simply letting witnesses who want to swear to a religious oath use whatever form of oath is consistent with their religious beliefs and opinions. Each witness would elect, without any predicate showing, whether to take an oath or make an affirmation. Witnesses who elect to take an oath would be able to specify the oath and the ritual, including which writing—if any—would be used in the oath taking. Such a policy could result in a range of oath forms and religious writings being used.[97] Such a system would be logistically complicated and inefficient, but it would solve the preference and free exercise problem.

Dean Milhizer has made a proposal for the reform of witness oaths which constitutes a different approach to the preference and free exercise problem.[98] As a response to "the religious pluralism present within the United States today,"[99] he suggests the requirements for a modern testimonial oath:

> Given the religious diversity in contemporary America, an

96. *See infra* app. C, items 1–31.

97. Rather than use a common edition of the Bible, Protestant, Catholic, Jewish, and LDS, witnesses might elect to use writings better aligned with their individual beliefs. Protestant witnesses might use a Bible with thirty-nine Old Testament books and twenty-seven New Testament books; Catholics a Bible with forty-six Old Testament books and twenty-seven New Testament books. Jewish witnesses might use the Tanakh. LDS witnesses might use the Authorized King James Bible (without the Apocrypha), the Book of Mormon, the Doctrine & Covenants, and the Pearl of Great Price. Witnesses from the Islamic faith tradition would presumably elect to use the Quran. Some Hindus might elect to use the Bhagavad Gita; Wiccans might elect to use a pentacle in lieu of a writing.

98. Milhizer, *supra* note 8, at 58–71.

99. *Id.* at 58.

effective oath must account for a variety of beliefs about the identity and nature of God, consistent with present-day attitudes. It must permit subjective and divergent understandings of God's relationship to an oath and oath taker. It must accommodate religious diversity, both as publicly expressed in the oath ceremony and as privately held by individual oath takers. Finally, it must retain substantive meaning while demonstrating procedural agility. These are the needs and challenges of the modern oath.[100]

Dean Milhizer proposes an oath form that contains "an explicit reference to an undifferentiated God while prohibiting the use of any artifacts."[101] He finds the use of a Bible, for Christians,[102] and a Quran, for Muslims,[103] is not required for the testimonial oath to be effective. He makes a parallel assertion as to "other faith traditions and belief systems"—"it is clear that the use of religious artifacts, while permissible and in some cases even helpful, are not required for meaningful and effective oaths and affirmations."[104] And, he asserts, such an oath form would be broadly acceptable:

> Such a public, generic reference to the divine would not intrude upon private conceptions of God, which can remain infinitely personal to the oath taker. Christians can comfortably swear an oath to God as God. So can Muslims. So too, presumably, can adherents of most monotheistic religious traditions.[105]

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100. *Id.* at 59.
101. *Id.* at 70.
102. *Id.* at 62–63.

> [T]he use of the Bible is not required . . . while it is permissible, and perhaps even desirable in certain instances to allow Christians to use the Bible in taking an oath, it is not necessary for the purpose of binding a Christian in conscience to tell the truth in court because of the general moral requirement that a Christian refrain from lying and giving false testimony.

Id. Undoubtedly Dean Milhizer is correct as a general proposition, although iconic Texas journalist Molly Ivins supplied a counter example in a somewhat different context: "Governor Bill Clements, when asked why he had repeatedly lied about the Southern Methodist University football scandal, replied reasonably enough, "Well, there was never a Bible in the room." MOLLY IVINS, MOLLY IVINS CAN'T SAY THAT, CAN SHE? 59 (1991).

103. Milhizer, *supra* note 8, at 63 ("Muslims do not consider swearing on a religious artifact, including the Quran, to be essential for a valid oath. Muslims have a pre-existing obligation from *shariah* to speak the truth, making it unnecessary for Muslim witnesses to use the Quran in oath ceremonies").
104. *Id.*
105. *Id.* at 70.

He concludes, "If the witness cannot swear to God in this manner, or swear at all, or does not believe in any form of divinity, he can instead affirm."[106]

The proposal is clever but ultimately unavailing. Although it would allow many witnesses to swear a generic oath, it would also discriminate against witnesses who wish to swear an oath but whose religious beliefs conflict with his "non-specific invocation of God" made without any religious artifacts.[107] The proposal would exclude all believers in polytheistic religions. Depending on the context and the beliefs of the individual, the proposal might exclude Buddhists, Shintos, Hindus, Wiccans, pagans, and followers of a wide range of indigenous religions in Africa and China. It would exclude Christians and Muslims whose idiosyncratic beliefs *require* the use of the Bible or Quran in the oath ceremony or nomenclature other than "God."[108] It would exclude witnesses who want to swear an oath using other religious artifacts:

> Any consideration of the [option to accede to an oath taker's request to use any artifact which he considers symbolic of his religious beliefs] must appreciate the enormous breadth of its logical extension. If no distinctions are to be drawn on substantive religious bases, then the range of permitted "religious" artifacts would be virtually unlimited. The only valid criterion for excluding an artifact would be on the basis that the reasons offered by an oath taker in support if its use did not conform to the oath's underlying purposes. Exclusion would thus turn solely upon the subjective and professed rationale for the object's use, and not upon the objective nature or legitimacy of the object itself.[109]

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106. *Id.*

107. *Id.* at 60.

108. *See, e.g.*, one Arizona pastor reported the plan of a North Carolina judge "to remove all references to God from his courtrooms . . . by having witnesses no longer to swear on the Bible and the witness oaths would no longer mention God." The pastor's reaction was negative:

> Nothing could be more important for a Christian and especially for a preacher than to bear witness unto the truth. O that every preacher of God would place his hand on the King James Bible, which is the scripture of truth and bear witness unto the truth, the whole truth, and nothing but the truth.

Mike Storti, *Bearing Witness unto the Truth*, BIBLE WATCHMAN, http://biblewatchman.com/witness.htm (last visited Oct. 12, 2016).

109. Milhizer, *supra* note 8, at 65–66. Of course, when dealing with religious belief it may be difficult to ascertain "the objective nature or legitimacy of the object itself." *See* Alison Lesley, *Jesus Appeared in Mexican Woman's Tortilla*, WORLD RELIGION NEWS (Aug. 3, 2015), http://www.worldreligionnews.com/religion-news/christianity/mexican-woman-sees-jesus-in-her-tortilla (reporting claim "that Jesus' face has miraculously appeared in one of the tiayadas

He also identifies the possibility of witnesses wanting to do affirmations using non-religious artifacts:

> Moreover, as affirmation is recognized as an alternative to oaths, presumably "non-religious" objects should likewise be allowed if an affirmer contends that they would enhance the efficacy of his affirmation. In other words, any distinction between religious artifacts and secular objects would evaporate; courts would be obligated to permit, for example, a philosophical text or a picture of Elvis for affirmers in the same way they would allow the Bible or the Quran for oath takers.[110]

Dean Milhizer also raises the horror of followers of non-traditional religions asserting *their* rights. Courts might be called upon "to determine whether Scientology qualifies as a religion," and if it does, to allow "its artifacts" to "be used during oath ceremonies."[111] He continues:

> What about New Age spirituality and secular humanism, or for that matter Satanism and witchcraft? The list seems inexhaustible. Indeed, if the definition of a "religion" does not include a requirement for a community of believers or a demonstrable historical basis, then any witness would be free to mint his own personal religion before testifying and insist upon using its unique and individually specified artifacts.[112]

Why is it inappropriate to have oaths and oath rituals tailored to the individual beliefs of witnesses? After all, the Federal Rules of Evidence,[113] and the constitutional[114] and statutory[115] provisions of forty-five states contemplate an individualized oath, one designed to impress the duty to testify truthfully on the witness' conscience. These provisions do precisely what Dean Milhizer seeks to avoid—they look to the subjective and professed beliefs of the witness.[116] It turns out, his objection to individualized oaths and oath rituals is essentially stylistic:

(tortilla)" being prepared.).

110. Milhizer, *supra* note 8, at 66.

111. *Id.* at 67.

112. *Id.*

113. FED. R. EVID. 603. ("Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience").

114. *See infra* app. A, items 1, 2, 3, 4, 5, 6 & 7.

115. *See infra* app. B, items 2b, 3b, 4a, 4b, 5a, 5c, 6a, 7b, 8b, 9a, 9c, 11a, 12b, 13b, 14b, 15a, 15b, 16a, 18b, 19a, 19c, 20a, 20c, 21b, 22a, 22c, 23b, 24c, 25b, 27c, 28b, 29a, 29c, 30b, 32c, 33a, 34b, 35b, 36a, 37c, 38a, 39c, 41b, 42b, 43a, 44a, 45b, 46b, 47b, 48b, 49b, 50a & 51b.

116. FED. R. EVID. 603.

> Such a prospect is intolerable. Unusual or elaborate forms of oaths, and controversial and offensive artifacts, would be distracting or worse. They could undermine the solemnity and decorum that is necessary and expected in courts of law. They could unduly detract from the credibility of a witness based on an expression of his religious beliefs when taking his oath. And, they could offend many more people, including the parties at trial and the public generally, than would be offended if all artifacts were categorically prohibited. Depending on the artifact used, the integrity and effectiveness of the justice system could be seriously compromised, thereby defeating the very purpose that oaths and affirmations were intended to serve.[117]

Of course, the horrors from having a witness swear an oath using the Scientology cross or the Sigil of Baphomet—much less having a devotee of early rock and roll affirm using a velvet portrait of Elvis—would be avoided in the main by adopting the reform suggested to avoid the credibility problem: have witnesses swear or affirm out of the presence of the judge and jury.[118] The oaths and affirmations of witnesses could be taken out of the public view, as well, to avoid the public offense that might come from having a witness take an oath on a sacred rock, a portrait of Elvis, or a tortilla with an image of Jesus.[119]

The most substantial barrier to the proposal to have an oath to an undifferentiated God *sans* religious artifacts is that it would violate the state constitutional anti-preference provisions of thirty-one states.[120] These provisions essentially prohibit preferences given by law to any religious denomination, creed, or mode of worship. It is hard to imagine an action of the state that would more clearly violate such a constitutional guarantee than a statute allowing witnesses from one faith tradition to swear a religious oath while denying the same right to other witnesses simply because they believe in another faith tradition.

Having oaths tailored to each witness' religious opinions and beliefs—and affirmations for any who wished—could be implemented in conjunction with having oaths and affirmations administered out of the hearing of the finder of fact. Such an arrangement would address both the credibility problem and the preference and free exercise problem. But such a system would fail to address the third problem—privacy—to which we now turn.

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117. Milhizer, *supra* note 8, at 67–68.

118. *Id.* at 66–67.

119. *Id. See* Lesley, *supra* note 109 (reporting claim "that Jesus' face has miraculously appeared in one of the tiayadas (tortilla)" being prepared.).

120. *See infra* app. C, items 1–31.

