

Winter 1932

## Religious Fiction of the Common Law

Frank Swancara

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Frank Swancara, Religious Fiction of the Common Law, 23 *Am. Inst. Crim. L. & Criminology* 614 (1932-1933)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in *Journal of Criminal Law and Criminology* by an authorized editor of Northwestern University School of Law Scholarly Commons.

# A RELIGIOUS FICTION OF THE COMMON LAW<sup>1</sup>

FRANK SWANCARA<sup>2</sup>

The judges who moulded the common law thought that one who does not believe in Divine punishments after death nor fear them cannot be trusted as a witness in a court of justice. Accordingly, not only the credibility but also the competency of such an unbeliever as a witness was denied. The supposed fact, regarding the veracity of such persons, was in reality a fiction.

The fiction in question is now generally without any influence in the administration of justice, due to the constitutional or statutory removal of the common law disqualifications of witnesses who lack orthodox or other religious belief. It is still timely, however, to expose the fiction, and to reveal the absurdity of the equivalent presumption, because instead of openly repudiating ancient judicial expressions to the effect that "unbelievers" are liars, modern courts have approved, and some of them continue to sanction, such expressions, directly or indirectly.

It was as recently as A. D. 1921 that the Supreme Judicial Court of Maine assumed that a lack of reverence for the Holy Scriptures, because such lack implies a want of belief in supernatural judgments and punishments, "would rob official oaths of . . . their sanctity, thus undermining the foundations of their binding force." That the court assumed that the disbeliever in such punishments does not feel bound and impelled to tell the truth, when a witness, though complying with all the formalities of an oath or affirmation, is shown by the following expression in the opinion:<sup>3</sup>

"Judicial tribunals, anxious to discover and apply the truth, the whole truth, and nothing but the truth, require those who are to give testimony in courts of justice to be sworn by an oath which recognizes deity."

In other prosecutions for blasphemy it was assumed that argumentative blasphemers ought to be punished because by their discourses they may undermine faith in the doctrine of eternal punishments and thereby weaken the effect of oaths taken by the persons

---

<sup>1</sup>This article is one of the chapters, in substance, of a book in preparation, entitled *Obstruction of Justice by Religion*.

<sup>2</sup>Member of the Denver, Colo., bar.

<sup>3</sup>*State v. Mockus*, 113 Atl. 39.

influenced. Accordingly the Supreme Court of Pennsylvania declared, in effect, that only by sworn testimony given by orthodox believers with whom an oath is effective, could any "question of property . . . be decided," or any "criminal brought to justice."<sup>4</sup> That court, like others, proceeded upon the theory or opinion expressed by Mr. Justice Ashhurst when pronouncing sentence upon Thomas Williams, in 1797, for having sold a copy of Thomas Paine's *Age of Reason*. The Justice indicated in his remarks that he thought attacks on "Christianity" (meaning the fundamentalist doctrines) are crimes because they tend to destroy the religious fears upon which the effectiveness of oaths was supposed to depend. In other words, such attacks were thought to strip the law of "one of its principal sanctions, . . . the *dread of future punishment*."<sup>5</sup>

The Supreme Court of Tennessee declared that one not believing in a judging and punishing deity "shows a recklessness of moral character and utter want of moral sensibility, such as very little entitles him to be heard or believed."<sup>6</sup> The highest court of New Hampshire said that he "is unworthy of any credit in a court of justice."<sup>7</sup> In 1858 Mr. Justice Balcom of the Supreme Court of New York said:<sup>8</sup>

"To say that a person whose religion teaches him that his happiness will not be diminished in time or eternity by the utterance of falsehood as a witness, is entitled to equal credit, in a court of justice, with one who believes the doctrine of the scriptures, is extremely absurd."

It is true that in most jurisdictions these cases are no longer followed with respect to their *law* as it affects the competency or credibility of witnesses, but that situation is not due to any judicial repudiation of the assertions of supposed *fact* mentioned in the expressions quoted. When a court now permits a non-religious person to testify, it does so, not because it recognizes his fitness and reliability as a witness, but because compelled to admit him by some constitutional<sup>9</sup> or statutory<sup>10</sup> provision. And when a court refuses to inflict a penalty or impose suffering upon one prosecuted as a blasphemer, whose offense may not have gone beyond disputing Trinitarian doctrines, it does not repudiate the dictum of Mr. Justice Ash-

<sup>4</sup>*Updegraph v. Com.*, 11 S. & R. 394.

<sup>5</sup>*Williams' Case*, 26 How St. Tr. 654.

<sup>6</sup>*Odell v. Koppee*, 5 Heisk. 88.

<sup>7</sup>*Norton v. Ladd*, 4 N. H. 444.

<sup>8</sup>*Stanbro v. Hopkins*, 28 Barb. 265.

<sup>9</sup>*Hronek v. Peo.*, 134 Ill. 139, 24 N. E. 861. Note, 12 Ann. Cas. 158.

