

## Scopes Trial (1925)

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### Clarence Darrow's Most Famous Trial

By 1925 Clarence Darrow was already one of the most well-known attorneys, if not the most famous in the country, because of several important cases. He first became known nationally to some extent during the Pullman strike in 1894, and much more so with the Haywood trial in 1907. Three years later the *Los Angeles Times* bombing, in which twenty-one people were murdered, was front page news across the country. Darrow's fame grew when he was hired to defend the McNamara brothers, who were charged with the bombing.

Darrow's defense in the McNamara case led to his indictment and trial for jury bribery in two separate trials. He repaired his reputation and continued practicing law and taking on some controversial cases. Darrow was also well known to the public because of his writings and frequent speeches, debates and pronouncements on various social issues of the day. But it was the Leopold and Loeb case in 1924 that propelled Darrow into the national headlines more than any of his previous cases. The case garnered interest around the country and even worldwide. Just a year later, the Scopes trial would surpass even the Leopold and Loeb case in public interest and lasting impact. It would ensure Darrow's reputation as the most famous lawyer of his day, and one of the most famous in American history.

### Key Players

#### Scopes Defense Team

**Clarence Darrow:** At the age of sixty-eight, Darrow was at the pinnacle of his career and likely the most famous lawyer in the United States. His participation in the Scopes trial came less than a year after his defense of Leopold and Loeb, in which he saved them from the death penalty in the "trial of the century." Darrow would gain even greater fame during the Scopes trial. Darrow was a very vocal critic of religion and an ardent believer in science. He often called himself an agnostic, although he could easily be seen as an atheist. Upon learning that William Jennings Bryan volunteered to help the prosecution, Darrow volunteered to help defend John Scopes.

**Arthur Garfield Hays:** Newly appointed as general counsel for the fledgling ACLU (American Civil Liberties Union), Hays was a very successful attorney who did extensive legal work for civil liberty causes he believed in. About a year after the Scopes trial, he would team up with Darrow in the Sweet murder trials in Detroit. Hays would also later defend Sacco and Vanzetti.

**Dudley Field Malone:** Malone was a successful lawyer who specialized in international divorces for wealthy clients. He was also Third Assistant Secretary for William Jennings Bryan when Bryan was Secretary of State for Woodrow Wilson. Malone gained a note of respect from courtroom observers for keeping his suit coat on during the trial despite the searing temperature in the courtroom. He only took off his coat when delivering his famous speech. Malone's stirring speech for freedom was regarded by many as the best of the entire trial.

**John R. Neal:** Neal was actually the official chief counsel for the defense, with Darrow and the others acting as assistant counsel. Neal was an eccentric law professor and a determined advocate for civil liberties issues.

Neal obtained an M.A. and a law degree from Vanderbilt University, and a Ph.D. in history from Columbia University. He then went to Colorado and taught law at the University of Denver before returning to Tennessee in 1907. Back in Tennessee, Neal won election to the Tennessee General Assembly. Two years later, he won election to the Tennessee Senate. In 1917, Neal was hired to teach at the University of Tennessee College of Law.

As a law professor, Neal was liked by his students, but his eccentric personality irked the school's administration. He failed to turn in grades on time and even failed to grade some exams. He told one class that they would all get a grade of 90 without taking an exam, and anyone who objected could take the exam. He often missed class and when he did show up he focused more on discussion of current events than teaching law.

Significantly, during the appeal to the Tennessee Supreme Court Neil failed to file the defense's bill of exceptions on time. This upset much of the defense planning for the appeal because they were unable to appeal the trial court's ruling excluding the defense's expert testimony from biblical scholars and scientists.

**John Scopes:** Scopes was a relatively new teacher at the Rhea county high school where he had just completed his first year of teaching. He taught general science and coached the football team. Later, Scopes confirmed that he never actually taught evolution, but agreed to be the defendant for the test case because he disagreed with the anti-evolution law.

