

“IN GOD WE TRUST”: THE LACK OF ATHEIST
REPRESENTATION ON THE BENCH

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INTRODUCTION

According to the Pew Research Center's Religious Landscape Study in 2015, the number of openly Atheistic² Americans totaled over ten million persons; another sixty-three million Americans identified generally as religious "nones."³ Although this represents over twenty-two percent of the American population, atheists continue to struggle with severe social stigma due to their non-religious affiliation.⁴ This stigma is often founded in the fallacy that religious affiliation is a necessary component to morality; since atheists do not have religious affiliation, they are perceived as being unable to make moral judgments.⁵

This widespread belief not only perpetuates a false stereotype, but also makes it less likely for Atheists to be elected or appointed to the judiciary, an institution responsible for the administration of justice necessarily requiring moral choices. In fact, zero to very few openly Atheist judges have served on the federal and state judiciaries, despite the growing population of Atheists in America.⁶ The exclusion of Atheists from the bench eliminates the perspective of a growing population in America and delegitimizes the judiciary.⁷ When an institution of a democratic republic does not reflect the nation's diversity, mistrust from the public results.⁸ Here, where the exclusion is related to a group that has been traditionally stigmatized and marginalized, the members of that group may believe the positions of government to be closed to them.⁹ While there have likely been more Atheists on the judiciary than researchers have identified, the social prejudice of Atheism may have led those judges to withhold or actively misconstrue their non-religious affiliation. These judges may have brought their unique perspectives as Atheists to the bench, but their

² While the various definitions of atheism will be discussed in depth in Subsection I.C.1, this Note will utilize the definition of atheism of a lack of belief in deities. References to nonbelief in religion will also be termed nonreligious belief; this is not meant to exclude nonreligious persons who view their personal philosophy as a neutral nonbelief rather than a positive nonreligious belief.

³ *Religious Landscape Study*, PEW RES. CTR., <http://www.pewforum.org/religious-landscape-study/> (last visited Mar. 8, 2016).

⁴ *See infra* Subsection I.C.2.

⁵ *Id.*

⁶ *See infra* Part II.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

service, unrecognized as the service of Atheists, does nothing to fight social prejudice against Atheists or legitimize the judiciary.

In order to rectify this exclusion, the inclusion of Atheists on the judiciary should be recognized as a diversity initiative by the legal profession, dedicating funds and time to explaining the importance of this inclusion and how it can be achieved.¹⁰ To further facilitate the appointment or election of Atheist judges, Atheists should also continue to battle societal prejudice.¹¹ The open self-identification as an Atheist to religious Americans and the formation of organizations dedicated to creating a positive perception of the non-religious in the community will help to eliminate prejudice, making it more likely for voters to elect an openly Atheist candidate and for an appointing official to choose an openly Atheist candidate.¹²

Part I of this Note will discuss religion in America, including Christianity’s influence in the early United States¹³ and its subsequent position as the majority religion in the United States.¹⁴ It will also define Atheism¹⁵ and assess its demographics in the current population¹⁶ and the stigma against Atheism.¹⁷ Part II demonstrates the lack of presence of Atheists on the bench¹⁸ and discusses how religion and a lack of diversity on the bench affects the judiciary.¹⁹ Finally, Part III advocates for the recognition of Atheists as a diversity initiative and suggests steps to be taken to minimize prejudice against Atheists.²⁰

I. RELIGION IN AMERICA

The proper role of religion in the United States government has generated strenuous debate.²¹ In part, the inability to resolve this controversy is due to the dissonance between popular views of the foundation of the country—namely, the view of the United States as a Christian nation and the view of the United States as a

¹⁰ See *infra* Part III.

¹¹ *Id.*

¹² *Id.*

¹³ See *infra* Section I.A.

¹⁴ See *infra* Section I.B.

¹⁵ See *infra* Subsection I.C.1.

¹⁶ See *infra* Subsection I.C.2.

¹⁷ See *infra* Subsection I.C.3.

¹⁸ See *infra* Section II.A.

¹⁹ See *infra* Sections II.B–C.

²⁰ See *infra* Part III.

²¹ See *infra* Section I.A.

nation founded on principles of religious freedom.²² Today, Christianity remains the predominant religion of the United States.²³ However, despite a history of marginalization and distrust,²⁴ a growing percentage of Americans are identifying as nonbelievers.²⁵ While this growth suggests that nonbelief is increasingly acceptable in mainstream society, nonbelievers remain disproportionately absent from positions of power within the United States.²⁶

A. Establishing Religious Freedom and a Judeo-Christian Nation

The central contradiction of religion in the United States is the interaction between the principle of separation of church and state with the establishment of Christianity as the moral foundation of the nation.²⁷ The Bill of Rights reflects the drafters' desire to prohibit government interference with the private practice of religion in the First Amendment, indicating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."²⁸ An additional provision in the Constitution also mandates that no religious test may be required in order for a candidate to assume government office.²⁹ Other early government documents, such as the Treaty of Tripoli, repeat the principle that the United States was not "founded on the Christian religion."³⁰ These provisions, preserving the right of the individual to practice his religion without undue government regulation,

²² See FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* 1 (2003). ("[T]wo of the most enduring views of colonial America [are] America as a haven of religious freedom, and America as a Christian Nation."); see also *infra* Section I.A.

²³ See *infra* Section I.B.

²⁴ See *infra* Subsection I.C.2.

²⁵ See *infra* Subsection I.C.3.

²⁶ See *infra* Subsection I.C.3.

²⁷ LAMBERT, *supra* note 21, at 23.

²⁸ U.S. CONST. amend. I.

²⁹ See U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

³⁰ JOHN FEA, *WAS AMERICA FOUNDED AS A CHRISTIAN NATION?: A HISTORICAL INTRODUCTION* 3 (2011).

undoubtedly stem from the experiences of early American settlers who were fleeing religious persecution in their home countries.³¹

Despite these statements, however, Christianity had a large influence on the founding and the subsequent development of the nation as the religion of the majority. Although some of the founders of the United States may be more accurately described as non-Christian deists, both orthodox Christians and Christian deists also participated in the development of the republic.³² Christianity was also the religion of the majority of the population, and many believed that

the United States “had a special role to play in the plan of God.”³³ The impact of this majoritarian influence is clear throughout the history of the United States. As the Supreme Court stated in 1892 in *Holy Trinity Church v. United States*³⁴:

If we pass beyond these matters to a view of American life, as expressed by its laws, its business, its customs, and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; . . . the laws respecting the observance of the Sabbath . . . ; the multitude of charitable organizations existing everywhere under Christian auspices . . . These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of

³¹ See generally LAMBERT, *supra* note 21, at 1 (detailing the Puritans’ flight from persecution due to their religious beliefs and practices).

³² See David L. Holmes, *The Founding Fathers, Deism and Christianity*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/The-Founding-Fathers-Deism-and-Christianity-1272214> (last visited Apr. 10, 2016). While the Founding Fathers came from largely Protestant backgrounds, deism was widespread in the eighteenth century. *Id.* Deism was characterized by a belief in a god of nature, one defined by human experience, rather than through religious rites or the Bible. See *id.* Deism represented a spectrum, however, from non-Christian deism—and adherents like Ethan Allen and James Monroe—to Christian deism—with adherents like John Adams and George Washington. *Id.* While it may be difficult to pin down the specific religious beliefs of the Founding Fathers centuries later, the influences of deism are clear in the founding documents. *Id.*

³³ See FEA, *supra* note 29, at 5.

³⁴ 143 U.S. 457, 471 (1892).

organic utterances that this is a Christian nation.³⁵

Although constitutional provisions prohibited the state sponsorship of Christianity, its traditions and beliefs permeated many facets of society.³⁶ Though the Supreme Court identified the United States as a Christian nation in 1892, with a large majority of the American population remaining Christian, the rise of religious minorities as well as increased separation of church and state brings new challenges to the question of whether the United States is indeed a Christian nation.³⁷

B. Religion in America Today

While no official statistics exist today,³⁸ a majority of Americans identify as some denomination of Christian.³⁹ The Pew Research Center's 2014 Religious Landscape Study, which surveyed more than 35,000 Americans from all fifty states about their religious affiliations, reported that 70.6% of Americans identify as Christian.⁴⁰ Of those who identified as Christian, 25.4% were Evangelical Protestant and 20.8% were Catholic, with the remainder consisting of other denominations of Protestants, Jehovah's Witnesses, and Mormons.⁴¹ As to the strength of belief, over half of the survey respondents indicated that they pray daily and attend religious services, demonstrating the importance of religion to their lives.⁴²

The United States continues to remain the country holding the greatest population of Christians; however, Americans' overall affiliation with Christianity has recently declined.⁴³ This decline is

³⁵ *Id.*

³⁶ *See id.*

³⁷ *See infra* Section I.B.