IV. WITNESS OATHS AND PRIVACY

In 2007, Catherine Nicole Donkers' legal malpractice case took an adverse turn when it came time for her to testify at a deposition.[121] She "refused to raise her right hand and to be sworn under oath [and] claimed that raising her right hand would violate her religious beliefs."[122] At a subsequent motion hearing, "Donkers again refused to raise her right hand and to be sworn under oath. She indicated that she would affirm to tell the truth, but stated that she was still unwilling to raise her right hand for religious reasons."[123] There followed an exchange between Catherine Donkers and Judge Melinda Morris of the Washtenaw County Circuit Court:

> *Court:* Are you going to raise your right [hand] or not?
>
> *Plaintiff Donkers:* No ma'am. It's writ-
>
> *Court:* Okay if not then I dismiss your case and you may take it up on appeal.
>
> *Plaintiff Donkers:* Ma'am-
>
> *Court:* Your case is dismissed.
>
> *Defendant:* Thank you, Your Honor.
>
> *Plaintiff Donkers:* Ma'am I haven't [been] given an opportunity. The same thing . . . happened at the deposition.
>
> *Court:* That's right, your case is dismissed.
>
> *Plaintiff Donkers:* I didn't have an opportunity to state what my substitute oath would be. . . .
>
> *Plaintiff Donkers:* Ma'am, I'm going to object. I haven't been given an opportunity to say what my sub-
>
> *Court:* You know what you do when you object, you appeal. You appeal to the Court of Appeals and explain to them why it is you will not affirm that you will tell the truth on a deposition. There is

121. *See* Ed Wesoloski, *It's the Truth, I Swear (Or Affirm)*, MICHIGAN LAW. (June 20, 2008), https://michiganlawyerblog.wordpress.com/category/oaths/.
122. Donkers v. Kovach, 745 N.W.2d 154, 155 (Mich. App. 2007).
123. *Id.*

> nothing religious about that. There is no basis for any religious objection. The case is dismissed.
>
> *Plaintiff Donkers:* I had offered to tell the truth . . . this [is] exactly what I offered to say at the deposition as a substitute for an oath. I've had no problem in any other court in Michigan. I've had no problem in Nevada.
>
> *Court:* The record is turned off, so you're talking to the wind here.[124]

Judge Morris dismissed Donkers' claims with prejudice.

Donkers appealed the dismissal of her case to the Michigan Court of Appeals,[125] which reviewed the applicable statutes and concluded "that the act of raising one's right hand is not required to effectuate a valid affirmation . . . ."[126] The court also used the Michigan enactment of FRE 603 to conclude that, notwithstanding the statutory language providing for a raised right hand, "that it is not necessary for a witness to raise his or her right hand or to engage in any special formalities when swearing or affirming to testify truthfully . . . ."[127] The majority remanded for reinstatement of Donkers' claims. Over the vigorous dissent of three justices, the Michigan Supreme Court declined to review the Court of Appeals decision in Donkers' favor.[128]

The case of Catherine Nicole Donkers illustrates the privacy problem caused by some contemporary oath and affirmation procedures. The general problem is that our oath and affirmation procedures require witnesses to divulge information about their religious beliefs that they might quite understandably wish to keep private. The oath and affirmation procedures do this in three ways.

First, thirty-one states make the religious oath their default, thus requiring witnesses to opt out of the religious option,[129] and even in the

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124. *Id.* at 156; Wesoloski, *supra* note 121.

125. *See* Donkers v. Kovach, 745 N.W.2d 154 (Mich. App. 2007). The Court of Appeals is imprecise about the exact claim being made. The court's recitation of the facts makes it appear that she refused to raise her right hand and be *sworn. See id.* at 155 ("At the time of the deposition, Donkers refused to raise her right hand *and to be sworn under oath.*" "At a subsequent motion hearing before the trial court, Donkers again refused to raise her right hand *and to be sworn under oath.*") (emphasis added). But the court cast the question as whether Catherine could be required to raise her right hand to recite an *affirmation. See id.* at 156 ("We . . . conclude that the act of raising one's right hand is not required when *affirming* to testify truthfully.") (emphasis added).

126. *Id.* at 158.

127. *Id.*

128. Donkers v. Kovach, 749 N.W.2d 744 (Mich., 2008).

129. *Infra* app. B, items 5a, 7a, 8a, 9a, 12a, 13a, 14a, 15a, 17a, 18a, 19b, 20a, 22a, 23a, 24a, 27a, 28a, 30a, 32a, 34a, 37a, 39a, 40b, 41a, 42a, 46a, 47a, 48a, 49a, 50a & 51a.

nineteen states that have facial parity between oaths and affirmations, it is reasonable to assume that the traditional oath form is the default.[130] The opt-out requirement in effect requires witnesses with objections to the religious oath to make some level of disclosure about their religious beliefs.

Second, eighteen states have a substantive predicate relating to the witness' religious beliefs before the witness can affirm.[131] Satisfying these requires some level of disclosure of the witness' religious beliefs.

Third, where a witness has religious objections to both the oath and the affirmation options, and wants to craft an alternative means of qualifying, the witness is required to disclose more details about his or her religious beliefs. There are a number of cases where witnesses have objected to *both* the oath and the affirmation option[132] or to the ceremonial aspects of the oath or affirmation alternatives on religious grounds.[133] Understandably, the witnesses who object to the standard

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130. *Infra* app. B, items 2a, 3a, 4a, 6a, 10a, 11a, 16a, 21a, 25a, 26a, 29a, 31a, 33a, 35a, 36a, 38a, 43a, 44a & 45a. I am aware of judges in jurisdictions that do not have a statutory oath form who have recast the traditional oath along the lines of "Do you swear that the testimony you are about to give shall be the truth, the whole truth, and nothing but the truth?" Although such a form retains a religious cast, through the use of the "swear" terminology, by omitting the traditional ending "so help you God" it is clearly less religious, and presumably more broadly acceptable, than the traditional form.

131. *Infra* app. B, items 5a, 8a, 9a, 14a, 17a, 18a, 22a, 23a, 24a, 30a, 34a, 37a, 42a, 46a, 47a, 48a, 50a & 51a.

132. Bisby v. State, 907 S.W.2d 949, 953 (Tex. App. 1995); Gordon v. Idaho, 778 F.2d 1397, 1399–1400 (9th Cir. 1985); Oliver v. State Tax Comm'n, 37 S.W.3d 243, 245 (Mo. 2001); Scott v. State, 80 S.W.3d 184, 189 (Tex. App. 2002); Soc'y of Separationists, Inc. v. Herman, 939 F.2d 1207, 1209 (5th Cir. 1991); State v. Allen, 2009 MT 90NLEXIS 101, P89 (Mont. 2009); State v. Bowlin, 850 S.W.2d 116, 117 (Mo. Ct. App. 1993); State v. Corrigan, 2012 WL 612313, at 3 (Minn. App. 2012) (refusal to allow defendant to affirm "I solemnly undertake to tell the truth"); State v. Spulak, 720 S.W.2d 396, 397 (Mo. Ct. App. 1986) (defendant could not swear because of his sincerely held religious beliefs, "he explained that affirmed is a euphemism for swear"); United States v. Looper, 419 F.2d 1405, 1406 (4th Cir. 1969); United States v. Moore, 217 F.2d 428, 430 (7th Cir. 1954), *rev'd*, 348 U.S. 966 (1955); United States v. Ward, 989 F.2d 1015, 1017 (9th Cir. 1992) (requesting alternative oath substituting "fully integrated Honesty" for "truth"); Ferguson v. Commissioner, 921 F.2d 588, 588 (5th Cir. 1991):

> Appellant is forbidden to swear as evidence by the Bible directive from her God, and since the word "oath" has become synonymous and interchangeable with the word "affirmation," and the word "swear" [has] become synonymous and interchangeable with the word "affirm," as is evidenced in 1 U.S.C. 1 and many other authorities, it is appellant's sincere belief that "affirmation" is just an "other oath" and "affirm" falls with "swear not *at all*." Also, "affirmation" is the chosen form of those who denounce the very existence of God. Because of these things, "swear" and "affirm" are very repugnant to appellant.

133. ACLU of N.C., Inc. v. State, 639 S.E.2d 136, 137 (N.C. Ct. App. 2007) (request to swear on Quran rather than Bible); Donkers v. Kovach, 745 N.W.2d 154, 155 (Mich. Ct. App.

oath and affirmation options frequently represent religious traditions other than the Christian faith[134] and non-mainstream religious traditions within the Christian faith.[135]

Donkers faced all three of these requirements to divulge information about her religious beliefs. The Michigan statute starts by assuming that the default position should be to require a religious oath.[136] It then adds a substantive test to use an affirmation instead of the default religious oath.[137] It includes a ceremonial component that she raise her right hand which conflicted with Donkers' faith.[138]

It is especially problematic that our oath and affirmation procedures require witnesses to divulge information about their religious beliefs because of the role religious belief has assumed in society. One of the most corrosive features of our contemporary national life is the open hostility with which some Americans confront those whose religious beliefs differ from theirs.[139] In such an environment, it is neither unexpected nor unreasonable to want to keep our religious beliefs private.

In the main, the government respects this desire for privacy on religious matters. Benjamin Franklin famously observed that "nothing can be said to be certain, except death and taxes,"[140] and in those areas,

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2007) (raise right hand); United States v. Looper, 419 F.2d 1405, 1406 (4th Cir. 1969) (raise right hand). Cushing, *supra* note 53 (Musaitef v. Musaitef, request to swear on Quran rather than Bible).

134. *ACLU of N.C.*, 639 S.E.2d at 137 (Muslim); *Soc'y of Separationists*, 939 F.2d at 1209 (atheist); *Bowlin*, 850 S.W.2d at117 (Hebrew).

135. *Looper*, 419 F.2d at 1405 (Radio Church of God); *Moore*, 217 F.2d at 430 (Church of Jesus Christ of Sullivan (Harshmanites)).

136. *See infra* app. B, item 23a.

137. *See id.* ("Every person conscientiously opposed to taking an oath may, instead of swearing, solemnly and sincerely affirm, under the pains and penalties of perjury.")

138. *See id.*

139. A 2014 study by the Pew Research Center on Religion & Public Life suggests the contours of the situation. On a scale of zero to 100, with zero being the most negative and 100 the most positive, no religious group received an overall rating in the "most positive" category (67 to 100). Overall ratings ranged from Jews (63) to Muslims (40), with Hindus (50) Mormons (48), atheists (41) and Muslims (40) scoring at the midpoint of 50 or lower. The values assigned by some groups to others are revealing. Protestants gave atheists a 32; white evangelical Christians gave atheists a 25; atheists gave white evangelical Christians a 28; black protestants gave Buddhists a 41, Hindus a 42, Mormons a 42, atheists a 30, and Muslims a 44; white evangelical Christians gave Buddhists a 39, Hindus a 38, Mormons a 47, and Muslims a 30. *How Americans Feel About Religious Groups: Jews, Catholics & Evangelicals Rated Warmly, Atheists and Muslims More Coldly*, PEW RESEARCH CENTER (July 16, 2014), http://www.pewforum.org/2014/07/16/how-americans-feel-about-religious-groups/.