Scopes was born in Paducah, Kentucky in 1900. His family lived in Danville, Illinois for two years before moving to Salem, Illinois, where Scopes graduated from high school. Interestingly, Salem, Illinois is also the birthplace of William Jennings Bryan. Bryan

would later give the commencement address at Scopes' high school graduation ceremony.

Scopes was well-suited to be the defendant challenging the Butler Act. He was well-liked, quiet and not confrontational, and although he believed in evolution and opposed the Butler Act, he did not display contempt for religion. Because Scopes was from out of town, single, and not otherwise tied to Dayton, he did not have to risk alienating neighbors and family as might have been the case for a lifelong Dayton native.

### **Scopes Prosecution Team**

**William Jennings Bryan:** As a leader of the antievolution movement, Bryan offered to assist the prosecution during the Scopes trial. In the early 1900s, Bryan had become increasingly alarmed about the teaching of evolution in public schools and what he perceived to be the application of the "survival of the fittest" doctrine in society. He believed that the theory of evolution if applied to society could be used by the more powerful to justify marginalizing the powerless. Bryan also believed that adherence to this theory led to German militancy and contributed to the slaughter of World War I. By 1921, Bryan was one of the leading critics of evolution in the United States. However, Bryan's stance was more nuanced as he was mainly against teaching evolution in public schools at taxpayer expense. As Bryan and many of his followers viewed the issue, it was unfair that the Bible and Christianity could not be taught in public schools along with evolution. Taxpayers were paying for the very instruction they believed was undermining children's faith in their parents' religion. Bryan was also against teaching evolution as fact instead of just theory.

Bryan served as the 41st United States Secretary of State under President Woodrow Wilson. Originally trained as a lawyer, he had not practiced for about thirty years prior to the Scopes trial. Bryan is considered one of the most effective public speakers in the history of the United States. Politically, he held many views that would be considered populist; he was a member of the Democratic Party and also a devout Christian.

**William Jennings Bryan Jr.:** Bryan Jr. was the only son of William Jennings Bryan. He studied law at Georgetown University, and after becoming a lawyer, served as Assistant U.S. Attorney for the District of Arizona from 1915-1920 and as a Regent of the University of Arizona. In 1921 he moved to Los Angeles to practice law. Bryan Jr. was appointed to be the Collector of Customs for the port of Los Angeles by President Roosevelt in 1938 and was reappointed for four terms in this position. He also served as the federal commissioner for the San Francisco Exposition of 1939.

**Ben G. McKenzie:** Ben McKenzie, a retired Tennessee attorney general, joined his son on the prosecution team. Initially, McKenzie's style and humor rankled the defense, but they soon came to like him and Darrow came to be very good friends with McKenzie over the course of the trial. As the oldest attorney in the trial, he was greatly affected by the heat in the courtroom, which caused him to faint once and nearly faint again. This prompted Dudley Field Malone on the defense team to come to his aid and even offer to

pay for the installation of electric fans. McKenzie was referred to by the title of “Colonel” throughout the trial because of his previous position as an attorney general.

**Gordon McKenzie:** Gordon was the son of Ben G. McKenzie. A Dayton attorney, he supported the anti-evolution law on religious grounds.

**Herbert E. Hicks:** Herbert Hicks was recently appointed the acting Rhea County attorney. Along with his brother Sue Hicks, he agreed to prosecute John Scopes for teaching evolution in violation of Tennessee’s newly enacted anti-evolution law.

**Sue Hicks:** Sue Hicks was named after his mother, who died at his birth. A graduate of Hiwasee College and the University of Kentucky, Sue Hicks was practicing law in Dayton, Tennessee with his brother Herbert E. Hicks, the recently appointed acting Rhea County attorney, when the Tennessee antievolution law was passed and the controversy arose. Sue Hicks participated in the plan to challenge the Tennessee antievolution statute and agreed to prosecute his friend John Scopes. Supposedly, the Johnny Cash song “A boy named Sue” was based on Sue Hicks’ name.