<sup>10</sup>*Peo. v. Jenness*, 5 Mich. 319.

hurst, but bases its discharge of the prisoner, sometimes with an expression of regret,<sup>11</sup> upon constitutional provisions relating to freedom of speech or to liberty of conscience.<sup>12</sup>

In at least some jurisdictions, where not restrained by constitution or statute, the courts repeat the ancient innuendo against non-believers in Divine wrath. It was as late as the year A. D. 1925 that the Supreme Judicial Court of Massachusetts declared: "The credibility of witnesses *can be* affected only by evidence of their disbelief in the existence of God."<sup>13</sup> As recently as 1929 a trial court in North Carolina ruled the same way. It is reported that the judge said:<sup>14</sup>

"If I believed that life ends with death and that there is no punishment after death, I would be less apt to tell the truth."

In 1930 the Supreme Court of that state refused either to denounce or to disapprove the practice of attempting to impeach the credibility of a witness by evidence regarding disbelief in future punishments.<sup>15</sup>

In decisions affecting the competency or credibility of dying declarations made by those who do not believe in "a future state," the courts still apply the ancient presumption against the veracity and character of persons not believing in Divine punishments after death.<sup>16</sup> Murderers are still permitted to slander such of their victims as had survived the fatal assault long enough to make a statement. The clergy still nurse the presumption in question, as evidenced by the fact that an eminent Cardinal recently attributed the present extent of perjury to "a prevalence of blasphemy in modern life and literature," without accounting for the perjury of believers or the perjury prevailing in believing times.<sup>17</sup>

In a previous article the present writer has attempted to show that the aspersions which have been cast upon heterodox persons in the manner indicated are and always have been false and libelous.<sup>18</sup> When Blackstone wrote that "all moral evidence, . . . all con-

<sup>11</sup>*Peo. v. Mockus*, Cir. Ct., Lake County, Ill. (1917); Theodore Schroeder, *Constitutional Free Speech*, p. 451, quoting Waukegan Daily Gazette (March 3, 1917).

<sup>12</sup>*Com. v. Moore*, Cir. Ct. at Lexington, Ky. Opinion quoted in Schroeder, *Constitutional Free Speech*, p. 60.

<sup>13</sup>*Allen v. Guarantee Co.*, 148 N. E. 461.

<sup>14</sup>Literary Digest (Nov. 9, 1929), p. 22.

<sup>15</sup>*State v. Beal*, 154 S. E. 604.

<sup>16</sup>*Carver v. Peo.*, 164 U. S. 694, 697; *State v. Rozell*, 225 S. W. 931, 16 A. L. R. 400; Frank Swancara, *Religion in the Law of Dying Declarations*, vol. LXVI U. S. Law Review (N. Y., April, 1932), p. 192.

<sup>17</sup>N. Y. Times (Apr. 29, 1927, p. 3, col. 6).

<sup>18</sup>Frank Swancara, *Judicial Aspersions of the Non-Religious*, vol. xxiii, JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY (Chicago, July-August, 1932), p. 231.

fidence in human veracity must be weakened by apostasy, and overthrown by total infidelity," he offered no evidence in support of that statement. In his time avowed atheists could not be found, and therefore could not establish any reputation concerning veracity. As evidenced by the experience of Thomas Paine, it was a disgrace even to profess Deism or anything corresponding to the now respectable Unitarianism. No tangible evidence in support of Blackstone's assertion has accumulated since his day. Instead, the evidence goes the other way.<sup>19</sup>

There never existed any tangible evidence that perjury is more apt to be committed by an avowed disbeliever in hell than by a witness presumed to be, or who is, God-fearing. The evidence has been to the contrary. Accordingly, "trustworthy writers inform us that it (perjury) was exceedingly common in England in the Middle Ages,"<sup>20</sup> when even heresy, to say nothing of apostasy and "total infidelity," was rare. "Recent times, by the way, have not furnished a more exuberant liar than Titus Oates."<sup>21</sup> Oates was a believer who took Anglican orders, once had a chaplaincy in the navy, and became a member of the Baptist Church.<sup>22</sup> The practice of sequestration of witnesses, based on the idea that witnesses may commit perjury and that they fear detection if they cannot hear each other testify, has been followed from the earliest, and most believing, times. It was by that means that Daniel exposed the perjury of the two pious believing elders who falsely charged Susanna with adultery. Sequestration was not a practice instituted because of any experience with "infidels." It originated on account of the behavior of the orthodox.

As before indicated, perjuries were committed in the early days when witnesses actually believed that a violation of the obligations of their oaths would bring punishment in a future life. The ecclesiastical courts, as well as the temporal tribunals, had frequent occasion to deal with false swearing. They placed so little reliance on solemn oaths that they employed the numerical principle, "and elaborated many specific rules as to the number of witnesses necessary in various situations; against a cardinal, for example, twelve or perhaps forty-four witnesses were required."<sup>23</sup> By way of digression, it may be said that possibly the "cardinal" had something to do with the formulation of the rules and caused them to take such form that no

---

<sup>19</sup>*Id.*, note 16.