³⁸ *Frequently Asked Questions: Does the Census Bureau Have Data for Religion?*, U.S. CENSUS BUREAU, <https://ask.census.gov/faq.php?id=5000&faqId=29> (last visited Nov. 8, 2016). By law, the U.S. Census Bureau is not allowed to mandate persons to report their religious affiliation. *Id.*

³⁹ *Religious Landscape Study*, *supra* note 2.

⁴⁰ *Id.*

⁴¹ *Id.* Specifically, 14.7% reported as Mainline Protestant, 6.5% as Historically Black Protestant, 1.6% as Mormon, 0.5% as Orthodox Christian, 0.8% as Jehovah's Witnesses, and 0.4% as Other Christian. *Id.*

⁴² *Id.*

⁴³ *America's Changing Religious Landscape: Christians Decline Sharply as Share of Population; Unaffiliated and Other Faiths Continue to Grow*, PEW RES.

due largely to the rise of nonbelievers in the country—though some of the shift can also be attributed to the small rise of non-Christian faiths.⁴⁴ The significant rise of persons identifying with no religion mandates a closer look at the evolution of Atheism in the United States and its current role in society.⁴⁵

C. American Atheism

Black’s Law Dictionary defines an Atheist as “[s]omeone who disbelieves the existence of all deities.”⁴⁶ However, this static description does not reflect the continuum nor the depth of beliefs held by persons identifying as Atheist.⁴⁷ Persons with nonreligious beliefs that do not fit this static definition have also identified with other labels or created new labels that they feel more correctly reflect their belief systems.⁴⁸ Regardless of the specific label attached to nonreligious beliefs, nonreligious persons have been marginalized throughout the history of the United States.⁴⁹ Today, a growing number of Americans identify as nonreligious, perhaps indicating a relaxation of stigma traditionally directed to the nonreligious.⁵⁰ However, the lack of cohesive identity of nonreligious persons makes identifying the nonreligious demographic difficult.⁵¹

1. Atheism Defined

Traditional religious belief systems are generally easy to identify due to the existence of a hierarchy of authority, the existence of a body of recognized religious texts, the imposition of required meeting attendance, and the identification of an individual with an established group.⁵² Nonreligious persons, however, typically have no centralized authority figure or system,

CTR., <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> (last visited Nov 8, 2016). Within the last seven years, the population of Christians in the United States has dropped by nearly eight percentage points.
Id.

⁴⁴ *See id.*

⁴⁵ *See infra* Section I.C.

⁴⁶ *Atheist*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁴⁷ *See infra* Subsection I.C.1.

⁴⁸ *Id.*

⁴⁹ *See infra* Subsection I.C.2.

⁵⁰ *See infra* Subsection I.C.3.

⁵¹ *Id.*

⁵² *See generally* RELIGIONS OF AMERICA: FERMENT AND FAITH IN AN AGE OF CRISIS (Leo Rosten ed., 1975).

foundational documents, or regular meetings. Without these guiding structures in place, the beliefs of nonreligious persons are various.⁵³ This means that the labeling and defining of nonreligious beliefs are particularly difficult. As a result, a number of terms for nonreligious beliefs have emerged, and multiple definitions of each term exist. Overall, however, the term “atheist” is still the most popularly used term to apply to a nonreligious person.

The activist group, American Atheists, defines Atheism as “a lack of belief in gods,” as distinguished from “a disbelief in gods or a denial of gods.”⁵⁴ In contrast, both Black’s Law Dictionary and Merriam-Webster Dictionary define Atheism as an active disbelief in the existence of deities.⁵⁵ This contrast between Atheism as an absence of belief in gods, and Atheism as an active denial or rejection of the existence of gods, is one of the main disagreements within atheism.⁵⁶ Definitions also differ based on whether they reference God, several gods, deities, or any supernatural force.⁵⁷ Atheism, therefore, can encompass a wide variety of viewpoints depending on the definition utilized.

While many nonreligious persons identify as Atheist, under any of the many iterations of Atheism, other nonreligious persons have turned to different labels to describe their beliefs. Agnosticism represents the belief that the evidence available to humans is an insufficient basis for a conclusion concerning whether deities exist.⁵⁸ Agnosticism also encompasses the more commonplace concept that a person is undecided or apathetic as to whether deities exist.⁵⁹ Other terms that have arisen representing nonreligious beliefs include anti-theism, non-theism, humanism, apatheism, and freethinkers.⁶⁰ These terms are typically more specific as to: (1) whether the subscriber believes that the existence of deities is knowable; (2) whether the question of the existence of deities is

⁵³ *What Is Atheism?*, AM. ATHEISTS, <https://atheists.org/activism/resources/what-is-atheism> (last visited Nov. 8, 2016). “The only common belief that ties all atheists together is a lack of belief in gods and supernatural beings . . . This is because atheists do not have a common belief system, sacred scripture or atheist Pope.” *Id.*

⁵⁴ *Id.*

⁵⁵ *See Atheism*, BLACK’S LAW DICTIONARY (10th ed. 2014); *Atheism*, MERRIAM-WEBSTER DICTIONARY.

⁵⁶ *See* Stephen Bullivant, *Defining ‘Atheism’*, in THE OXFORD HANDBOOK OF ATHEISM 11–12 (Stephen Bullivant & Michael Ruse eds., 2013).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ ALEX CHAMDEN & ALAIN MARCEL, ATHEISM: THE THEOLOGICAL DEFAULT xxxiv (2015).

meaningful; and (3) whether the subscriber rejects religion or is neutrally nonreligious.⁶¹ The specific terms may also represent an additional set of ethical, moral, or political beliefs of the subscriber.⁶²

Another increasingly popular category of nonreligious definition is “spiritual but not religious” (SBNR).⁶³ Typically, this belief system reflects a disenchantment with organized religion.⁶⁴ The subscriber may believe in a god unaffiliated with an identified religion or may view spirituality as a communal feeling with nature and self.⁶⁵ SBNR has faced significant criticism from religious leaders and others who believe that it is a complacent, egotistical form of religion.⁶⁶ SBNR subscribers may still believe in a deity but not follow an organized religion; similarly, deists believe in a deity based in nature, but reject the traditional supernatural tenants of organized religion.⁶⁷

This plethora of categories of nonbelief allows the modern nonreligious person a wide range of options to use to identify her nonreligious beliefs to herself and others. While useful in the sense of self-identification, lacking one consistent and universally recognized definition of Atheism has its detriments, including an inability to correctly identify the proportion of nonbelievers in society.⁶⁸ For the purposes of this Note’s discussion on Atheism in the judiciary, Atheism will be defined as a lack of belief in deities. This general definition will encompass those who reject the existence of deities as well as those who simply have no belief as to the matter. It will not encompass those persons who believe in a deity but do not follow organized religion. This specific definition is

⁶¹ See *Non-theistic beliefs, spiritual paths, etc. Comparing Non-Theistic Belief Systems: Secularists, Agnostics, to Strong Atheists*, RELIGIOUS TOLERANCE.ORG, http://www.religioustolerance.org/at_ag_hu.htm, (last visited Nov. 8, 2016).

⁶² See *id.*

⁶³ See John Blake, *Are There Dangers in Being ‘Spiritual But Not Religious?’*, CNN (June 9, 2010, 11:47 AM), <http://www.cnn.com/2010/LIVING/personal/06/03/spiritual.but.not.religious/>.

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See, e.g., Mark Oppenheimer, *Examining the Growth of the ‘Spiritual, But Not Religious’*, N.Y. TIMES, July 18, 2014, http://www.nytimes.com/2014/07/19/us/examining-the-growth-of-the-spiritual-but-not-religious.html?_r=0 (quoting Reverend Lillian Daniel, who stated, “[t]here is nothing challenging about having deep thoughts all by yourself”).

⁶⁷ See *Comparing Non-Theistic Belief Systems: Secularists, Agnostics, to Strong Atheists*, RELIGIOUS TOLERANCE.ORG, http://www.religioustolerance.org/at_ag_hu.htm (last visited Feb. 13, 2016).

⁶⁸ See *infra* Subsection I.C.3.

chosen to reflect best the nonreligious persons who have faced consistent marginalization and discrimination in American history.⁶⁹

2. The Perception of Nonbelief in the United States

Atheism has consistently been demonized by established religions and has been associated with revolution, immorality, and rejection of the status quo.⁷⁰ The negativity and prejudice directed toward atheism has often been attributed to the widespread belief that morality is inherently rooted in religion.⁷¹ A majority of society subscribes to the belief that moral rules come from religion, and that humanity's desire to follow these rules is due to the presence of a supernatural agent to which humanity is responsible.⁷² Therefore, Atheists, who do not subscribe to a religion's moral code and are not obligated by the judgment of a supernatural agent, are believed to have no moral code or to be more capable of committing immoral acts.⁷³ Some scientific research supports the belief that religious persons are more moral: religious persons give more money to charity, are more capable of resisting temptation, and have increased self-control.⁷⁴ However, these results may simply indicate that religion is a useful tool for supporting moral choices, as other scientific research has demonstrated that certain animal species, who definitively lack religion, are able to and do engage in positive moral choices such as altruism, cooperation, fairness, empathy, and sympathy.⁷⁵ Animals engage in positive moral choices and make moral choices—such as rejecting schemes where unequal rewards

⁶⁹ See *infra* Subsection I.C.2.