140. In a letter to Jean-Baptiste Leroy dated November 13, 1789, Benjamin Franklin observed that "in this world nothing can be said to be certain, except death and taxes." Letter from Benjamin Franklin to Jean-Baptiste Leroy (Nov. 13, 1789), *reprinted in* 1 THE PRIVATE CORRESPONDENCE OF BENJAMIN FRANKLIN 258 (1818).

religious privacy is provided: One can die[141] and pay taxes[142] without having to disclose one's religious beliefs . . . One can also be born,[143] obtain a social security card,[144] attend public school,[145] secure a driver's license,[146] sign up for the selective service,[147] participate in the census,[148] and register to vote,[149] all without disclosing one's religious beliefs.

There is only one situation where the government routinely compels individuals to either disclose their religious beliefs or violate them: when a witness is subpoenaed to testify in court and is required to either take a default religious oath or request an affirmation.

Reforming our oath and affirmation practices to eliminate the first two of the ways in which witnesses are forced to divulge their religious beliefs—the default to oaths and the substantive predicates to opt out of the religious oath—would be straightforward: simply make the non-religious affirmation the default method of qualifying witnesses.[150]

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141. *See, e.g., Electronic Death Registration System*, ALA. DEP'T PUBLIC HEALTH (Aug. 2014), http://www.adph.org/edrs/assets/EDRSTrainingMedicalFacilitiesAugust2014.pdf (electronic death registration system provides for the input of no information on religion).

142. *Form 1040, U.S. Individual Income Tax Return*, INTERNAL REVENUE SERVICE (2015), https://www.irs.gov/pub/irs-pdf/f1040.pdf (no information on religion).

143. *See, e.g., Idaho Certificate of Live Birth*, IDAHO DEPARTMENT OF HEALTH AND WELFARE, http://www.healthandwelfare.idaho.gov/Portals/0/Health/Vital%20Records/CompleteBirths.pdf (last updated Jan. 1, 2012) (birth registration system provides for the input of information on race, ethnicity and education of parents, but no information on religion).

144. *Application for a Social Security Card, Form SS-5*, SOCIAL SECURITY ADMINISTRATION, https://www.ssa.gov/forms/ss-5.pdf (last modified Aug. 2011) (providing for information on race and ethnicity but not information on religion).

145. *See, e.g., Student Registration Form*, PORTLAND PUBLIC SCHOOLS, http://www.pps.k12.or.us/files/enrollment-transfer/Registration-Form-2014-15.pdf (last revised Aug. 8, 2014) (requiring information on race and ethnicity but not information on religion for registration of student to attend Portland, Oregon public schools).

146. *See, e.g.*, Michigan Secretary of State, Applying for a License or ID? U.S. Citizens, Permanent Residents, & Refugees Need the Following Documents, MICHIGAN SECRETARY OF STATE, http://www.michigan.gov/documents/DE40_032001_20459_7.pdf (last updated Feb. 2016), http://www.michigan.gov/documents/DE40_ 032001_20459_7.pdf (application for motor vehicle operator license or identification card requires no information on religion).

147. *Selective Service System Registration Form, SSS Form 1*, SELECTIVE SERVICE SYSTEM, https://www.sss.gov/Portals/0/PDFs/regform_ copyINT.pdf (no information on religion).

148. Act of Oct. 17, 1976, Pub. L. No. 94-521, 90 Stat. 2459 (1976); 13 U.S.C. 221(c) (1976) ("no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious body.").

149. *See, e.g., New York State Voter Registration Form*, NY STATE BOARD OF ELECTIONS, http://www.elections.ny.gov/NYSBOE/download/voting/voteform.pdf (last revised Sept. 2015) (no information on religion).

150. Making the non-religious affirmation the default does not address the third way in which witnesses are forced to divulge their religious beliefs—when the witness has religious objections to both the oath and the affirmation options, and is required to disclose more details about his or her religious beliefs so that the court might craft a method of qualifying the witness compatible with the witness' religious beliefs. Presumably one could eliminate all such objections

Witnesses would be able to qualify without divulging any information concerning their religious beliefs. A witness desirous of using a religious oath would be able to make an election among a set of standard alternatives or, if none of the standard alternatives conformed to the witness' beliefs, the witness could arrange a custom oath with the court official charged with overseeing witness qualifications. The object of the affirmation and oath procedures would be to secure from each witness what is required by FRE 603: an undertaking to testify truthfully "in a form designed to impress that duty on the witness' conscience."[151]

V. WHERE DO WE GO FROM HERE?

Witness oaths and affirmations are in need of a final evolution. At present, some witnesses are subjected to credibility assessments improperly influenced by their religious beliefs. Some are discriminated against in how they qualify to testify, based solely on their religious beliefs. Some are compelled to disclose information on their religious beliefs that they would like to keep private in order to avoid violating those beliefs. There are essentially two options for evolutionary change, between which we can choose:

1. The *reform option* retains oaths and affirmations but reforms them to eliminate improper credibility determinations based on religion, eliminate preferences for some religions, and minimize the required disclosure of witness religious information.
2. The *representation option* eliminates oaths and affirmations and substitutes a uniform, non-religious representation.

A. *The Reform Option*

The reform option retains oaths and affirmations but reforms them. It provides a non-religious affirmation as a means of witness qualification. To minimize situations in which witnesses have to disclose religious information they would prefer to keep private—the problem illustrated by the case of Catherine Nicole Donkers—affirmation is the default, with witnesses able to opt out of affirmation and into a religious oath at will, with no predicate showing.

The reform option provides a range of standard oath options for established faith groups. To preclude preferences among religious groups—the problem illustrated by the case of Rawda Musaitef—

only by eliminating oaths and affirmations for qualifying witnesses, and rewriting our perjury statutes to define the crime simply as testifying falsely.

151. FED. R. EVID. 603.

witnesses with religious beliefs not represented in the range of standard oath options can arrange with the court for a custom oath consistent with their beliefs.

Finally, to preclude credibility assessments improperly influenced by the religious beliefs of the witness—the problem illustrated by the case of Dr. Abbas Husain—under the reform option, all witnesses are qualified out of the presence of the judge and jury.

While the reform option addresses the credibility problem, the preference and free exercise problem, and the privacy problem, it is not without disadvantages. It requires a complicated and inefficient system of oaths and affirmations with a wide range of oath and affirmation forms based on the religious beliefs of individual witnesses. It removes witness qualifications from the presence of the judge and jury.

B. *The Representation Option*

The representation option eliminates oaths and affirmations and substitutes a uniform, non-religious representation.[152] The representation is structured as a question from the court along the following lines: "*Do you represent that the testimony you are about to give shall be the truth, the whole truth, and nothing but the truth, and do you understand that your testimony will be subject to the pains and penalties of perjury?*" To which the witness would respond either "*I do*" or "*yes*." Such a representation would constitute an undertaking to testify truthfully "in a form designed to impress that duty on the witness' conscience" as required by the Federal Rules of Evidence.[153]

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152. Whether it would be possible to construct an oath or affirmation devoid of specific religious content, such that it could be administered to all witnesses is not a new question, it was the subject of debate in the mid-eighteenth century. Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1333 (1959). One view held that the oath, even with religious references, did not imply a theistic position such as to render it inappropriate with any witness. *Id.* at 1353 ("religious references in the oath were inconsequential additions that did not affect its essence; the religious oath formula did not even imply a theistic attitude."). A moderate view thought it possible to secularize the oath. *Id.* at 1353 ("Moderates maintained that it was at least possible to secularize the oath by omitting religious references."). The extreme view was that even an oath with secularized language could not render it without religious import. *Id.* at 1353 ("In the extreme opposing view, even omission of all express religious content could not deprive the oath of its essentially religious connotation."). In her study Professor Helen Silving identified the problem: "Assuming that the terms 'I swear' may be assigned any chosen meaning, some commentators have raised the question of what that meaning is if it is not religious: 'the so-called 'secular oath formula' had either a religious meaning . . . or no meaning at all.'" *Id.* at 1353. The same three positions might be asserted today.

153. FED. R. EVID. 603. The representation option requires a simple reworking of the language of two sections of the Federal rules and the state adoptions of those rules. FRE 603 could be rewritten as follows:

This is, in effect, phasing out religious oaths and moving uniformly to a non-religious affirmation. The only reason the "affirmation" nomenclature is not used in this option is the existence of cases in which witnesses have successfully interposed religious objections to affirmations.[154] Hence the designation of this option as a "representation."

Under the representation option, all witnesses are qualified in a way that does not reflect their religious beliefs. This precludes credibility assessments improperly influenced by the religious beliefs of the witness disclosed through qualification—the problem illustrated by the case of Dr. Abbas Husain—so that witnesses do not need to be qualified out of the presence of the judge and jury. Under the representation option, preferences among religious groups—the problem illustrated by the case of Rawda Musaitef—are precluded. Finally, under the representation option, the disclosure of religious information that witnesses preferred to keep private—the problem illustrated by the case of Catherine Nicole

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> Before testifying, a witness must give *a representation,* oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience.

The "oath or affirmation" nomenclature would be retained to provide for the situation in which a witness makes a religious objection to the representation. The Federal Rules of Evidence and the Federal Rules of Civil Procedure would also have to be rewritten to add representations to the current language.

154. Bisby v. State, 907 S.W.2d 949, 953 (Tex. App. 1995); Gordon v. Idaho, 778 F.2d 1397, 1399–1400 (9th Cir. 1985); Oliver v. State Tax Comm'n, 37 S.W.3d 243, 245 (Mo. 2001); Scott v. State, 80 S.W.3d 184, 189 (Tex. App. 2002); Soc'y of Separationists, Inc. v. Herman, 939 F.2d 1207, 1209 (5th Cir. 1991); State v. Allen, 2009 MT 90N 101, P8 (Mont. 2009); State v. Bowlin, 850 S.W.2d 116, 117 (Mo. Ct. App. 1993); State v. Corrigan, 2012 WL 612313, at 3 (Minn. App. 2012) (refusal to allow defendant to affirm "I solemnly undertake to tell the truth"); State v. Spulak, 720 S.W.2d 396, 397 (Mo. Ct. App. 1986) (defendant could not swear because of his sincerely held religious beliefs, "he explained that affirmed is a euphemism for swear"); United States v. Looper, 419 F.2d 1405, 1406 (4th Cir. 1969); United States v. Moore, 217 F.2d 428, 430 (7th Cir. 1954), *rev'd*, 348 U.S. 966 (1955); United States v. Ward, 989 F.2d 1015, 1017 (9th Cir. 1992) (requesting alternative oath substituting "fully integrated Honesty" for "truth"); Ferguson v. Commissioner, 921 F.2d 588, 588 (5th Cir. 1991):

> Appellant is forbidden to swear as evidence by the Bible directive from her God, and since the word "oath" has become synonymous and interchangeable with the word "affirmation," and the word "swear" [has] become synonymous and interchangeable with the word "affirm," as is evidenced in 1 U.S.C. 1 and many other authorities, it is appellant's sincere belief that "affirmation" is just an "other oath" and "affirm" falls with "swear not *at all.*" Also, "affirmation" is the chosen form of those who denounce the very existence of God. Because of these things, "swear" and "affirm" are very repugnant to appellant.