Sue Hicks later served as a judge in Tennessee and remained interested in the issues involved within the Scopes Trial. He was greatly upset by the movie *Inherit the Wind*, which he considered a travesty of the Scopes trial. His family had to dissuade him from buying television time to set the story straight.

**Tom Stewart:** Because Stewart was the state attorney general for Tennessee’s eighteenth judicial district where Rhea County was located, he served as the lead prosecutor. He fought hard to limit the case by opposing the defense’s introduction of expert witnesses on evolution and the Bible, hoping instead to focus on whether John Scopes taught evolution and thus violated the Butler Act. Stewart engaged in most of the legal arguments for the prosecution.

Stewart later served as a Democratic United States Senator, representing Tennessee from 1939 to 1949.

## **Others**

**Judge John Raulston:** As the Eighteenth Circuit Court judge, Raulston eagerly anticipated presiding over what he knew would be the most important case in his legal career. Notably, Raulston was an ordained Methodist minister. Prior to the Scopes trial, a large part of Judge Raulston’s criminal trial work involved trials for bootlegging whiskey. Few judges have presided over a trial with such historical significance – especially when compared to their former trial experience.

**George Rappleyea:** Rappleyea was the prime instigator in challenging the Butler Act, Tennessee’s antievolution law. He believed that such a trial would generate publicity and tourism for Dayton, Tennessee, which was suffering economically. Rappleyea was a civil engineer who came from New York to Dayton to manage ironworks in the area for out-

of-state owners. He and others hatched the plan to challenge the law after he saw an ACLU advertisement in a newspaper offering to defend anyone in Tennessee who would challenge the law. Although not an attorney, he was an open supporter of Scopes, hosted defense lawyers and expert witnesses, and often sat with the defense team during the trial.

**Frank E. “Doc” Robinson:** Several Dayton residents decided to challenge Tennessee’s anti-evolution statute while talking in Robinson’s drugstore. Robinson and several others helped persuade John Scopes to be the defendant who would be charged with violating the law.

**Walter White:** White was a school superintendent who participated in the plan to have John Scopes challenge the anti-evolution statute. White would later replace George Rappleyea as the person bringing the complaint against Scopes.

**H.L. Mencken (Henry Louis) (1880–1956):** Mencken was editor of the *American Mercury* and reporter for *The Baltimore Sun*. Mencken was an iconoclast who wrote scathing attacks against the South and religion; he covered the trial for the *Baltimore Sun*. Mencken is generally credited with coining the phrase “Bible Belt” to describe the South where religious fundamentalists were influential. Prepared to find Dayton just as he envisioned it, he told his readers, “The town, I confess, greatly surprised me. I expected to find a squalid Southern village, with darkies snoozing on the houseblocks, pigs rooting under the houses and the inhabitants full of hookworm and malaria. What I found was a country town of charm and even beauty.”<sup>1</sup>

### **Significant Figures Not Directly Involved in the Scopes Trial**

**Charles Robert Darwin (1809–1882)<sup>2</sup>:** Born in Shrewsbury, Shropshire, England, Charles Darwin was not an atheist and described himself as an agnostic.

Darwin’s eventual fame grew largely out of his years spent as naturalist aboard the H.M.S. Beagle during an expedition to explore the South American coast in 1831-1836. Darwin was recommended for the expedition by a professor of botany at Cambridge, John Stevens Henslow. Darwin’s most famous work and the work most responsible for starting the evolution controversy is *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life*, which is usually abbreviated as *On the Origin of Species*. It was published in 1859 when Darwin was 50 years old.

Adding to the controversy was Darwin’s *The Descent of Man*. Published in 1871, the book argued that Darwin’s evolutionary theory applied to man just as it did to the animal kingdom. Thus, man was influenced by natural selection.