⁷⁰ See GAVIN HYMAN, A SHORT HISTORY OF ATHEISM 9 (2010) (“Not only would atheism be tainted with blood, violence and revolution, but also Christianity came to be regarded as inherently conservative and reactionary, an upholder of the status quo.”).

⁷¹ See Will Gervais, *Breaking New Ground in the Science & Religion Dialogue: Popular Perceptions of Atheists*, YOUTUBE (Aug. 3, 2015), <https://www.youtube.com/watch?v=nrjw6bBOqR0>. See generally Will M. Gervais, Azim F. Shariff, Ara Norenzayan, *Do You Believe in Atheists? Distrust Is Central to Anti-Atheist Prejudice*, 101 J. PERSONALITY AND SOC. PSYCHOL. 1189 (2011).

⁷² Gervais, Shariff, Norenzayan, *supra* note 69, at 1190–91.

⁷³ See *id.* at 1191.

⁷⁴ *Id.*

⁷⁵ See generally, e.g., Marc Bekoff, *Wild Justice and Fair Play: Cooperation, Forgiveness, and Morality in Animals*, 19 BIOLOGY & PHIL. 489 (2004). Sarah F. Brosnan & Frans B. M. de Waal, *Monkeys Reject Unequal Pay*, 425 NATURE 297 (2003).

are given for equal effort—demonstrating that religion is not a necessary precursor for morality.⁷⁶

While scientific studies indicate that religion is helpful but not necessary to morality, this viewpoint has not extended to lay populations throughout the world. In the United States, fifty-three percent of Americans believe that belief in a god is essential to morality.⁷⁷ Of the thirty-nine countries whose citizens participated in a Pew Research Center global survey about religion, the majorities from only fifteen countries believed that it was *not* necessary to believe in a god to be moral.⁷⁸ These countries were largely centered in Europe.⁷⁹ Of the twenty-four countries that indicated it was necessary to believe in a god in order to be moral, most reported over seventy percent of the surveyed citizens subscribed to this belief.⁸⁰

Conjunction fallacy tests performed by Will Gervais, a psychology professor at the University of Kentucky, confirm this general bias against the ability of Atheists to perform moral judgments.⁸¹ A conjunction fallacy test is one in which survey respondents are asked to choose which of two options are most likely—however, the first option is a general condition, followed by a specific condition that includes the general condition.⁸² For example, a respondent is asked whether it is more likely that the person is an engineer or that the person is an engineer and a feminist. Logically, the general condition is always more likely than—or, rarely, equally as likely as—the specific condition occurring.⁸³ Conjunction fallacy tests indicate intuitive judgments made about a person or object: respondents often get the question wrong, choosing the specific condition, because they feel the specific condition is more representative of the person or object described.⁸⁴

⁷⁶ See generally Brosnan & de Waal, *supra* note 73.

⁷⁷ *Worldwide, Many See Belief in God as Essential to Morality*, PEW RES. CTR., Mar. 13, 2014, <http://www.pewglobal.org/2014/03/13/worldwide-many-see-belief-in-god-as-essential-to-morality/> (last visited Mar. 26, 2016).

⁷⁸ *Id.* (emphasis added). These countries were Canada, Greece, Poland, Russia, Germany, Italy, Britain, Spain, Czech Republic, France, Israel, Australia, Japan, Argentina, and Chile. *See id.*

⁷⁹ *See id.*

⁸⁰ *See id.* For example, Egypt reported at ninety-five percent, Turkey at eighty-seven percent, Indonesia at ninety-nine percent, India at seventy percent, Brazil at eighty-six percent, and Ghana at ninety-nine percent. *See id.*

⁸¹ See Gervais, Shariff, Norenzayan, *supra* note 69, at 1192, 1194–96.

⁸² *See id.* at 1192.

⁸³ *See id.*

⁸⁴ *See id.*

Gervais's conjunction fallacy tests indicate that people overwhelmingly and intuitively believe that Atheists are more likely to make negative moral choices.⁸⁵ For example, one test informed participants of a person named Richard who made negative moral choices throughout the day: he crashed his car into a neighbor's car and did not leave his contact information, and, after finding a lost wallet on the ground, took the money and threw the wallet away.⁸⁶ Respondents were asked to indicate whether it was more likely that Richard was a teacher, or more likely that Richard was a teacher and an additional condition.⁸⁷ Additional conditions that did not return significant results—that is, the additional condition did not indicate bias toward these conditions in regard to likelihood of making negative moral choices—included being gay, Christian, Muslim, Jewish, or feminist.⁸⁸ However, when Atheism was added as a specific condition, the specific condition was chosen more than the general, indicating intuitive bias toward atheism: despite the logical fallacy, Richard must be both a teacher and Atheist because his poor moral choices represent that of an Atheist.⁸⁹ The only other condition to merit such a response was the condition of being a rapist.⁹⁰ Additional conjunction fallacy tests run—including moral violations such as physical harm, violations of loyalty, violations of purity, and violations of authority—indicated similar results.⁹¹

Gervais's work illustrates society's systemic distrust of Atheists and commonplace belief that Atheists are unable to form proper moral judgment.⁹² A 2016 Pew Research Center study indicates that this negative perception can be a deciding factor in

⁸⁵ See *id.* at 1195–96.

⁸⁶ See *id.*

⁸⁷ See *supra* note 69, at 1195. Logically, it is more likely—or equally likely—that Richard was a teacher rather than a teacher and whatever specific condition was imposed.

⁸⁸ See *id.* at 1196–97.

⁸⁹ See *id.* at 1196.

⁹⁰ See *id.*

⁹¹ See *id.* When presented with issues of physical harm (kicking a stray puppy), violations of loyalty (pretending to be a citizen of a different country while traveling or rejecting family due to a disagreement), violations of authority (making a rude gesture to a boss behind her back), and violations of purity (eating flesh stolen from a cadaver lab), atheists were again selected over gays, various religions, and various ethnicities. See Gervais, *Breaking New Ground in the Science & Religion Dialogue: Popular Perceptions of Atheists*, *supra* note 71.

⁹² See *id.*

the political arena.⁹³ The study, conducted to analyze the effects of religion in the upcoming presidential election, indicated that Atheism “continues to be one of the biggest perceived shortcomings a hypothetical presidential candidate could have.”⁹⁴ Fifty-one percent of those surveyed reported that they would be less likely to vote for an Atheist candidate than one that is religious.⁹⁵ Atheism has been identified as a greater drawback to a candidate than hypothetical candidates who had financial struggles, formerly smoked pot, or had an extramarital affair.⁹⁶ This survey indicates that the public still harbors a perception of Atheists as untruthful or valueless.⁹⁷ It also has special implications for the presence of Atheists on the bench. Because judges are either elected or appointed by an elected official, the overall perception of Atheism as a detriment to a candidate entrusted with important political decisions is also applicable to candidates entrusted with important legal decisions.⁹⁸

The demonstrated moral distrust of atheism and Atheists has inserted itself into society in various ways. Globally, the practice of Atheism is criminalized in many sovereign states as a capital crime in itself—such as the crime of apostasy or as the crime of blasphemy.⁹⁹ In the United States, where no official state religion is recognized and religious freedom is avowed, Atheists are still marginalized and have little to no voice in government.¹⁰⁰ Very few to no Atheists have served in federal and state legislatures¹⁰¹ or the federal and state judiciaries.¹⁰² Some of those Atheists who have served have refrained from disclosing their nonbeliever status until

⁹³ *How Religion is Shaping the 2016 Presidential Race*, PEW RESEARCH CTR., <http://www.pewforum.org/2016/01/27/faith-and-the-2016-campaign/> (last visited Mar. 20, 2016).

⁹⁴ *See id.*

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *See infra* Part II.

⁹⁹ Int’l Humanist and Ethical Union, *The Freedom of Thought Report 2015*, at 14 (2015).

¹⁰⁰ *See id.* at 196.

¹⁰¹ *See* Nick Wing, *Here Are All the Atheists in Congress*, HUFFINGTON POST (Sept. 19, 2013, 7:40 AM), http://www.huffingtonpost.com/2013/09/19/atheists-in-congress_n_3944108.html. *See also* *The Freedom of Thought Report 2015*, *supra* note 95, at 200 (stating that only one current Congressional member openly identifies as Atheist).