See id.

Donkers—is almost completely eliminated.

While the representation option addresses the credibility problem, the preference and free exercise problem, and the privacy problem, it has some potential disadvantages. For example, it might be that there are witnesses for whom a particular form of religious oath would more strongly bind the witness' conscience to tell the truth. But as Dean Milhizer observes in the context of the use of religious artifacts in the oath process, it is not necessary that the oath and affirmation used be the strongest form as to the individual witness; it is enough if the form "raises sufficient awareness in the mind of the oath taker of his truth-telling obligations."[155] The representation proposed meets Dean Milhizer's standard.

Another potential disadvantage is that some witnesses would undoubtedly raise objections to the representation based on their religious beliefs. As with objections to the current affirmation option, if the witness made a threshold showing of sincerity, courts would be reluctant to reject such an objection. Such witnesses should be allowed to work with the court to fashion a means of qualification which constitutes an undertaking to testify truthfully in a form designed to impress that duty on the witness' conscience as required by the Federal Rules of Evidence, and is nevertheless consistent with the witness' religious beliefs.[156] It is assumed that such witnesses would be so rare as to not require that qualifications be done out of the presence of the judge and jury.

There is, of course, an additional theoretical option. We could eliminate oaths and affirmations, not put anything in their place, and rely solely on the civil and criminal perjury statutes to motivate witnesses to be truthful.[157]

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155. Milhizer, *supra* note 8, at 62:

> It is sufficient that the oath binds the conscience of the oath taker to tell the truth; it is not, however, necessary that the oath and its accompanying ceremony bind an oath taker's conscience in the strongest conceivable manner. Thus, the imperative of the court system to discover and preserve truth and administer justice is met if the form and manner of the oath or affirmation raises sufficient awareness in the mind of the oath taker of his truth-telling obligations.

156. FED. R. EVID. 603.

157. One could include a judicial declaration of the expectations for witnesses and the existence of the perjury penalty. For example: "*You are hereby put on notice that in the testimony you are about to give you are required by law to tell the truth, the whole truth, and nothing but the truth, and that your testimony will be subject to the pains and penalties of perjury.*" Lacking a witness response, such a representation would not constitute an undertaking to testify truthfully, "in a form designed to impress that duty on the witness' conscience" as required by FRE 603 and would require a revision of the rule and its progeny. FED. R. EVID. 603. The Federal Rules of Evidence and the Federal Rules of Civil Procedure and their state counterparts would also have to be rewritten to substitute a judicial declaration for the oaths and affirmations in the current

Doing away with oaths and affirmations entirely is not a new proposal. British utilitarian philosopher Jeremy Bentham called for the elimination of testimonial oaths in the mid-nineteenth century.[158] At the turn of the last century, American journalist and social commentator Ambrose Bierce correctly described the connection between oaths and perjury when he defined the testimonial oath as: "[i]n law, a solemn appeal to the Deity, made binding upon the conscience by a penalty for perjury."[159] In her remarkable 1959 work on oaths, Yale Professor Helen Silving concluded that "[i]n order to uphold both its own dignity and the dignity of its citizens, the state should not participate in oath-taking at all."[160]

Eliminating oaths and affirmations would solve the credibility problem, the preference and free exercise problem, and the privacy problem. Witnesses would not be subjected to credibility assessments improperly influenced by the religious beliefs of the witness disclosed through qualification. Preferences among religious groups would be abolished. Witnesses would not be forced to disclose information as to their religious beliefs. Why, then, not consider this option? Because the representation option brings essentially identical benefits while maintaining a ritual in which the witness is called upon to make a commitment to testify truthfully. It is impossible to prove that such a ritual has a positive influence on witnesses, but after numerous discussions with lawyers and judges whose judgment I respect, I know that they are convinced of the value of having some affirmative commitment on the part of witnesses. If they are convinced, so am I.

In which direction should the final evolution of oaths and affirmations take us? The answer, I believe, comes from who we have become as a nation, and who we should aspire to be.

Witness oaths and affirmations had their origin in a much simpler time. Before the middle of the eighteenth century, witness oaths were uncomplicated, as only Christians could be witnesses. In 1745, *Omychund v. Barker* opened the door to non-Christian witnesses, although atheists remained incompetent by virtue of their religious beliefs.[161] After *Omychund*, there developed—in theory, at least—a remarkable number of different ways in which to accommodate different religious beliefs.[162] But even with the theoretical possibility of having

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language.

158. 5 JEREMY BENTHAM, *"Swear Not At All:" Containing an Exposure of the Needlessness and Mischievousness, as Well as Anti-Christianity of the Ceremony of an Oath*, *in* THE WORKS OF JEREMY BENTHAM, 187 (1843).

159. AMBROSE BIERCE, THE DEVIL'S DICTIONARY (1911).

160. Helen Silving, *The Oath: II*, 68 YALE L.J. 1527, 1576 (1959).

161. Omychund v. Barker, (1744) 26 Eng. Rep. 15 (K.B.).

162. Vestal, *supra* note 1, at 73. These included Jews ("on the Pentateuch with covered heads"), "Mahometans" (upon the Koran), "Gentoos" ("touching the foot of a Brahmin (or priest"), Chinese ("by the ceremony of killing a cock, or breaking a saucer, the witness declaring

non-Christian witnesses in American courtrooms, drafting statutory provisions on oaths and affirmations must have seemed relatively simple two centuries ago. There were, after all, in mid-nineteenth century America, a vanishingly small number of people who publicly acknowledged non-Abrahamic religious beliefs.

No longer; religious diversity has long ceased to be merely a theoretical possibility in this nation. We have become a strikingly diverse society on matters of religious belief. Today, only a minority of adult Americans identify as Protestant Christians.[163] Some 56.1 million of us are "unaffiliated:" atheists, agnostics, and those who identify as "nothing in particular."[164] The unaffiliated outnumber both Catholics and mainline Protestants.[165] Some 14.5 million adult Americans identify with non-Christian faiths: 2.2 million Muslims, 4.7 million Jews, 1.7 million Hindus, and 1.7 million Buddhists.[166] The research suggests that our religious diversity is going to increase. Between 2007 and 2014, Protestant Christians went from majority to minority status.[167] During the same period, the percentages for Christians,—Protestants, Catholics, Evangelicals, mainline Protestants, historically black Christian groups, Orthodox Christians, and Mormons—all declined; and the percentages for Jews, Muslims, Hindus, atheists, agnostics, and those responding

that, if he speaks falsely, his soul will be similarly dealt with"), "a Scotch covenanter and a member of the Scottish Kirk" ("by holding up the hand, without kissing the book"), and a "Hindoo" ("by the uplifting of the hand"). JAMES M. HENDERSON, COMMENTARIES ON THE LAW OF EVIDENCE (San Francisco, 1926), at 3914–15, 3914 n.19 (as to "Hindoo"). "Quakers and others, who profess to entertain conscientious scruples against taking an oath in the usual form, are allowed an affirmation, i.e., a solemn religious asservation that their testimony shall be true." *Id.* at 3915.

163. *America's Changing Religious Landscape: Christians Decline Sharply as Share of Population; Unaffiliated and Other Faiths Continue to Grow*, PEW RESEARCH CENTER (May 12, 2015), http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/ [hereinafter 2015 PEW RESEARCH SURVEY] (reporting 46.5% of adults identifying as Christian protestants). The study uses nearly 245 million for the number of adult Americans.

164. *Id.* The study reports 2014 allocations of 3.1% (atheists), 4.0% (agnostics), and 15.8% (nothing in particular), for an aggregate unaffiliated score of 22.9%. Using the 245 million figure for American adults, these translate into 7.6 million atheists, 9.8 million agnostics, and 38.7 identified as "nothing in particular."

165. *Id.* (reporting 20.8% of adults identifying as Catholics; 14.7% as mainline Protestants; and 3.1% as atheists, 4.0% as agnostics, and 15.8% as "nothing in particular," for an unaffiliated total of 22.8%).

166. *Id.* The study uses an overall adult population of nearly 245 million, with 2014 allocations of 0.9% (Muslim), 0.7% (Buddhist), and 0.7% (Hindu). Some 4,655,000 people, 1.9% of the total, are identified as Jewish.

167. *Id.* (demonstrating Protestant Christians went from 51.3% in 2007 to 46.5% in 2014, a 9.4% decline.

"nothing in particular" all increased.[168] Looking at age cohorts[169] and marriage patterns[170] suggests that our diversity on matters of religion will only increase.

Given our religious diversity, adopting the reform option would create a complex and unwieldy oath and affirmation system. It would be challenging to adopt oaths and affirmations to meet the religious requirements of witnesses who are adherents of the many variations of Christianity, and the challenge would be compounded by witnesses who are adherents of non-Christian faith traditions, including agnosticism, atheism, Baha'ism, Buddhism, Confucianism, Druidism, Hinduism, Islam, Jainism, Judaism, Satanism, Scientology, Shinto, Sikhism, Taoism, Wicca, and Zoroastrianism. Additionally, the system would have to accommodate witnesses whose individual religious beliefs require custom oaths and affirmations. We could create and maintain such a system. The question is, would it be worth the effort?

Beyond the logistical challenges of the reform option lies a question of mutual respect. Respect for citizens of different religious beliefs is more than mere toleration. At the close of the eighteenth century, Baptist minister John Leland captured the idea: "the very idea of toleration is despicable; it supposes that some have a pre-eminence above the rest, to grant indulgence; whereas all should be equally free, Jews, Turks, Pagans and Christians."[171] Nineteenth century lawyer Andrew Dunlap, who defended Abner Kneeland—the last man imprisoned in the United States for blasphemy—appropriately identified the tension between toleration

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168. *Id.* (demonstrating that within the Christian grouping, only the Jehovah's Witness and "other Christian" categories increased in percentage terms; from 0.7% to 0.8%, and 0.3% to 0.4%, respectively. Within the non-Christian grouping Jewish respondents increased from 1.7% to 1.9% (which the study notes is not statistically significant), Muslims from 0.4% to 0.9%, and Hindus from 0.4% to 0.7%. Atheists increased from 1.6% to 3.1%, agnostics from 2.4% to 4%, and nothing in particular from 12.1% to 15.8%).