<sup>20</sup>XXXIII Law Notes, 165 (Dec., 1929).

<sup>21</sup>*Id.*, note 18.

<sup>22</sup>16 Enc. Brit. (14th ed.) 662.

<sup>23</sup>15 Harvard Law Rev. 84.

testimony would ever be introduced against *him*, or at least no judgment would be rendered. How could the ordinary or any complainant muster a force of "forty-four witnesses"?

There is "much skepticism in modern times about the effect and value of the oath."<sup>24</sup> This is because men of affairs know that so far as veracity is concerned there is apparently no difference between the religious and the non-religious, and that neither class is much influenced by an oath. Accordingly the administration of the oath to a witness in a court of justice is ordinarily treated as if it was but an empty formality carried out only because of a technical requirement of the law.

After a witness has taken an oath, no attention is paid to that fact alone; no reliance is placed upon his oath by those interested on either side in the litigation or hearing. No one assumes that the oath will, of itself, compel the witness to adhere strictly to the truth. If confidence is reposed in his veracity either before or after he testifies, it is because of other considerations, which are generally mentioned in stock instructions to juries, such as his appearance and demeanor on the witness stand. The oath has never prevented a court from instructing the jury that they may take into consideration his possible interest in the result of the trial.

Evidencing the known ineffectiveness of oaths and the lack of any difference between the veracity of a religious and that of a non-religious witness, are the numerous rules which are constantly invoked, or the practice which is followed, whereby the truthfulness of a witness may be tested and, where possible, shown to be wanting. Trial methods are applied whereby the witness may be contradicted or impeached, even to the extent of revealing him as a wilful perjurer. The art of cross-examination is deemed of such importance that lengthy books upon that subject have been written, sold and purchased. Cross-examination is conducted, sometimes successfully, for the purpose of showing that a witness wilfully testified falsely.

Because human experience has shown the oath to be ineffective, even with those who are thoroughly competent, religiously, to take it, perjury is punished criminally. For the same reason a multitude of other things are being done. For example, newly elected or appointed public officials are each required not only to subscribe an oath of office but also to furnish a surety bond. Banks demand collateral for loans, not an oath of the borrower.

Jurors, as well as witnesses, sometimes violate the obligations of their oaths. Accordingly we have laws providing for new trials in

---

<sup>24</sup>3 Wigmore on Ev. (2d ed.), 864.

the event of such "misconduct." Even judges who have been officially vociferous in proclaiming the necessity for religious belief have sometimes shown by their conduct that they themselves are not terrified by the fear of future punishments. On the other hand, Unitarian judges who have stricken hell from their private theology have, like most jurists, been worthy of all the encomiums bestowed upon them.

Where the obligations of an oath are fully performed, the oath itself is not even a contributing cause. No reputable witness ever offered proof that he would have testified falsely if he had not been deterred from doing so by the fear of Divine retribution. The veracity he exhibited was due to the fact that "the natural inclination of every sane person is to speak the truth on all occasions."<sup>25</sup> No public official seeking a re-election ever declared that his fidelity to his oath of office was made possible because of the fear of Divine punishments.

That the oath, or supposed fear of Divine vengeance, has no effect upon anyone, otherwise than as an emphatic promise likely to be fulfilled because of the promisor's innate moral qualities, is evident from human experience.

Chief Justice Ward Hunt of the Court of Appeals of New York, speaking at a time (1868) when it was not popular to dispute the notion that religion is the sole support of morality, observed:<sup>26</sup>

"Experience teaches us that not only believers in the Christian religion, but those who for years have given the highest evidence that they would receive the ultimate reward of the true Christian, are guilty of grave offenses, moral and legal."

If the professed fear of Divine punishments does not influence a known number, however small, of the believers, that fact is evidence that it does not affect any of them, though most of them, as in the case of the North Carolina judge,<sup>27</sup> may think otherwise. Human nature is much the same everywhere and with everyone. If the believers are truthful and otherwise moral, it is for the same reasons which cause unbelievers to be so. Fortifying this conclusion is the fact that criminologists find that the *minimum* of criminality in all crimes is shown by the *irreligious*,<sup>28</sup> and that psychologists find atheists as moral as believers in Christian creeds.<sup>29</sup>

<sup>25</sup>*State v. Yee Gueng* (Ore.), 112 Pac. 424.

<sup>26</sup>*Gibson v. American Life Ins. Co.*, 37 N. Y. 580.

<sup>27</sup>See note 12.

<sup>28</sup>Bonger, *Criminality and Economic Conditions* (Boston, 1916), p. 209; Parmelee, *Criminology*, p. 108.

<sup>29</sup>Leuba, *Belief in God and Immortality*. George Herbert Palmer, *The Field of Ethics* (Houghton, Mifflin & Co., 1901), p. 172. Other and later authorities for this and preceding note are available to the student.