¹⁰² *See infra* Section II.A.

retirement.¹⁰³ Laws exist mandating religious tests for public service in eight states—although these have been ruled unconstitutional, they have not been removed or amended, potentially serving as local rallying points.¹⁰⁴ Lawmakers or elected officials frequently make statements criticizing Atheists.¹⁰⁵ Government officials are also criticized for interaction with Atheist groups.¹⁰⁶ The continued perception of Atheists as morally bankrupt is surprising, given the increasing number of Americans who identify as Atheists.¹⁰⁷

3. Current Demographics of Nonbelief in the United States

Providing accurate statistics as to the number of Atheists in the United States is exceedingly difficult because of the variety of definitions and titles of nonbelief.¹⁰⁸ A nonbeliever may identify with one of several titles, including, but not limited to, Atheist, Agnostic, anti-theist, non-theist, humanist, apatheist, freethinker, or SBNR, making it difficult, if not impossible, for researchers to properly account for the entire continuum of nonbelief.¹⁰⁹ Considering Atheism's long history of stigma and marginalization, certain non-believers may also be hesitant to openly identify as Atheist, preferring instead more socially accepted titles such as Agnostic or SBNR.¹¹⁰

In 2014, the Pew Research Center published its Religious Landscape Study, which surveyed more than 35,000 Americans from all fifty states about their religious affiliations.¹¹¹ The Study

¹⁰³ See Wing, *supra* note 97 (discussing former Massachusetts Representative Barney Frank, who announced his Atheism following his twenty-five years of service in the House).

¹⁰⁴ See *The Freedom of Thought Report 2015*, *supra* note 95, at 198.

¹⁰⁵ See, e.g., Richard Fausset & Abby Sewell, *Alabama Governor's Remarks on Non-Christians Raise Eyebrows*, L.A. TIMES (Jan. 19, 2011), <http://articles.latimes.com/2011/jan/19/nation/la-na-alabama-governor-20110119> (quoting Governor Bentley who stated, "So anybody here today who has not accepted Jesus Christ as their savior, I'm telling you, you're not my brother and you're not my sister").

¹⁰⁶ See, e.g., *Friendly Atheist, Republicans Smear Candidate Kay Hagan for Meeting with Atheists*, PATHEOS (Oct. 7, 2008), <http://www.patheos.com/blogs/friendlyatheist/2008/10/07/republicans-smear-senate-candidate-kay-hagan-for-meeting-with-atheists/>.

¹⁰⁷ See *infra* Subsection I.C.3.

¹⁰⁸ See *supra* Subsection I.C.1.

¹⁰⁹ See *supra* Subsection I.C.1.

¹¹⁰ See Blake, *supra* note 63.

¹¹¹ See *Religious Landscape Study*, *supra* note 2, at 1.

reported that 22.8% surveyed identified as “religious ‘nones.’”¹¹² It also reported that 3.1% identified as Atheist, 4.0% as Agnostic, and 15.8% as “nothing in particular,”¹¹³ reflecting the difficulty of capturing the spectrum of nonbelief.¹¹⁴ Extrapolated to the general population, this study illustrates that there are approximately fifty-six million nonbelievers in the United States.¹¹⁵ This group is larger than the nation’s population of Catholics and mainline Protestants, and second only to evangelical Protestants.¹¹⁶

The substantial increase in nonbelievers can be attributed to two main causes: (1) generational replacement; and (2) shifting religious profiles.¹¹⁷ Generational replacement occurs as younger generations who hold higher percentages of identification with nonbelief enter adulthood.¹¹⁸ Additionally, transitions between religions tend to favor nonbelief: for every one person who was raised nonreligious and now identifies with a religion, four persons who were raised with religious affiliation now report no religious affiliation.¹¹⁹ In other words, transitions into Atheism are more frequent than transitions out of Atheism.¹²⁰

In a country founded on Judeo-Christian beliefs that also subscribe to the principles of freedom of religion, Atheism has represented a unique challenge.¹²¹ As a system of nonbelief, Atheism and those that subscribe to it have been consistently marginalized and denied a voice in mainstream society throughout American history.¹²² Recently, however, the number of Americans identifying as Atheists has experienced a dramatic increase.¹²³ While the Atheist population continues to increase and gain societal

¹¹² *Id.*

¹¹³ *Id.* Of those surveyed, identifying as “nothing in particular,” 8.8% stated that religion was not important to them, whereas 6.9% reported that religion was important to them. *Id.* Those reporting importance of religion may reflect unaffiliated religious persons—such as those that believe in a deity but do not follow organized religion, or those that are spiritual on some level beyond that typically ascribed to Atheism. *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See America’s Changing Religious Landscape, supra* note 42, at 11.

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *See id.* For example, 11% of the “Silent generation,” born between 1928 and 1945, identify as unaffiliated, whereas 23% of “Generation X,” born between 1965 and 1980, in addition to the 36% of “Younger Millennials,” born between 1990 and 1996 identify as unaffiliated. *Id.*

¹¹⁹ *Id.*

¹²⁰ *See supra* note 42.

¹²¹ *See generally* Section I.A.

¹²² *See generally* Subsection I.C.1; *see also* Subsection I.C.2.

¹²³ *See Religious Landscape Study, supra* note 2, at 3.

tolerance—and perhaps, acceptance—Atheists still continue to be underrepresented in the judiciary.¹²⁴

II. RELIGION IN THE JUDICIARY

Although the percentage of Atheists in the general population has dramatically increased, the amount of Atheists serving in the federal and state judiciaries remains extremely low.¹²⁵ This lack of religious diversity impacts judicial decision-making, but while studies have indicated a discernible impact, it is one commiserate with other demographic factors such as age and socioeconomic status.¹²⁶ However, the lack of Atheists in the judiciary has significant consequences for the legitimacy of this particular branch of government as a democratic institution.¹²⁷ Because the judiciary does not reflect the general population, it is not perceived as fair.¹²⁸ The exclusion of a traditionally marginalized group such as the non-religious also indicates to Atheists that seats of power in government are closed to them.¹²⁹

A. Religious Demography in the Judiciary

Of the 112 justices who have served on the Supreme Court of the United States, only the Protestant, Catholic, and Jewish faiths have been represented.¹³⁰ Ninety-one (approximately 81%) justices have identified as Protestants, twelve (approximately 11%) have identified as Catholic, and eight (approximately 7%) have identified as Jewish.¹³¹ One justice, Justice David Davis, has been reported to have had no religious affiliation,¹³² however, he has also been reported to have identified as a Presbyterian, as he was raised.¹³³

¹²⁴ See *infra* Part II.

¹²⁵ See *infra* Section II.A.

¹²⁶ See *infra* Subsection II.B.1.

¹²⁷ See *infra* Subsection II.B.2.

¹²⁸ See *infra* Subsection II.B.2.

¹²⁹ See *infra* Subsection II.B.2.

¹³⁰ Lewis M. Wasserman & James C. Hardy, *U.S. Supreme Court Justices' Religious and Party Affiliation, Case-Level Factors, Decisional Era and Voting in Establishment Clause Disputes Involving Public Education, 1947-2012*, 2 BRIT. J. AM. LEGAL STUD. 111, 117 (2013).

¹³¹ See *id.*

¹³² See *id.*

¹³³ Zachary Baron Shemtob, *The Catholic and Jewish Court: Explaining the Absence of Protestants on the Nation's Highest Judicial Body*, 27 J.L. & RELIGION 359, 362 (2012); see also David Davis, OYEZ,

The Supreme Court consisted of only Protestant justices until 1836, when Catholic Justice Roger Brooke Taney was appointed.¹³⁴ The overall historic representation of Catholicism on the Court has increased recently, with six of the twelve Catholic justices having been appointed within the last thirty years.¹³⁵ In 1921, the first Jewish justice, Justice Louis Dembitz Brandeis, joined the Court. Jewish appointments have since continued sporadically.¹³⁶

Only three religions have been represented at the Supreme Court; however, both the singular nature of the Court—in that there is only one court and nine justices—and lifetime appointments work to limit the opportunity for diversity.¹³⁷ Because lower courts are more plentiful—in that they have multiple circuits or districts—and often serve as a pipeline for candidates for the Supreme Court, the religious diversity of the lower courts is important to analyze.¹³⁸ The lack of diversity on lower courts indicates that the judiciary is non-representative of the general population and limits any argument that the lack of diversity on the Supreme Court particularly is due to its unique nature.¹³⁹

The Judicial Research Initiative at the University of South Carolina hosts a database containing information about the

https://www.oyez.org/justices/david_davis (last visited Mar. 18, 2016). Justice Davis served on the Court from 1862 until 1877, resigning following his election as an Illinois Senator. *Id.* *Judge David Davis*, MCLEAN CTY. MUSEUM OF HISTORY, <http://mchistory.org/research/resources/judge-david-davis.php> (last visited Mar. 18, 2016).

¹³⁴ See Shemtob, *supra* note 128, at 362.

¹³⁵ See *id.* The following are the Catholic justices appointed to the Supreme Court, along with their years of appointment: Roger Brooke Taney (1836), Edward Douglass White (1894), Joseph McKenna (1898), Pierce Butler (1923), Frank Murphy (1940), Sherman Minton (1949), William Joseph Brennan, Jr. (1956), Antonin Gregory Scalia (1986), Anthony McLeod Kennedy (1988), Clarence Thomas (1991), John Glover Roberts, Jr. (2005), Samuel Anthony Alito (2006), and Sonia Sotomayor (2009). *Id.*

¹³⁶ See *id.*

¹³⁷ See Adrienne LaFrance, *Down with Lifetime Appointments*, SLATE (Nov. 12, 2013, 7:15 AM), http://www.slate.com/articles/technology/future_tense/2013/11/lifetime_appointments_don_t_make_sense_anymore.html.