169. *Id.*

> One of the most important factors in the declining share of Christians and the growth of the 'nones' is generational replacement. As the Millennial generation enters adulthood, its members display much lower levels of religious affiliation, including less connection with Christian churches, than older generations. Fully 36% of young Millennials (those between the ages of 18 and 24) are religiously unaffiliated, as are 34% of older Millennials (ages 25-33). And fewer than six-in-ten Millennials identify with any branch of Christianity, compared with seven-in-ten or more among older generations . . .

Id.

170. *Id.* (reporting that 39% of those married since 2010 are in religiously mixed marriages, compared to only 19% in 1960, and that nearly 20% of marriages since 2010 include one religiously unaffiliated partners, compared to only 5% in 1960).

171. DICKSON D. BRUCE, JR., EARNESTLY CONTENDING: RELIGIOUS FREEDOM AND PLURALISM IN ANTEBELLUM AMERICA 124 (2013).

and rights: "This is the boasted land of toleration. . . . No, gentlemen, that is not the proper word, for who shall presume to tolerate another, when the latter has an undeniable right to enjoy and maintain his own opinion?"[172]

Respect for citizens of different religious beliefs, upon which the reform option depends, requires a commitment to equality. We need to sincerely be willing to accord equal respect to the Muslim witness and the Presbyterian, the Catholic and the Wiccan, the atheist and the Episcopalian, the Southern Baptist and the Hindu. As a nation, we fall short of that standard. At a time when a majority of Americans believe that the United States is a "Christian nation" the reform option should not be implemented.[173]

The final challenge to the reform option is the question of what type of nation we should strive to be. We live in a time of great turmoil based on religion. Too many Americans are suspicious of and hostile toward one another based on religion. In such an environment, we are given the choice between continuing oaths and affirmations that divide us based on religious belief and having a witness representation, which does not discriminate among witnesses based on their religious beliefs. There is something to be said for a choice that unites Americans rather than divides us based on religion.

There is also something to be said for getting beyond our history in this matter. Witness oaths and affirmations are the product of our prejudiced and exclusionary past. Given where we have come in terms of religious diversity, the number of Americans who represent those discriminated against by these policies is substantial. In excess of 70,000,000 of us—more than 1 in 4 adult Americans—would have been

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172. *Id.* at 124–25.

173. *See* Daniel Cox & Robert P. Jones, *Most Americans Believe Protests Make the Country Better; Support Decreases Dramatically Among Whites if Protesters are Identified As Black*, PUBLIC RELIGION RESEARCH INSTITUTE (June 23, 2015), http://publicreligion.org/research/2015/06/survey-americans-believe-protests-make-country-better-support-decreases-dramatically-protesters-identified-black/#.VpVJ9JMrJ27 (demonstrating in a 2015 survey, only 35% of adult Americans believed "the U.S. was a Christian nation in the past and is still a Christian nation today," down from 42% only five years previous. Some 45% said "the U.S. was once a Christian nation but no longer remains so today." Only 14% said "the U.S. has never been a Christian nation." And among the 45% who thought America had ceased to be a Christian nation, 61% "say this is a bad thing." There are some indications of generational progress. While 66% of those aged 65 and above "say that being a Christian is an important part of being American," only 35% of those 18 to 29 agreed. But Americans still see religious faith as central to the American identity. Overall, 81% of Republicans and 63% of Democrats though that "believing in God is an important part of being American," although that God being a Christian God was important to only 69% of Republicans and 46% of Democrats). Kevin M. Kruse, *A Christian Nation? Since When?*, N.Y. TIMES (Mar. 14, 2015), http://www.nytimes.com/2015/03/15/opinion/sunday/a-christian-nation-since-when.html?_r=0 (demonstrating the story of how the identity of America as a Christian nation came to be is interesting).

deemed untrustworthy and incompetent to testify under the original rules on oaths.[174] Over 55,000,000 of us—more than 1 in 5—would have been excluded under the "liberal" rule of *Omychund*.[175]

We should complete the evolution of witness oaths and affirmations by eliminating them in favor of a uniform non-religious witness representation. Doing so would resolve the credibility problem, the preference and free exercise problem, and the privacy problem. Because the method of qualification would not provide any information as to the witness' religious beliefs, witnesses could be qualified in the presence of the judge and jury, and they would not be subjected to credibility assessments improperly influenced by their religious beliefs as disclosed through qualification. Because no religious references or artifacts would intrude into the qualification process, preferences among religious groups would be abolished. Because qualification would be the same regardless of religious belief, witnesses would not be forced to disclose information as to their religious beliefs.

Adoption of the representation option would sever the oath and affirmation link with our prejudiced and exclusionary past. It would be a final signal that the religious beliefs of a witness are not an indicator of credibility. And it would signal that equality based on religious belief, not mere toleration of diverse religious beliefs, is what we seek as a nation.

CONCLUSION

The framers of the Rhode Island constitution eloquently asserted the connection between religious liberty and a flourishing society when remembering that:

> [A] principal object of our venerable ancestors, in their migration to this country and their settlement of this state, was, as they expressed it, to hold forth a lively experiment that a flourishing civil state may stand and be best maintained with full liberty in religious concernments.[176]

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174. 2015 PEW RESEARCH SURVEY, *supra* note 163 (using a 2014 U.S. adult population of 245 million, of which Christians accounted for 70.6% (172,970,000) those of non-Christian faiths were 5.9% (14,455,000), and those who were "unaffiliated" (atheist, agnostic, and "nothing in particular") were 22.8% (55,860,000). Those of non-Christian faiths and the unaffiliated aggregate to 28.7%, or 70,315,000).

175. *See id.* (demonstrating even post *Omychund* at least almost 56 million American adults would have been deemed incompetent, using the 22.8% Pew figure for the unaffiliated. This understates the actual number, by excluding those of non-Christian faiths who would have failed the *Omychund* test).

176. R.I. CONST. art. I, § 3.

They committed to religious liberty, to the proposition that the civil capacity of a person should not be diminished on account of that person's religious beliefs:

> [W]e, therefore, declare that no person shall . . . suffer on account of such person's religious belief; and that every person shall be free to worship God according to the dictates of such person's conscience, and to profess and by argument maintain such person's opinion in matters of religion; and that the same shall in no wise diminish, enlarge, or affect the civil capacity of any person.[177]

The founders observed what results from attempts to impinge on religious liberty: "Whereas Almighty God hath created the mind free; and all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend to beget habits of hypocrisy and meanness. . . ."[178]

Hypocrisy and meanness. How better to describe a system of witness oaths and affirmations that, in its earlier incarnation, declared that all non-Christians were unworthy of belief and incompetent to testify in court? The system that, in its modern incarnation, put Dr. Abbas Husain in a position where a juror's religious bigotry over how he swore his oath could have influenced the assessment of his credibility? The system that refused to let Rawda Musaitef swear on a Quran rather than the Bible? The system that, in response to Catherine Nicole Donkers' attempt to explain her religious objection to being forced to raise her right hand and be sworn saw the trial judge respond "you're talking to the wind here"?[179]

We have prohibited the use of religious belief in witness competency and credibility determinations. But when some witnesses are treated differently because of their religious beliefs, we run the risk that judges and jurors will allow religious prejudice to color their credibility determinations.

We have attempted to accommodate some diversity of religious belief by providing an affirmation alternative. But when we allow some witnesses to swear a religious oath compatible with their particular religious beliefs, but deny other witnesses the same right, we are implicating the free exercise rights of some of our fellow citizens and violating the guarantees against religious preferences in most of our state constitutions.

We have a government that essentially never requires citizens to disclose their religious beliefs. But when we retain oath and affirmation practices that require some witnesses to either disclose or violate their

177. *Id.*

178. *Id.*

179. Donkers v. Kovach, 745 N.W.2d 154, 156 (Mich. Ct. App., 2007).

religious beliefs, we are unnecessarily impinging on their privacy on a matter of great consequence.

To what end do we treat some of our citizens in these ways? The present system of oaths and affirmations is not required to impose civil and criminal penalties upon those who fail to tell the truth in judicial proceedings. The use of witness oaths and affirmations is a vestige of our prejudiced and exclusionary past, a lingering and unnecessary entanglement of the justice system and religion.

We should complete our evolution on this issue and eliminate witness oaths and affirmations in favor of a uniform, non-religious witness representation. It is time to bid a final farewell to the rewarder of truth and avenger of falsehood. It is time for our hypocrisy and meanness, on this small point at least, to end.

Appendix A – Constitutional Witness Oath Provisions.

1. **Arizona.** ARIZ. CON. (1912), Art. II., § 7 ("The mode of administering an oath, or affirmation, shall be such as shall be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.").
2. **Indiana.** IND. CON. (1851), Art. I., § 8 ("The mode of administering an oath or affirmation, shall be such as may be most consistent with, and binding upon, the conscience of the person, to whom such an oath or affirmation may be administered.").
3. **Kentucky.** KY. CON. (1891), § 232 ("The manner of administering an oath or affirmation shall be such as is most consistent with the conscience of the deponent, and shall be esteemed by the General Assembly the most solemn appeal to God.").
4. **Maryland.** MD. CON. (1867), Declaration of Rights, Art. 39 ("That the manner of administering an oath or affirmation to any person, ought to be such as those of the religious persuasion, profession or denomination, of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being.").
5. **Oregon.** ORE. CON. (1859), Art. I., § 7 ("The mode of administering an oath, or affirmation shall be such as may be most consistent with, and binding upon the conscience of the person to whom such oath or affirmation may be administered.").
6. **Texas.** TEX. CON. (1876), Art. I., § 5 (". . . 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.").
7. **Washington.** WASH. CON. (1889) Art. I., § 6. ("The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.").

Appendix B – Statutory and Rule Witness Oath Provisions.

1. **Federal.**
   a. F.R.C.P., Rule 43(b) ("Affirmation Instead of an Oath. When these rules require an oath, a solemn affirmation suffices.").

b. F.R.E., Rule 603 ("Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience.").