¹³⁸ See Sherrilyn Ifill & Emily Bazelon, *Supreme Court: Does Diversity Matter?*, NPR (July 15, 2009), <http://www.npr.org/templates/story/story.php?storyId=106647145> (discussing the established track of appointment to the Supreme Court from the lower federal courts).

¹³⁹ See generally Ciara Torres-Spelliscy, Monique Chase, & Emma Greenman, *Improving Judicial Diversity*, BRENNAN CENTER FOR JUSTICE (2010).

attributes of federal judges, including their religions.¹⁴⁰ These datasets indicate that religious diversity, while greater on lower federal levels, is still problematic, especially concerning the non-religious.¹⁴¹ Over the history of the United States courts of appeals, five sects of religion account for almost seventy percent of all judges: Episcopalian (approximately 20.2%), Catholic (approximately 17.3%), Jewish (approximately 9.0%), Presbyterian (approximately 13.4%), and Methodist (approximately 8.7%). Researchers identified zero judges—out of 677—as identifying as Atheist, Agnostic, or unaffiliated.¹⁴² Ten judges (approximately 1.5%) were listed as “unknown.”¹⁴³ These judges are not necessarily Atheist; at least one of the ten is identified as belonging to a specific religion by other sources.¹⁴⁴

The Judicial Research Initiative dataset for federal district courts reflected a very slight increase in representation by non-religious individuals.¹⁴⁵ The same five sects of religion account for a majority—64.2% to be exact—of judges that have served on the federal district court: Episcopalian (approximately 16.1%), Catholic (approximately 19.4%), Jewish (approximately 7.0%), Presbyterian (approximately 12.4%), and Methodist (approximately 9.3%).¹⁴⁶ Approximately 4.2% of the dataset—which contains information on 2,558 judges—was identified as unknown; again, this does not indicate that these judges are non-religious.¹⁴⁷ Unlike the court of appeals database, however, two judges who have served on a United States district court were identified as Agnostic—0.1% of the

¹⁴⁰ *Attributes of U.S. Federal Judges Database*, THE JUD. RES. INITIATIVE AT THE U. OF S.C., <http://artsandsciences.sc.edu/poli/juri/attributes.htm> (last visited Mar. 18, 2016). The information for the Court of Appeals contains data from judges serving from 1801 to 2000 and partial information for those serving until 2004—overall, 677 judges. *Id.* The federal district court dataset contains data from judges who served from 1789 to 2000 and partial information for those serving until 2004—overall, 2,558 judges. *Id.*

¹⁴¹ See *id.* (reporting a low amount of non-religious judges on the federal bench as compared to national levels of non-religious individuals).

¹⁴² See *id.*

¹⁴³ The ten judges were: Mary Beck Briscoe, Eric L. Clay, Ransey Guy Cole Jr., Merrick B. Garland, Theodore Alexander McKee, Margaret M. McKeown, Johnnie B. Rawlinson, Sidney Runyan Thomas, Kim McLane Wardlaw, and Diane Pamela Wood. See *id.*

¹⁴⁴ Judge Merrick B. Garland—at the time of writing, a nominee for Justice Scalia’s vacant seat on the Court—is Jewish. See *Merrick B. Garland*, NNDB, <http://www.nndb.com/people/049/000208422/> (last visited Mar. 18, 2016).

¹⁴⁵ See *Attributes of U.S. Federal Judges Database*, *supra* note 132.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* Unknown may indicate a judge’s preference to refrain from disclosing her religious identity. See *also supra* note 38.

dataset.¹⁴⁸ Four judges (approximately 0.2%) also were identified as unaffiliated.¹⁴⁹ Just as with the judges who have served on federal courts of appeal, zero of the judges who have served on the federal district courts have identified as Atheist.¹⁵⁰

In a country where 22.8% of citizens identify as religious “nones”—3.1% Atheist and 4.0% Agnostic—there remains sparse representation of these religious beliefs on the federal bench.¹⁵¹ The Judicial Research Initiative’s Study provides valuable information concerning the religious identification of judges who have served on the federal courts; however, no similar study has been conducted across the state courts.¹⁵² The overall lack of representation in the judiciary reflects that any unique perspective Atheists may provide to the law is not heard and also negates the legitimacy of the institution.¹⁵³ It is likely that Atheists have served in both the state and federal judiciaries but, due to social stigma, withheld their non-religious affiliation. However, despite this invisible participation of Atheists on the judiciaries, this does not resolve issues regarding the legitimacy of the judiciaries as democratic institutions and does not help to improve the social perception of Atheists.

B. The Influences of a Judge’s Religion on Decision-Making and the Public

While religious diversity in the judiciary has grown since the inception of the United States, today the judiciary is still unreflective of the demographics of the general population, specifically as it relates to Atheists.¹⁵⁴ Though statistics are clear,

¹⁴⁸ See *id.* The two Agnostic judges identified were Arnold Krekel and Benjamin Tappel. *Id.*

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

¹⁵¹ See *Attributes of U.S. Federal Judges Database*, *supra* note 132 (identifying zero non-religious judges on the federal Court of Appeals and two judges, 0.1% of the judges who have served on the court, as Agnostic in the federal district courts); see also *supra* Subsection I.C.3.

¹⁵² Some state judges are openly Atheist. James Schlarmann, *Atheist Alabama Judge to State’s Chief Justice: I Can’t Find God’s Signature on the Constitution*, THE POLITICAL GARBAGE CHUTE (Jan. 11, 2016), <http://www.politicalgarbagechute.com/atheist-alabama-judge-cant-find-gods-signature-on-constitution/>. However, it can be difficult to determine whether a judge does ascribe to Atheism or is simply identified as Atheist by the media or political groups following controversial rulings on religion cases. See, e.g., *Atheist Judge Fires Shot in War on Christmas*, RAISE THE FLAG REPORT (Nov. 17, 2015), <http://raisetheflagreport.com/atheist-judge-fires-shot-in-war-on-christmas/>.

¹⁵³ See *infra* Section II.B.

¹⁵⁴ See *supra* Section I.A.

the practical impact of the lack of religious diversity on the bench is less so. Scientific literature demonstrates that religion can influence judicial decision-making, though it does so on a level comparative to other demographic factors, such as age and class.¹⁵⁵ Additionally, diversity, or lack thereof, can impact how marginalized groups feel about the judicial system and can allow for unique perspectives to be considered at high levels of government.¹⁵⁶

1. Religion's Influences in the Judiciary

Significant literature has been dedicated to determining how judges—Supreme Court justices, in particular—make their decisions and, more specifically, what factors influence these decisions. Two primary theories of judicial decision-making have emerged from this literature: (1) the legal mode, and (2) the attitudinal model.¹⁵⁷ Under the legal model, a judge decides disputes “in light of the facts of the case vis-à-vis precedent, the plain meaning of the Constitution and statutes, the intent of the framers, and a balancing of societal versus constitutional interests.”¹⁵⁸ Conversely, under the attitudinal model, a judge “decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.”¹⁵⁹ While the reality of judicial decision-making likely lies somewhere in between these two models, their interaction underscores the importance of understanding the significance of religion as an influential ideological value in the judge's decision-making.¹⁶⁰

Several empirical studies have demonstrated that religion has a role in determining the disposition and selection of cases in appellate courts, but that it typically only matters in certain kinds of cases.¹⁶¹ Not surprisingly, religion has the most discernible impact on cases dealing directly with religion, such as free-exercise cases.¹⁶² Studies from Frank J. Sorauf and Gregory C. Sisk demonstrated that, when free-exercise and establishment cases are

¹⁵⁵ See *supra* Section II.A; see also *infra* Subsection II.B.1.

¹⁵⁶ See *infra* Subsection II.B.2.

¹⁵⁷ See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 64-65 (2002).

¹⁵⁸ *Id.* at 64.

¹⁵⁹ *Id.* at 65.

¹⁶⁰ See *id.*

¹⁶¹ Brian H. Bornstein & Monica K. Miller, *Does a Judge's Religion Influence Decision Making?*, 45 *AMERICAN JUDGES ASS'N* 112, 113-14 (2009) (“[J]udges' religion matters in some types of cases but not others.”).