2. **Alabama.**
   a. ALA.R.C.P., Rule 43(d) ("Affirmation in lieu of oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof. The court may, but shall not be required to, frame such affirmation according to the religious faith of the witness.").
   b. ALA.R.E., Rule 603 ("Oath or affirmation. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").
3. **Alaska.**
   a. AK.R.C.P., Rule 43(d) ("Affirmation in lieu of oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.").
   b. AK.R.E., Rule 603 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").
4. **Arizona.**
   a. ARIZ. REV. STAT. § 12-2221.A. ("Manner of administering oath or affirmation . . . An oath or affirmation shall be administered in a manner which will best awaken the conscience and impress the mind of the person taking the oath or affirmation, and it shall be taken upon the penalty of perjury."); and, ARIZ.R.C.P.SUP.CT., Rule 43(b) ("Affirmation in Lieu of Oath. Whenever under these Rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.").
   b. ARIZ.R.E., Rule 603 ("Oath or Affirmation to Testify Truthfully. Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience.").
5. **Arkansas.**
   a. ARK. CODE § 16-2-101(a) ("The usual mode of administering oaths practiced by the person who swears, laying his or her hand on and kissing the Gospels, shall be observed in all cases in which an oath is or may be required by law to be administered, except as otherwise provided in this chapter."), (b) ("Every person who shall desire it shall be permitted to

swear with an uplifted hand in the following form: 'You do solemnly swear, etc.'"), (c) ("Every person who shall declare that he or she has conscientious scruples against taking an oath or swearing in any form shall be permitted to make his or her solemn declaration or affirmation in the following form: 'You do solemnly and truly declare and affirm'."), (d) ("Whenever the court or magistrate by whom any person is about to be sworn, shall be satisfied that the person has any peculiar mode of swearing connected with or in addition to any of the forms mentioned in this section, which mode is more solemn and obligatory in the opinion of the person, the court or magistrate may adopt that mode of swearing."), (e) Every person believing in any religion other than the Christian religion shall be sworn according to the peculiar ceremonies of his or her religion, if there are any such ceremonies, instead of any of the other modes prescribed in this section.").

b. ARK.R.C.P., Rule 43(b) ("Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.").

c. ARK.R.E., Rule 603 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.").

6. California.

a. CAL. CODE CIV. PRO. § 2094 ("(a) An oath, affirmation, or declaration in an action or a proceeding, may be administered by obtaining an affirmative response to one of the following questions: (1) 'Do you solemnly state that the evidence you shall give in this issue (or matter) shall be the truth, the whole truth, and nothing but the truth, so help you God?' (2) 'Do you solemnly state, under penalty of perjury, that the evidence that you shall give in this issue (or matter) shall be the truth, the whole truth, and nothing but the truth?' (b) In the alternative to the forms prescribed in subdivision (a), the court may administer an oath, affirmation, or declaration in an action or a proceeding in a manner that is calculated to awaken the person's conscience and impress the person's mind with the duty to tell the truth. The court shall satisfy itself that the person testifying understands that his or her testimony is being given under penalty of perjury.").

b. CAL.E.C. § 710 ("Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by law . . .").

7. **Colorado.**
   a. COL.R.S. § 13-90-117. ("Affirmation - form – perjury. (1) A witness who desires it, at his option, instead of taking an oath may make his solemn affirmation or declaration by assenting when addressed in the following form: 'You do solemnly affirm that the evidence you shall give in this issue (or matter), pending between .... and .... shall be the truth, the whole truth, and nothing but the truth.' (2) Assent to this affirmation shall be made by answer: 'I do.' (3) A false affirmation or declaration is perjury in the first degree.").
   b. COL.R.E., Rule 603 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.").
8. **Connecticut.**
   a. 43 CONN. GEN. STAT. Tit. 1, § 1-22 ("Ceremony. The ceremony to be used, by persons to whom an oath is administered, shall be the holding up of the right hand; but when any person, by reason of scruples of conscience, objects to such ceremony or when the court or authority by whom the oath is to be administered has reason to believe that any other ceremony will be more binding upon the conscience of the witness, such court or authority may permit or require any other ceremony to be used."), §1-23 ("When affirmation may be used. When any person, required to take an oath, from scruples of conscience declines to take it in the usual form or when the court is satisfied that any person called as a witness does not believe in the existence of a Supreme Being, a solemn affirmation may be administered to him in the form of the oath prescribed, except that instead of the word "swear" the words "solemnly and sincerely affirm and declare" shall be used and instead of the words "so help you God" the words "upon the pains and penalties of perjury or false statement" shall be used."), § 1-25 ("Forms of oath. The forms of oaths shall be as follows, to wit: . . . For witnesses. You solemnly swear or solemnly and sincerely affirm, as the case may be, that the evidence you shall give concerning this case shall be the truth, the whole truth and nothing but the truth; so help you God or upon penalty of perjury.").
   b. CT.C.E. § 6-2 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form

calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").

9. **Delaware.**
    a. DEL. CODE Tit. 10, § 5321 ("Method of administering. The usual oath in this State shall be by swearing upon the Holy Evangels of Almighty God. The person to whom an oath is administered shall lay his or her right hand upon the book."), § 5322 ("Uplifted hand. A person may be permitted to swear with the uplifted hand; that is to say, a person shall lift up his or her right hand and swear by the ever living God, the searcher of all hearts, that etc., and at the end of the oath shall say, 'as I shall answer to God at the Great Day.'"), § 5323 ("Affirmation. A person conscientiously scrupulous of taking an oath may be permitted, instead of swearing, solemnly, sincerely and truly to declare and affirm to the truth of the matters to be testified."), § 5324 ("Non-Christians. A person believing in any other than the Christian religion, may be sworn according to the peculiar ceremonies of such person's religion, if there be any such.").
    b. DEL.R.C.P.SUP.CT. Rule 43(c) ("Affirmation in lieu of oath. -- Whenever under these Rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.").
    c. DEL.R.E., Rule 603 ("Oath or affirmation. Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.").
10. **Florida.**
    a. FLA. STAT. § 90.605(1) ("Oath or affirmation of witness.—(1) Before testifying, each witness shall declare that he or she will testify truthfully, by taking an oath or affirmation in substantially the following form: 'Do you swear or affirm that the evidence you are about to give will be the truth, the whole truth, and nothing but the truth?' The witness' answer shall be noted in the record.").
    b. FLA. STAT. § 92.52 ("Affirmation equivalent to oath.—Whenever an oath shall be required by any law of this state in any proceeding, an affirmation may be substituted therefor.").
11. **Georgia.**
    a. Ga. Code § 24-6-603 ("Oath or affirmation. (a) Before testifying, every witness shall be required to declare that he or she will testify truthfully by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").

b. O.C.G.A. § 24-9-60 ("Oath or affirmation required. The sanction of an oath or affirmation equivalent thereto shall be necessary to the reception of any oral evidence. The court may frame such affirmation according to the religious faith of the witness.").

12. Hawaii.

a. HA.R.C.P., Rule 43(d) ("Affirmation in lieu of oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.").

b. HA.C. § 33.626, Rule 603 ("Oath or affirmation. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the witness' duty to do so.").

13. Idaho.

a. ID.R.C.P., Rule 43(d) ("Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.").

b. ID.R.E., Rule 603 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience of the witness and impress upon the mind of the witness of the duty to do so.").

14. Illinois.

a. 5 ILCS 255/0.01 ("Sec. 3. Whenever any person shall be required to take an oath before he enters upon the discharge of any office, place or business, or on any other lawful occasion, it shall be lawful for any person empowered to administer the oath to administer it in the following form, to-wit: The person swearing shall, with his hand uplifted, swear by the ever-living God, and shall not be compelled to lay the hand on or kiss the gospels. Sec. 4. Whenever any person required to take or subscribe an oath, as aforesaid, and in all cases where an oath is upon any lawful occasion to be administered, and such person shall have conscientious scruples against taking an oath, he shall be admitted, instead of taking an oath, to make his solemn affirmation or declaration in the following form to-wit: You do solemnly, sincerely and truly declare and affirm. Which solemn affirmation or declaration shall be equally valid as if such person had taken an oath in the usual form; and every person guilty of falsely and corruptly declaring, as aforesaid, shall incur and suffer the like pains and penalties as are or shall be

inflicted on persons convicted of willful and corrupt perjury.").

b. ILL.R.E., Rule 603 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation, administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").

15. Indiana.

a. IND. CODE § 34-45-1-2 ("Before testifying, every witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath must be the most consistent with and binding upon the conscience of the person to whom the oath may be administered.").

b. IND.R.E., Rule 603 ("Oath or Affirmation to Testify Truthfully. Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience.").

16. Iowa.

a. IA. R. EVIDENCE Rule 5.603 ("Oath or affirmation. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the witness' duty to do so.").

17. Kansas.

a. KAN. STAT. § 54-102 ("How administered. All oaths shall be administered by laying the right hand upon the Holy Bible, or by the uplifted right hand."), § 54-103 ("Persons having conscientious scruples may affirm. Any person having conscientious scruples against taking an oath, may affirm with like effect."), § 54-104 ("Form of commencement and conclusion of oaths. All oaths shall commence and conclude as follows: 'You do solemnly swear,' etc.; 'So help you God.' Affirmation shall commence and conclude as follows: 'You do solemnly, sincerely and truly declare and affirm,' etc.; 'And this you do under the pains and penalties of perjury.'").

b. KAN.C. § 60-418 ("Oath. Every witness before testifying shall be required to express his or her purpose to testify by the oath or affirmation required by law.").

18. Kentucky.

a. KY. REV. STAT. § 454.170 ("Substitution of affirmation for oath. An oath required by any statute derived from the former Civil Code, or by the Rules of Civil Procedure may be substituted by the affirmation of a person who is conscientiously opposed to taking an oath.").

b. KY. R. EVID. Rule 603 ("Oath or affirmation. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").

19. Louisiana.

a. LA.C.C.P. Art. 1633 ("Oath or affirmation of witnesses; refusal to testify. A. Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so. B. A witness who appears but refuses to testify without proper cause shall be considered in contempt of court.").

b. LA. C.CR.P. Art. 14 ("Oath or affirmation in criminal proceedings; witness. A. If a person refuses to take an oath or to make a sworn statement or affidavit required in connection with any criminal proceedings, he may affirm in lieu of swearing, and his affirmation shall fulfill the requirement and shall have the same legal effect as an oath, sworn statement, or affidavit. B. Before testifying every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.").

c. LA. R. E. Art. 603. ("Oath or affirmation. Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.").

20. Maine.

a. ME. REV. STATE., Tit. 17., Ch. 1., § 151 ("Oaths. A person to whom an oath is administered shall hold up his hand unless he believes that an oath administered in that form is not binding, and then it may be administered in a form believed by him to be binding. One believing any other than the Christian religion may be sworn according to the ceremonies of his religion."), and § 152 ("Affirmation. Persons conscientiously scrupulous of taking an oath may affirm as follows: 'I affirm under the pains and penalties of perjury,' which affirmation is of the same force and effect as an oath.").

b. ME.R.C.P., Rule 43(d) ("Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.").

c. ME.R.E., Rule 603 ("Oath or Affirmation to Testify

Truthfully. Before testifying, a witness must give an oath or affirmation to testify truthfully. The oath or affirmation must be in a form designed to impress that duty on the witness' conscience.").

21. Maryland.

a. Md. Rules, Tit. 1, § 303 ("Form of oath. Except as provided in Rule 1-333 (c)(3), whenever an oral oath is required by rule or law, the person making oath shall solemnly swear or affirm under the penalties of perjury that the responses given and statements made will be the whole truth and nothing but the truth. A written oath shall be in a form provided in Rule 1-304.").

b. MD.R., Rule 5-603 ("Oath or Affirmation. Before testifying, a witness shall be required to declare that the witness will testify truthfully. The declaration shall be by oath or affirmation administered either in the form specified by Rule 1-303 or, in special circumstances, in some other form of oath or affirmation calculated to impress upon the witness the duty to tell the truth.").