¹⁶² *Id.* at 114.

considered, the most prominent factor influencing the judges’ decisions was religion.¹⁶³ For example, Jewish judges tend to vote in favor of greater separation between church and state, while Catholics tend to vote in favor of state accommodation of religious exercise.¹⁶⁴

Outside of cases dealing specifically with religion, studies have attempted to find general trends of decision-making based on the religion of the judge.¹⁶⁵ One study found Catholic judges were more likely to decide in favor for injured persons and persons of lower economic status, as opposed to Protestant judges.¹⁶⁶ Another study found that, for cases dealing with gay rights, Jewish judges were more likely to side with LGBT petitioners than Protestant judges, and Catholic judges were the least likely to side with LGBT petitioners.¹⁶⁷ In part, scholars attribute the ability to identify Catholic-judging trends on the fact that the Catholic Church has taken explicit moral positions on specific social issues; however, this social guidance from a central authority is not present for all religions.¹⁶⁸

Despite these trends, studies have also found religion to have no influence on judicial decision-making in a number of cases.¹⁶⁹ As described, findings do indicate that in some cases, a judge’s religious affiliation makes her more likely to decide in a specific way in a particular case—but, other than in free-exercise and establishment cases, this is not the sole statistically significant factor.¹⁷⁰ Thus, while religion can help to explain why a judge decides the way she

¹⁶³ See *id.* at 114–15. According to Sorauf, “Nothing explains the behavior of the judges in these church-state cases as frequently as do their own personal religious histories and affiliations.” *Id.* at 114 (quoting FRANK J. SORAUF, *THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE* (1976)). Similarly, Sisk concluded that “the single most prominent, salient, and consistent influence on judicial decision making was religion—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community.” *Id.* at 115 (quoting Gregory C. Sisk et al., *Searching for the Soul of Judicial Decision Making: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004)).

¹⁶⁴ *Id.* at 114.

¹⁶⁵ See generally *id.*

¹⁶⁶ *Id.* at 113 (“Catholic judges were more liberal in certain types of cases, in the sense of being more likely to side with injured persons and to vote for the economic underdog.”).

¹⁶⁷ *Supra* note 152.

¹⁶⁸ See *id.* at 115.

¹⁶⁹ See *id.* at 113.

¹⁷⁰ See *id.* at 115.

does, it is only “another factor to consider,” not the sole deciding factor.¹⁷¹

2. Impact of a Lack of Diversity on the Public

While literature demonstrates that the effect of religion on individual judges is comparable to that of other demographic factors, perhaps the most consequential effect of the lack of religious diversity on the bench is public perception. Diversity on the bench—whether racial, gender, religious, or otherwise—adds legitimacy to the institution through symbolic and functional representation.¹⁷² The existence of specific minority populations on the judiciary helps the judicial system to be perceived as fair because this symbolic representation makes clear that positions of power and influence are accessible to the minority population.¹⁷³ As the population of Atheists rises in the United States, the notion of majority rule in a representative democracy calls for a similar rise of Atheists in positions of power in government.¹⁷⁴ This is especially important to groups that have been traditionally marginalized or excluded from the political process,¹⁷⁵ as it may change public perception of that group.¹⁷⁶

Diversification helps prove the judiciary to be a legitimate institution through its creation of a “distinctive medley of views.” As Justice Ruth Ginsburg once stated in reference to the rise of women’s rights:

A system of justice is the richer for the diversity of background and experience of its participants. It is the poorer, in terms of evaluating what is at stake and the impact of

¹⁷¹ See *id.*

¹⁷² Theresa M. Beiner, *White Male Heterosexist Norms in the Confirmation Process*, WOMEN’S RTS. L. REP. (forthcoming 2012) (manuscript at 15–16), available at <http://ssrn.com/abstract=1706164>.

¹⁷³ *Id.* at 15.

¹⁷⁴ See Zachary Baron Shemtob, *The Catholic and Jewish Court: Explaining the Absence of Protestants on the Nation’s Highest Judiciary*, 27 J.L. & RELIGION 359, 360 (2012).

¹⁷⁵ See *supra* Subsection I.C.2.

¹⁷⁶ See Beiner, *supra* note 163, at 19–20; see also Chris Weller, *The Next Supreme Court Justice Should Be an Atheist for One Simple Reason*, Tech Insider (Feb. 20, 2016, 12:00 PM), <http://www.techinsider.io/why-the-next-supreme-court-justice-should-be-an-atheist-2016-2> (“[H]aving an openly atheistic justice sends an official message that non-believing people can be morally right – in a country where a person’s goodness is often equated with the depth of their faith”).

its judgments, if its members—its lawyers, jurors, and judges—are all cast from the same mold.¹⁷⁷

As Justice Ginsburg alluded, diversity highlights the importance of functional representation as well as symbolic representation.¹⁷⁸ Electing or appointing an Atheist to the bench would ensure that the viewpoint and life experience of Atheists is considered; the Atheist judge may also choose to advocate for the interests of Atheists as a group.¹⁷⁹

The prospect of having Atheist judges appointed or elected to the bench has multiple benefits. First, religion—or the lack thereof—has a discernible impact on judicial decision-making.¹⁸⁰ Second, this diversity on the bench legitimizes the judicial system to the Atheist community, indicating that positions of power are available to their group.¹⁸¹ Third, an Atheist judge brings her unique perspective to the bench and may advocate for her community.¹⁸² Considering the importance of diversity in the judiciary, it is worth analyzing what role religion plays during the judicial election and appointment processes.¹⁸³

C. The Role of Religion in the Judicial Election and Appointment Processes

Although having Atheism represented in the judiciary would encourage the sharing of a unique perspective, improve the perception of the judiciary as a fair institution, and potentially inspire change in the public’s perception of Atheism,¹⁸⁴ Atheists have not been elected or appointed to the bench in numbers reflective of their general makeup in the United States population.¹⁸⁵ On the federal level, judges are appointed; on the state level, judges are either appointed or elected. Where judges are

¹⁷⁷ Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 SW. U. L. REV. 189, 189–90 (2003) (internal quotation marks omitted).

¹⁷⁸ See Beiner, *supra* note 163, at 15–16.

¹⁷⁹ *Id.* at 17.

¹⁸⁰ See *supra* Subsection II.B.1.

¹⁸¹ See Beiner, *supra* note 163, at 15.

¹⁸² *Id.* at 17.

¹⁸³ See *infra* Section II.C.

¹⁸⁴ See *infra* Section II.B.

¹⁸⁵ See *supra* Section II.A. Statistics are generally unavailable for religious affiliation of lawyers or law students, the two groups within the pipeline to the judiciary.

elected, an openly Atheist candidate faces a clear disadvantage; studies demonstrate that Atheism is among the most significant drawbacks for an election candidate, as the general public perceives Atheists to be less moral.¹⁸⁶ In elections where voters are typically uninformed of the candidates' qualifying characteristics, such as legal education and experience, and overwhelmed with "bad information"—such as partisan affiliations and personal stances on controversial issues—information concerning a judge's religion or non-religion may have a great effect.¹⁸⁷ Additionally, political action committees ("PACs") centered on religious beliefs may donate and actively support judicial candidates during elections.¹⁸⁸

In the federal appointment process, past presidents have considered religion as a proxy for how the candidate would vote on specific political issues.¹⁸⁹ Additionally, the appointment of a candidate of a particular religion may lead voters of that religion to support the appointing president.¹⁹⁰ This may have particular relevance to appointments on the Supreme Court, where political discourse always exists as to the makeup of Catholic justices, Jewish justices, and Protestant justices on the bench.¹⁹¹ Despite the consideration of religion as a tool for predicting how a future justice may rule, some scholars conclude that the religious makeup is overwhelmingly due to candidates of specific religions being "in the

¹⁸⁶ See *How Religion is Shaping the 2016 Presidential Race*, *supra* note 91. While this particular study was focused on presidential candidates, judges are also perceived as making moral choices. *Id.*

¹⁸⁷ See Jordan M. Singer, *Knowing Is Half the Battle: A Proposal for Prospective Performance Evaluations in Judicial Elections*, 29 U. ARK. LITTLE ROCK L. REV. 725, 726–30 (2007).

¹⁸⁸ See Henry Glass, *Justice for Sale? More Money Flowing to Judicial Elections*, THE CHRISTIAN SCI. MONITOR (Nov. 2, 2014), <http://www.csmonitor.com/USA/Justice/2014/1102/Justice-for-sale-More-money-flowing-to-judicial-elections>; Debra Lehrmann, *Christian Attorneys for Texans PAC Endorses Justice Debra Lehrmann*, JUDGE DEBRA LEHRMANN (Feb. 21, 2016), <http://75.103.78.169/wp/christian-attorneys-for-texans-pac-endorses-justice-debra-lehrmann/>. *But see* FREETHOUGHT EQUALITY FUND PAC, <http://freethoughtequality.org/> (last accessed Dec. 9, 2016).

¹⁸⁹ Tuan Samahon, *The Judicial Vesting Option: Opting out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 798 (2006).

¹⁹⁰ *Id.*

¹⁹¹ See *id.*; see also, e.g., Michelle Boorstein, *The Supreme Court Could Become Mostly Liberal Jews and Conservative Catholics*, WASH. POST (Mar. 16, 2016), <https://www.washingtonpost.com/news/acts-of-faith/wp/2016/03/16/the-supreme-court-could-become-mostly-liberal-jews-and-conservative-catholics/>; Dan Gilgoff, *A Supreme Court Without Protestants?*, CNN (Mar. 10, 2010, 9:53 AM), <http://www.cnn.com/2010/POLITICS/05/03/supreme.court.protestants/>.

right place at the right time.”¹⁹² Additionally, the actual questioning of candidates during confirmation hearings regarding their religion occurs rarely, if ever, and is largely viewed as inappropriate and irrelevant to the fitness of the candidate for her duty.¹⁹³

Overall, it is difficult to surmise how much of an effect a candidate’s religion may have on her appointment or election to judgeship. Religion likely has a greater effect in elections, where voters’ perceptions of a candidate could be harmed by their declaration of Atheism and where PACs focused on religion donate and support campaigns publicly. With appointments, where appointing bodies sometimes have used religion as a proxy for predicting decision-making, the effects of religion are more subtle and difficult to identify.

Very few Atheists have served on the federal and state judiciaries, despite increasing amounts of Americans who identify as Atheist or non-religious.¹⁹⁴ Though it is difficult to define the extent of the influence of a non-religious affiliation in the appointment or election processes, the social stigma of Atheism likely makes both the voters less likely to vote for an Atheist candidate and the appointing official less likely to appoint an Atheist candidate. This results in a judiciary that does not reflect the diversity of the American population, calling into question the legitimacy of the judiciary as a representative institution.¹⁹⁵

III. BRINGING ATHEISM TO THE BENCH

Currently, 3.1% of Americans—nearly ten million people—identify as Atheist; another 19.7%—or nearly sixty-three million people—identify as agnostic or as a religious “none.”¹⁹⁶ Despite this growing proportion of the population that identifies with non-belief, zero self-identified Atheists have served in the federal judiciary

¹⁹² See Zachary Baron Shemtob, *The Catholic and Jewish Court: Explaining the Absence of Protestants on the Nation’s Highest Judicial Body*, 27 J.L. & RELIGION 359, 396 (2012).

¹⁹³ DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW* 156 (2003) (describing an e-mail response to author by Professor Richard K. Neumann, Jr., from Hofstra Law School).

¹⁹⁴ See *supra* Section II.A.

¹⁹⁵ See *supra* Subsection II.B.2.

¹⁹⁶ *Religious Landscape Study*, *supra* note 2.

prior to 2004,¹⁹⁷ and very few have served in the state judiciary.¹⁹⁸ Since no comprehensive study exists detailing the religious affiliation of law students and lawyers—groups serving the pipeline to the judiciary—it is assumed that similar percentages of these groups are Atheist. Some studies indicate that the proportion of Atheists within the lawyering profession may even be higher than that of the general population.¹⁹⁹ Despite availability of Atheists, they are not being elected or appointed to the judiciary—nor are they choosing to keep their non-religious affiliation private.

Having openly-identified Atheists serving on the judiciary would ensure that a unique perspective is represented on the bench, which will improve the legitimacy of the judiciary as a fair, representative government body.²⁰⁰ Though studies demonstrate that religion has no greater effect than other demographic factors, having a variety of these demographic factors represented ensures that no single factor has a decisive impact on the judiciary as a whole.²⁰¹ Religious diversity is also important for the purposes of functional representation.²⁰² When religious diversity is achieved, judges can more adequately address the impact of the issues before them and consider the viewpoints of a diverse selection of litigants.²⁰³

Without the symbolic representation of Atheism in the federal and state judiciaries, the public may perceive the judiciaries as unfair or inaccessible to Atheists.²⁰⁴ When a group is excluded from the “mechanisms of justice,” the group may perceive the

¹⁹⁷ See *Attributes of U.S. Federal Judges Database*, *supra* note 132. Though this database is comprehensive only through 2004, searches by other means did not discover any Atheists who have served on the federal judiciary between 2004 and 2016. *Id.*

¹⁹⁸ See *id.* and accompanying text.

¹⁹⁹ See Alan Payne, *Redefining “Atheism” in America: What the United States Could Learn from Europe’s Protection of Atheists*, 27 EMORY INT’L L. REV. 661, 678–79 (2013) (“[A]theists tend to be better educated, more upwardly mobile, and overrepresented among scientists.”); see also Jordan Lorence, *Atheists and Agnostics Are the Largest Affiliation of Yale Law School Students*, THE CHRISTIAN POST (Nov. 4, 2011, 1:03 PM), <http://blogs.christianpost.com/liberty/atheists-and-agnostics-are-the-largest-affiliation-of-yale-law-school-students-7454/>, which reported that in Yale Law School, 34% of law students identify as Atheist and Agnostic. However, the article does not identify the source of the statistics cited and this author was unable to find the statistics hosted elsewhere. *Id.*

²⁰⁰ See *supra* Section II.B.

²⁰¹ See Bornstein & Miller, *supra* note 152, at 114.

²⁰² See Beiner, *supra* note 163, at 15.

²⁰³ See Ginsburg, *supra* note 168, at 190.

²⁰⁴ See Beiner, *supra* note 163, at 15–16.

institution and its decisions as illegitimate and distrustful.²⁰⁵ With over ten million Americans identifying as Atheists and zero federal judges openly identifying as such, a perception of exclusion exists, even if Atheists are not being intentionally, specifically excluded by law.²⁰⁶

While most categories of diversity—race, gender, religion, and others—satisfy the goals of functional and symbolic representation, the inclusion of Atheists specifically serves to mend perceptions of a historically and currently marginalized, distrusted group of people.²⁰⁷ Atheism is criticized openly by public officials, and laws mandating religious tests for public office remain on the books despite their clear unconstitutionality.²⁰⁸ Having Atheists in influential positions in government—such as judgeships—indicates that this marginalization does not extend to determinations of justice, and may indicate a lessening of societal prejudice directed towards Atheists. In this way, the inclusion of Atheists both bolsters the perception of legitimacy of the judiciary for the ten million Americans who identify as Atheists, and also may aid in decreasing societal prejudice against Atheists.

Though acknowledging the benefits of diversity is fairly simple, the implementation of diversity is more complex.²⁰⁹ First, implementing diversity initiatives on limited budgets may require determining which types of diversity receive the most funding or focus. The federal judiciary has overwhelmingly consisted of white Christian heterosexual males, leaving arguments open for increasing diversity as to gender, race, sexual orientation, disability, political affiliation, age, and economic status.²¹⁰ While some minority groups within these categories have representation in the judiciaries, albeit minimal, Atheists have zero or only scarce representation in the judiciaries.²¹¹ Studies have also identified Atheists as a globally mistrusted and marginalized group.²¹² Atheists are believed to be morally decrepit—and more so than

²⁰⁵ *Diversity in the Legal Profession: The Next Steps*, AMERICAN BAR ASS'N at 9 (April 2015), http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf.

²⁰⁶ *See id.*; *see also Religious Landscape Study*, *supra* note 2.

²⁰⁷ *See The Freedom of Thought Report 2015*, *supra* note 95, at 14–16.

²⁰⁸ *See supra* note 84–91 and accompanying text.

²⁰⁹ *See Diversity in the Legal Profession: The Next Steps*, *supra* note 205 (advocating for various strategies to improve diversity beyond data-gathering).

²¹⁰ *See Attributes of U.S. Federal Judges Database*, *supra* note 132.

²¹¹ *See id.*

²¹² *See supra* Subection I.C.2.

other minority groups such as LGBTQ+ members, Muslims, or feminists.²¹³ Atheism, in relation to political candidates, is also perceived as a greater drawback than having financial struggles, participating in extramarital affairs, or utilizing drugs frequently.²¹⁴ Though Atheism has an extremely negative societal perception, the percentage of Americans identifying as Atheist is rapidly increasing.²¹⁵ Diversity initiatives benefiting Atheists will help an increasingly large proportion of the American public and a group of persons that continues to battle significant prejudice. Though this does not negate the importance of pursuing other diversity goals such as race and gender, it underscores the importance of supporting Atheism in particular.

Another difficulty facing the implementation of religious diversity initiatives toward the judiciary is the private nature of religious beliefs. Normative objections exist as to whether judges should disclose their religious affiliation and whether religion affects their decision-making abilities.²¹⁶ Being able to assess religious diversity implies the necessity of knowing the religious affiliation of most or all judges, which may be objectionable to those who are against such disclosure in public service.²¹⁷ However, the database compiled by the Judicial Research Initiative at the University of South Carolina retrieved information on over 3,000 judges with very few entries reflecting unknown religious affiliation.²¹⁸ This indicates that judges who wish to keep their religious affiliation private may continue to do so without sacrificing the availability of significant statistical data.

Finally, seeking to increase the amount of Atheists on the bench remains difficult because of the lack of data available. Comprehensive statistics as to religious affiliation of federal judges exist only through 2004.²¹⁹ No such database exists containing information about the religious affiliations of state judges.²²⁰ Additionally, very limited to no data is available regarding the religious affiliations of those in the pipeline to becoming judges,

²¹³ See Gervais, *supra* note 69.

²¹⁴ See *How Religion is Shaping the 2016 Presidential Race*, *supra* note 91.

²¹⁵ See *Religious Landscape Study*, *supra* note 2.