22. Massachusetts.

a. MASS. GEN. L. PT. III., Tit. II, Ch. 233., § 15 ("The usual mode of administering oaths now practiced in the commonwealth, with the ceremony of holding up the hand, shall be observed in all cases in which an oath may be administered by law, except as provided in sections sixteen to nineteen, inclusive."), § 16 ("If a person to be sworn declares that a different mode of taking the oath is in his opinion more solemn and obligatory than the upholding of the hand, the oath may be administered in such mode."), § 17 ("A Friend or Quaker when called on to take an oath may solemnly and sincerely affirm under the penalties of perjury."), § 18 ("A person who declares that he has conscientious scruples against taking an oath shall, when called upon for that purpose, be permitted to affirm in the manner prescribed for Quakers, if the court or magistrate on inquiry is satisfied of the truth of such declaration."), and § 19 ("A person believing in any other than the Christian religion may be sworn according to the appropriate ceremonies of his religion. A person not a believer in any religion shall be required to testify truly under the penalties of perjury, and evidence of his disbelief in the existence of God may not be received to affect his credibility as a witness.").

b. MASS.CIV.P.R., Rule(d) ("Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a

solemn affirmation under the penalties of perjury may be accepted in lieu thereof.").

c. MASS.R.E., § 603 ("Oath or Affirmation to Testify Truthfully. Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience.").

23. Michigan.

a. MICH. C. L. § 600.1432(1) ("The usual mode of administering oaths now practiced in this state, by the person who swears holding up the right hand, shall be observed in all cases in which an oath may be administered by law except as otherwise provided by law. The oath shall commence, 'You do solemnly swear or affirm.'"), and, § 600.1434 ("Every person conscientiously opposed to taking an oath may, instead of swearing, solemnly and sincerely affirm, under the pains and penalties of perjury.").

b. MICH.R.E., Rule 603 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").

24. Minnesota.

a. MN. STAT. § 358.07 ("An oath substantially in the following forms shall be administered to the respective officers and persons hereinafter named: . . . (7) To witnesses: 'You do swear that the evidence you shall give relative to the cause now under consideration shall be the whole truth, and nothing but the truth. So help you God.'"); § 358.08 ("If any person of whom an oath is required shall claim religious scruples against taking the same, the word 'swear' and the words 'so help you God' may be omitted from the foregoing forms, and the word 'affirm' and the words 'and this you do under the penalties of perjury' shall be substituted therefor, respectively, and such person shall be considered, for all purposes, as having been duly sworn.").

b. MINN.R.C.P., Rule 43.04 ("Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.").

c. MINN.R.E., Rule 603 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do

so.").

25. Mississippi.

a. MISS. R. CIV. PRO. § 43(d) ("Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.").

b. MISS.R.E., Rule 603 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.").

26. Missouri.

a. MO. REV. STAT. § 491.380.1 ("Every person offered as a witness, before any testimony shall be given by him, shall be duly sworn, or affirmed, that the evidence he shall give relating to the matter in issue between , plaintiff, and , defendant, shall be the truth, the whole truth, and nothing but the truth.").

27. Montana.

a. MONT. CODE ANN. § 1-6-102 ("Form of ordinary oath. An oath or affirmation in an action or proceeding may be administered by the person who swears or affirms expressing that person's assent when addressed with 'You do solemnly swear (or affirm, as the case may be) that the evidence you will give in this issue (or matter), pending between . . . . and . . . ., is the truth, the whole truth, and nothing but the truth, so help you God.'"), § 1-6-103. Variation of oath to suit witness' belief ("The court shall vary the mode of swearing or affirming to accord with the witness' beliefs whenever it is satisfied that the witness has a distinct mode of swearing or affirming."), and 1-6-104 ("Affirmation or declaration in lieu of oath. Any person who desires it may instead of taking an oath make a solemn affirmation or declaration by assenting when addressed with 'You do solemnly affirm (or declare), etc.,' as provided in 1-6-102.").

b. MONT.R.C.P., Rule 43(b) ("Affirmation Instead of an Oath. When these rules require an oath, a solemn affirmation suffices.").

c. MONT.CODE Tit. 26, Rule 603 ("Oath or affirmation. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").

28. Nebraska.

a. NEB. REV. STAT. § 25-2220 ("Oaths and affirmations. Whenever an oath is required by this code, the affirmation of a person conscientiously scrupulous of taking an oath, shall have the same effect.").
b. NEB. REV. STAT. § 27-603 ("Oath or affirmation. Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.").

29. Nevada.

a. NRS § 50.035 ("Oath or affirmation. 1. Before testifying, every witness shall be required to declare that he or she will testify truthfully, by oath or affirmation administered in a form calculated to awaken his or her conscience and impress his or her mind with the duty to do so. 2. An affirmation is sufficient if the witness is addressed in the following terms: 'You do solemnly affirm that the evidence you shall give in this issue (or matter), pending between .... and ...., shall be the truth, the whole truth, and nothing but the truth.' Assent to this affirmation shall be made by the answer, 'I do.'").
b. NEV.R.C.P., Rule 43(b) ("Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.").
c. NEV.R.STAT. § 50.035 ("Oath or affirmation. 1. Before testifying, every witness shall be required to declare that he or she will testify truthfully, by oath or affirmation administered in a form calculated to awaken his or her conscience and impress his or her mind with the duty to do so. 2. An affirmation is sufficient if the witness is addressed in the following terms: 'You do solemnly affirm that the evidence you shall give in this issue (or matter), pending between .... and ...., shall be the truth, the whole truth, and nothing but the truth.' Assent to this affirmation shall be made by the answer, 'I do.'").

30. New Hampshire.

a. N.H. STAT. § 516:19 ("Swearing. – No other ceremony shall be necessary in swearing than holding up the right hand, but any other form or ceremony may be used which the person to whom the oath is administered professes to believe more binding upon the conscience."), and §516:20 ("Affirmation. – Persons scrupulous of swearing may affirm; the word 'affirm' being used in administering the oath, instead of the word 'swear,' and the words '*this you do under the pains and*

penalties of perjury,' instead of the words '*So help you God.*'").

b. N.H.R.E., Rule 603 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that he or she will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience and impress his or her mind with the duty to do so.").

31. New Jersey.

a. N.J.R.E., Rule 603 ("Oath or Affirmation. Before testifying a witness shall be required to take an oath or make an affirmation or declaration to tell the truth under the penalty provided by law. No witness may be barred from testifying because of religious belief or lack of such belief.").

32. New Mexico.

a. N.M. STAT. § 31-6-6 ("Oaths . . . A. The following oaths shall be administered . . . by the foreman to witnesses: . . . (3) FOR WITNESS: 'You do swear (or affirm) that the testimony which you are about to give will be the truth, so help you God.'").

b. N.M.R.C.P., Rule 2.601.C. ("Oath of witnesses. The magistrate shall administer the following oath to each witness: 'You do solemnly swear (or affirm) that the testimony you give is the truth, the whole truth and nothing but the truth under penalty of perjury?'").

c. N.MEX.R.E., Rule 11-603 ("Oath or Affirmation to Testify Truthfully. Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience.").

33. New York.

a. N.Y.C.P.L.R. § 2309(b) (McKinney 2015) ("Form. An oath or affirmation shall be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs.").

34. North Carolina.

a. N.C. GEN. STAT. § 11-1 ("Oaths and affirmations to be administered with solemnity. Whereas, lawful oaths for discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, and whereas, lawful affirmations for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government, therefore, such oaths and affirmations ought to be taken and

administered with the utmost solemnity."), § 11-2 ("Administration of oaths. Judges and other persons who may be empowered to administer oaths, shall (except in the cases in this Chapter excepted) require the party to be sworn to lay his hand upon the Holy Scriptures, in token of his engagement to speak the truth and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of that holy book and made liable to that vengeance which he has imprecated on his own head."), § 11-3 ("Administration of oath with uplifted hand. When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the Holy Gospel; and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth he would draw down the vengeance of heaven upon his head, and shall introduce the intended oath with these words, namely: I, A.B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known (etc., as the words of the oath may be."), and § 11-4 ("Affirmation in lieu of oath. When a person to be sworn shall have conscientious scruples against taking an oath in the manner prescribed by G.S. 11-2, 11-3, or 11-7, he shall be permitted to be affirmed. In all cases the words of the affirmation shall be the same as the words of the prescribed oath, except that the word 'affirm' shall be substituted for the word 'swear' and the words 'so help me God' shall be deleted.").

b. N.C.STAT. § 8C-1, Rule 603 ("Oath or affirmation. Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.").

35. North Dakota.

a. N.D. CENT. C. § 1-01-49.4. ("'Oath' includes 'affirmation.'").

b. N.D. CENT. CODE, N.D. R.E., Rule 603 ("Oath or Affirmation. Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience.").

36. Ohio.

a. OHIO R.E., Rule 603 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that the witness will

testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").

37. Oklahoma.

a. OK. STAT. § 12-72 ("Affirmation. Whenever an oath is required by this Code, the affirmation of a person, conscientiously scrupulous of taking an oath shall have the same effect.").

b. OK. STAT. § 12-849 (Examination under oath – answer by corporation. The party or witness may be required to attend before the judge, or before a referee appointed by the judge. . . All examinations and answers before a judge or a referee must be on oath.").

c. OK.R.C.P. § 12-2603 ("Oath or affirmation. Every witness shall be required to declare before testifying that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").

38. Oregon.

a. OR. REV. STAT. § 40.320 ("(1) Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience of the witness and impress the mind of the witness with the duty to do so. (2) An oath may be administered as follows: The person who swears holds up one hand while the person administering the oath asks: Under penalty of perjury, do you solemnly swear that the evidence you shall give in the issue (or matter) now pending between _____ and _____ shall be the truth, the whole truth and nothing but the truth, so help you God? If the oath is administered to any other than a witness, the same form and manner may be used. The person swearing must answer in an affirmative manner. (3) An affirmation may be administered as follows: The person who affirms holds up one hand while the person administering the affirmation asks: Under penalty of perjury, do you promise that the evidence you shall give in the issue (or matter) now pending between _____ and _____ shall be the truth, the whole truth and nothing but the truth? If the affirmation is administered to any other than a witness, the same form and manner may be used. The person affirming must answer in an affirmative manner.").