²¹⁶ See Pinello, *supra* note 184, at 155–61. Professor Daniel Pinello received significant critique from fellow law professors following a solicitation for information related to the religious affiliations of judges in the course of his research. *Id.*

²¹⁷ See *id.* at 156.

²¹⁸ See *Attributes of U.S. Federal Judges Database*, *supra* note 132.

²¹⁹ See *id.*

²²⁰ See *supra* note 143 and accompanying text.

such as law students and practicing attorneys. Because the United States Census Bureau is prohibited from asking questions regarding religious affiliation, the onus for collecting this data falls on academic programs and research companies.²²¹

Despite the difficulties of implementing religious diversity in the judiciary, there remain viable options to facilitate the presence of Atheist judges. Atheism should be recognized as a diversity initiative within the legal profession and political arena, similar to the promotion of females and minorities.²²² In practical terms, a diversity initiative would seek to educate and publicize the lack of Atheist representation in the judiciary and promote the benefits of such representation. It would advocate for and demonstrate how decision-makers in the industry can implement methods encouraging diversification in their hiring and promoting processes. Education concerning the lack of representation of Atheists within the judiciary and the need for change will encourage the consideration of non-religious affiliation during the appointment process—similar to gender and race—and spur the nomination of Atheist lawyers to the federal bench.²²³

However, for Atheism to be recognized as a diversity initiative, Atheism must first combat its societal stigma so it may be acknowledged as a viable, desirable perspective both inside the judiciary and in public life. Clearly, no one-step solution exists to curing prejudice; still, Atheists may take advantage of the examples of marginalized groups battling prejudice that have come before them. Social psychologists, initially studying racial prejudice, have advocated that prejudice stems, in part, from the lack of positive contact among members of specific groups; this is called the Intergroup Contact Theory.²²⁴ Unlike race or gender, which are visible on some level to the outside observer, exposure to Atheism typically requires an affirmative action on part of the non-believer. In order to utilize the Intergroup Contact Theory to decrease prejudice, Atheists must affirmatively identify themselves to other persons.²²⁵ This is no small task, given the societal stigma attached to being Atheist. Regardless of the difficulty, the reward is great. The more that individuals are exposed to positive interactions with

²²¹ See *supra* note 37.

²²² See *Diversity in the Legal Profession: The Next Steps*, *supra* note 196.

²²³ See Samahon, *supra* note 180, at 817–19.

²²⁴ Sheri R. Levy, Lisa Rosenthal & Alberto Herrera-Alcazar, *Racial and Ethnic Prejudice Among Children*, in *THE PSYCHOLOGY OF PREJUDICE AND DISCRIMINATION* 39 (Jean Lau Chin ed., 2009).

²²⁵ Will Gervais, *Please Don't Be That Atheist*, WILL GERVAIS (Mar. 25, 2016), <http://willgervais.com/blog/2016/3/25/please-dont-be-that-atheist>.

self-identified Atheists, the lesser prejudice they will hold.²²⁶ Similarly, Atheists who have served or currently serve in the judiciary should publicly acknowledge their affiliation with non-belief. As with the Intergroup Contact Theory, this increase in exposure of Atheists will help to alleviate social stigma. It will also indicate to outsiders that Atheists are capable of making moral judgments and being a responsible part of the government machinery.

While individual declarations of Atheism can help alleviate social stigma and indicate the abilities of Atheists, on a macro level, mass organization of Atheists may provide the vehicle necessary for Atheism to become a politically powerful movement.²²⁷ Various obstacles stand in the way of a unified movement, including the diversity of non-belief²²⁸ and predispositions of individuality and nonconformity generally held by Atheists.²²⁹ If Atheists are able to conquer these obstacles, their growing proportion of American society will correlate to political lobbying power.²³⁰ This power may include the platform to advocate for the inclusion of Atheists in the judiciary via appointment or election, or to provide political pressure to presidential administrations considering judicial appointments. Though positive benefits could result from creating a central organization for American Atheists, it may also create tension with the goal of reducing social stigma. Considering popularized notions that Christianity, despite being the majority religion in America, is under attack, the formation of a powerful Atheist lobby may create a fearful backlash of prejudice.²³¹

Organization on a smaller scale may be the best solution to balance fears of the religious majority but still provide the benefits of centralized organization. Local community groups can provide social contact between religious Americans and Atheists, providing a positive, non-threatening perspective of Atheists through

²²⁶ See Payne, *supra* note 199, at 684 (“It is therefore possible that as atheists become more visible to the average American, this visibility will provide an opportunity for people to reevaluate their prejudices and engage in dialogue. This could provide the impetus for Atheists to enjoy the same increase in social acceptance experienced by other minorities over the last fifty years.”).

²²⁷ See *id.* at 678–79.

²²⁸ See *supra* Subsection I.C.1.

²²⁹ See Payne, *supra* note 190, at 678.

²³⁰ See *id.* at 678–79.

²³¹ *Id.* (“As their numbers grow, atheists become increasingly visible in society, more atheists challenge laws they view as discriminatory or as endorsing religion, and the religious majority will feel increasingly that ‘religion is under attack,’ thus contributing to a greater stigma.”).

activities such as charity work or community events. On the professional development level, Atheists can seek the establishment of an American Bar Association commission.²³² Commissions dedicated to diversity in the profession currently include Racial & Ethnic Diversity in the Profession, Women in the Profession, and Sexual Orientation and Gender Identity.²³³ A similar commission established for the promotion of Atheist attorneys would seek to ensure that Atheist attorneys receive the same opportunities as religiously affiliated attorneys and would also provide a network for attorneys facing difficulties with associated social prejudice.

While education, organization, and public self-identification may appear to be roundabout solutions to achieving the presence of openly Atheist judges on the judiciary, more dramatic solutions have a low probability of realistic implementation. More dramatic approaches—like mandating that a certain amount of Atheists serve on the judiciary, or even that a certain amount of Atheists are considered for a position—would likely result in greater numbers of Atheists being appointed or elected to the bench and more quickly.²³⁴ However, even assuming a legal ability exists to do so, these approaches are highly unlikely to be implemented because they require the prioritization of religious diversity over race and gender diversity. It is difficult to argue that one particular form of diversity is more important than the others as to merit state implementation of one over the rest. It would be especially difficult to advocate for such state support for a non-religious identification diversity initiative where these initiatives have failed in more mainstream and recognized diversity initiatives, such as women in the law.²³⁵

Implementing non-religious diversity on the judiciary, as an institution of a democratic republic, necessitates the challenge of social prejudice existing against Atheism. Atheists may help battle this stigma by openly self-identifying as such, demonstrating to religious Americans that Atheists are also everyday Americans.²³⁶ While no one theory of belief defines all Atheists, making

²³² See American Bar Ass’n, Centers & Commissions, http://www.americanbar.org/groups/centers_commissions.html (last visited Apr. 10, 2016).

²³³ *Id.*

²³⁴ See Paula A. Monopoli, *Gender and Justice: Parity and the United States Supreme Court*, 8 GEO. J. GENDER & L. 43, 46-48 (2007) (advocating for a constitutional amendment requiring gender parity on the United States Supreme Court).

²³⁵ See generally *id.*

²³⁶ See Payne, *supra* note 190, at 684.

organization difficult, Atheists who are able to organize can fight social stigma on a greater level. Organizations may also help Atheists network and provide professional support to one another. Finally, institutions like the American Bar Association should recognize Atheism as a diversity initiative, funding education regarding the benefits of inclusion of non-religious persons in the profession and advocating for their appointment or election to the judiciary.

CONCLUSION

As the number of Atheist Americans continues to rise—and rise at a greater rate than religions—the lack of Atheist persons serving on the judiciary is problematic.²³⁷ While religious affiliation may only affect decision-making to the same extent as other demographic factors, the non-inclusion of Atheists challenges the fairness of the judiciary.²³⁸ A judiciary that is not reflective of the general population excludes certain American perspectives and illegitimizes the institution through implication that these perspectives are not valued.²³⁹ For a group traditionally and currently marginalized such as Atheists, the lack of inclusion also indicates that the doors to powerful decisions in government, including those that ensure justice, are closed to them.²⁴⁰ To remedy this problem, the inclusion of Atheists should be recognized as a diversity initiative.²⁴¹ Organizations such as the American Bar Association can help to demonstrate why this inclusion is important and what can be done to promote this ideal.²⁴² On a more micro level, Atheists can personally help to combat the social prejudice that supports this exclusion by identifying themselves openly and creating community organizations.²⁴³ Through organization, education, and self-identification, social prejudice can be weakened; allies in decision-making capacities who are educated through diversity initiatives will help ensure the inclusion of atheists on the bench.²⁴⁴

²³⁷ See *supra* Section I.C.

²³⁸ See *supra* Section II.B.

²³⁹ See *supra* Section II.B.

²⁴⁰ See *supra* Section II.B.

²⁴¹ See *supra* Part III.

²⁴² See *supra* Part III.

²⁴³ See *supra* Part III.

²⁴⁴ See *supra* Part III.