39. Pennsylvania.

a. PA. STAT. § 5901 ("Judicial oath (a) General rule.--Every

witness, before giving any testimony shall take an oath in the usual or common form, by laying the hand upon an open copy of the Holy Bible, or by lifting up the right hand and pronouncing or assenting to the following words: 'I, A. B., do swear by Almighty God, the searcher of all hearts, that I will, and that as I shall answer to God at the last great day.' Which oath so taken by persons who conscientiously refuse to take an oath in the common form shall be deemed and taken in law to have the same effect as an oath taken in common form. (b) Right to affirm.--The affirmation may be administered in any judicial proceeding instead of the oath, and shall have the same effect and consequences, and any witness who desires to affirm shall be permitted to do so.").

b. PA.R.C.P., Rule 76. ("Definitions . . . *Oath*—Includes affirmation.").

c. PA.CODE Tit. 225, Rule 603 ("Oath or Affirmation to Testify Truthfully. Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience.").

40. Rhode Island.

a. R.I. SUP.CT. R.C.P. Rule 43(b) ("Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.").

b. R.I. DIST.CT. R.C.P. Rule 43(d) ("Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.").

41. South Carolina.

a. S.C.R.C.P., Rule 43(d) ("Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.").

b. S.C.R.E., Rule 603 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").

42. South Dakota.

a. S.D.C.L. § 18-3-5 ("Affirmation in lieu of oath. Persons conscientiously opposed to swearing may affirm, and shall be subject to the penalties of perjury as in case of swearing."), § 19-19-603.1 ("Form for oath of witness. The following oath may be used to satisfy the requirements of § 19-19-603: You do solemnly swear that the evidence you shall give relative to the matter in difference now in hearing between _____, plaintiff, and _____, defendant, shall be the truth, the whole

truth, and nothing but the truth, so help you God."), and § 19-19-603.2 ("Form for affirmation of witness. The following affirmation may be used to satisfy the requirements of § 19-19-603: You do solemnly affirm that the evidence you shall give relative to the matter in difference now in hearing between _____, plaintiff, and _____, defendant, shall be the truth, the whole truth, and nothing but the truth under the pains and penalties of perjury.").

b. S.D.COD.L. § 19-14-3, Rule 603 ("Oath or affirmation of witness. Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.").

43. Tennessee.

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

44. Texas.

a. TEX.R.E., Rule 603 ("Oath or Affirmation to Testify Truthfully. Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience.").

45. Utah.

a. Utah Code, Tit. 78B, Ch. 1, § 143 ("Witnesses – Form of oath. An oath or affirmation in an action or proceeding may be administered in the following form: You do solemnly swear (or affirm) that the evidence you shall give in this issue (or matter) pending between ____________ and ________________ shall be the truth, the whole truth and nothing but the truth, so help you God (or, under the pains and penalties of perjury). The person swearing or affirming shall express assent when addressed.").

b. U.R.E., Rule 603 ("Oath or Affirmation to Testify Truthfully. Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience.").

46. Vermont.

a. 12 V.S.A. § 5810 ("Oath to be administered to witnesses. You solemnly swear that the evidence you shall give, relative to the cause now under consideration, shall be the whole truth and nothing but the truth. So help you God."), and § 5851 ("Affirmation. In the administration of an oath, the word

'swear' may be omitted, and the word 'affirm' substituted, when the person to whom the obligation is administered is religiously scrupulous of swearing, or taking an oath in the prescribed form; and, in such case, the words 'so help you God' may be omitted, and the words 'under the pains and penalties of perjury' substituted; and a person so affirming shall be considered, for every legal purpose of privilege, qualification or liability, as having been duly sworn.").

b. VT.R.E., Rule 603 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his min with his duty to do so.").

47. Virginia.

a. Code Va. § 49-9 ("When affirmation may be made. If any person required to take an oath shall declare that he has religious scruples as to the propriety of taking it, he may make a solemn affirmation, which shall in all respects have the same effect as an oath."), and § 49-10 ("Use of Bible in administration of oaths. No officer of this Commonwealth, or any political subdivision thereof, shall, in administering an oath in pursuance of law, require or request any person taking the oath to kiss the Holy Bible, or any book or books thereof, but persons being sworn for any purpose may be required to place their hand on the Holy Bible. Any officer violating this section shall be subject to a fine of $100.").

b. VA.R.E., Rule 2:603 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that he or she will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience and impress the mind of the witness with the duty to do so.").

48. Washington.

a. RCW § 5.28.030 ("Form may be varied. Whenever the court or officer before which a person is offered as a witness is satisfied that he or she has a peculiar mode of swearing connected with or in addition to the usual form of administration, which, in witness' opinion, is more solemn or obligatory, the court or officer may, in its discretion, adopt that mode."), § 5.28.040 ("Form may be adapted to religious belief. When a person is sworn who believes in any other than the Christian religion, he or she may be sworn according to the peculiar ceremonies of his or her religion, if there be any such."), § 5.28.050 ("Form of affirmation. Any person who has conscientious scruples against taking an oath, may make

his or her solemn affirmation, by assenting, when addressed, in the following manner: 'You do solemnly affirm that,' etc., as in RCW 5.28.020."), and § 5.28.060 ("Affirmation equivalent to oath. Whenever an oath is required, an affirmation, as prescribed in RCW 5.28.050 is to be deemed equivalent thereto, and a false affirmation is to be deemed perjury, equally with a false oath.").

b. WASH.CT.R., Rule ER 603 ("Oath or Affirmation. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").

49. West Virginia.

a. W.VA.R.C.P., Rule 43(d) ("Affirmation in lieu of oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.").

b. W.VA.R.E., Rule 603 ("Oath or Affirmation to Testify Truthfully. Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience.").

50. Wisconsin.

a. WIS. STAT. § 906.03 ("Oath or affirmation. (1) Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the witness' duty to do so. (2) The oath may be administered substantially in the following form: Do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth, so help you God. (3) Every person who shall declare that the person has conscientious scruples against taking the oath, or swearing in the usual form, shall make a solemn declaration or affirmation, which may be in the following form: Do you solemnly, sincerely and truly declare and affirm that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth; and this you do under the pains and penalties of perjury. (4) The assent to the oath or affirmation by the person making it may be manifested by the uplifted hand.").

51. Wyoming.

a. WY. STAT. § 1-2-101 ("Form. A person may be sworn by any form he deems binding on his conscience."), § 1-2-103

("Affirmation in lieu of oath; manner of administering. Persons conscientiously opposed to swearing or to taking any oath may affirm, and are subject to the penalties of perjury as in the case of swearing an oath. Whenever any person is required to take an oath in any court, or before any person or officer authorized by law to administer oaths, it is lawful for the court, officer or person administering the same, to administer it in the following manner: the person taking the oath or swearing shall, with his or her right hand uplifted, swear or take the oath, concluding with the words 'so help me God'.").

b. WYO.R.E., Rule 603 ("Oath or affirmation. Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.").

Appendix C – Constitutional Guarantees Against Religious Preferences.

1. **Alabama.** ALA. CON. art. I, § 3 (". . . that no preference shall be given by law to any religious sect, society, denomination, or mode of worship . . .").
2. **Arkansas.** ARK. CON. art. 2, § 24 (". . . no preference shall ever be given, by law, to any religious establishment, denomination or mode of worship, above any other.").
3. **California.** CAL. CON. art. I, § 4 ("The free exercise and enjoyment of religious jprofession and worship, without discrimination or preference, shall forever be guaranteed in this State . . .").
4. **Colorado.** COLO. CON. art. II, § 4 ("The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed . . . Nor shall any preference be given by law to any religious denomination or mode of worship.").
5. **Connecticut.** CONN. CON. art. I, § 3 ("The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in the state . . .").
6. **Delaware.** DEL. CON. art. I, § 1 (". . . nor a preference given by law to any religious societies, denominations, or modes of worship.").
7. **Idaho.** IDAHO CON. art. I, § 4 (". . . nor shall any preference be given by law to any religious denomination or mode of worship.").

8. **Illinois.** ILL. CON. art. 1, § 3 (". . . nor shall any preference be given by law to any religious denomination or mode of worship.").
9. **Indiana.** IND. CON. art. I, § 4 ("No preference shall be given, by law, to any creed, religious society, or mode of worship . . .").
10. **Kansas.** KAN. CON. Bill of Rights, § 7 (". . . nor shall any preference be given by law to any religious establishment or mode of worship.").
11. **Kentucky.** KY. CON. Bill of Rights, § 5 ("No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity . . . ").
12. **Maine.** ME. CON. ART.I, § 3 (". . . no subordination nor preference of any one sect or denomination to another shall ever be established by law . . .").
13. **Massachusetts.** MASS. CON. Articles of Amendment, art. XI (". . . and all religious sects and denominations, demeaning themselves peaceably, and as good subjects of the commonwealth, shall be equally under the protection of the law; and no subordination of any sect or denomination to another shall ever be established by law.").
14. **Minnesota.** MINN. CON. art. I, § 16 (" . . . nor shall . . . any preference be given by law to any religious establishment or mode of worship . . . ").
15. **Mississippi.** MISS. CON. art. 1, § 18 (". . . no preference shall be given by law to any religious sect or mode of worship . . .").
16. **Missouri.** MO. CON. art. I, § 7 (". . . that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.").
17. **Nebraska.** NEB. CON. art. I, § 4 (". . . no preference shall be given by law to any religious society . . .").
18. **Nevada.** NEV. CON. art. I, § 4 ("The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever allowed in this State . . .").
19. **New Hampshire.** N.H. CON. art. I, § VI (". . . no subordination of any one sect, denomination or persuasion to another shall ever be established.").
20. **New Mexico.** N.M. CON. art. II, § 11 (". . . nor shall any preference be given by law to any religious denomination or mode of worship.").
21. **New York.** N.Y. CON. art. I, § 3 ("The free exercise and enjoyment of religious profession and worship, with-out discrimination or preference, shall forever be allowed in this State to all mankind . . .").

22. **North Dakota.** N.D. CON. art. I, § 3 ("The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state . . .").
23. **Ohio.** OHIO CON. art. I, § 7 (". . . no preference shall be given, by law, to any religious society . . .").
24. **Pennsylvania.** PA. CON. art. I, § 3 (". . . no preference shall ever be given by law to any religious establishments or modes of worship.").
25. **South Dakota.** S.D. CON. art. VI, § 3 (". . . nor shall any preference be given by law to any religious establishment or mode of worship.").
26. **Tennessee.** TENN. CON. art. I, § 3 (". . . that no preference shall ever be given, by law, to any religious establishment or mode of worship.").
27. **Texas.** TEX. CON. art. I, § 6 (". . . that no preference shall ever be given by law to any religious society or mode of worship.").
28. **Virginia.** VA. CON. art. I, § 16 (". . . the General Assembly shall not . . . confer any peculiar privileges or advantages on any sect or denomination . . .").
29. **West Virginia.** W.VA. CON. art. III, § 15 (". . . the Legislature shall not . . . confer any peculiar privileges or advantages on any sect or denomination . . . ").
30. **Wisconsin.** WIS. CON. art. I, § 18 (". . . nor shall . . .any preference be given by law to any religious establishments or modes of worship . . .").
31. **Wyoming.** WYO. CON. art. I, § 18 ("The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state . . .").