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<sup>1</sup> H.L. Mencken, *Mencken Finds Daytonians Full of Sickening Doubts About Value of Publicity*, BALTIMORE EVENING SUN, July 9, 1925, at 1. Note that several sources quote the word “horseblocks” instead of “houseblocks.”

<sup>2</sup> See *The Complete Work of Charles Darwin Online*, <http://darwin-online.org.uk/>.

**Thomas Henry Huxley (1825–1895):** Huxley was an English biologist. He was such a determined advocate of Charles Darwin's theory of evolution that he was known as "Darwin's Bulldog."

### **Antievolutionists**

**William Bell Riley:** As a prominent minister of the First Baptist Church in Minneapolis, Riley was one of the most outspoken opponents of evolution. He founded the interdenominational World Christian Fundamentals Association (WCFA) in 1919. When he neared retirement, Riley picked a young evangelist named Billy Graham to replace him. Riley's influence was substantial:

It is difficult to overstate William Bell Riley's importance to the early fundamentalist movement . . . . Riley founded and directed the first interdenominational organization of fundamentalists, served as an active leader of the fundamentalist faction in the Northern Baptist Convention, edited a variety of fundamentalist periodicals, wrote innumerable books and articles and pamphlets (including . . . a forty-volume exposition of the entire Bible), presided over a fundamentalist Bible school and its expanding network of churches, and masterminded a fundamentalist takeover of the Minnesota Baptist Convention. Besides all this, in these years William Bell Riley also established himself as one of the leading antievolutionists in America.<sup>3</sup>

**Billy Sunday:** Before his conversion at the Pacific Garden Mission in Chicago in 1891, Sunday was a very successful professional baseball player with the Chicago White Stockings. Sunday left professional baseball and devoted himself to full-time Christian work beginning at Chicago's YMCA, and then working for itinerant evangelists. In 1896, he began his own career as a preacher and became one of the most dynamic and successful evangelists in the country. It is estimated that over his lifetime, Sunday preached to over 100 million people without the aid of loudspeakers, radio or television.

Sunday is most famous for his "Sawdust Trail" preaching circuit, in which he traveled the country and spoke in temporary wooden structures or tabernacles, with sawdust covering the floor. Sunday urged his audience to trust Christ and they walked up the sawdust covered aisles to shake his hand. Sunday was also an ardent prohibitionist stating in his "Booze" sermon that "I am the sworn, eternal and uncompromising enemy of the liquor traffic. I have been, and will go on, fighting that damnable, dirty, rotten business with all the power at my command. I shall ask no quarter from that gang, and they shall get none from me."

**T.T. Martin (Thomas Theodore Martin):** In 1920, Martin became prominent in the anti-evolution movement in North Carolina when he attacked the President of Wake Forest College, William Louis Poteat, in a series of articles. In 1923, he wrote *Hell and the High Schools*, a vehement attack on teaching the theory of evolution that portrayed

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<sup>3</sup>WILLIAM VANCE TROLLINGER, JR., THE ANTIEVOLUTION PAMPHLETS OF WILLIAM BELL RILEY ix (1995).

evolutionist teachers as worse than war criminals. Martin was a vocal presence in Dayton during the Scopes trial, where he sold copies of his book *Hell and the High Schools*.

Martin held important leadership positions in national anti-evolution organizations, including the Anti-Evolution League of America and the Bible Crusaders of America. He participated in the successful campaign to enact anti-evolution legislation in Mississippi and in 1926 traveled to North Carolina to help fight to ban the teaching of evolution in public schools.

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## **William Jennings Bryan and the Anti-evolution Movement**

Since he was so influential in the anti-evolution movement and the Scopes trial, it is useful to understand how Bryan became involved in this social and legal controversy. During his more than four decades of public life, William Jennings Bryan was a formidable presence both as a religious speaker and as a major political figure. Bryan was the Democratic nominee for president in 1896, 1900, and 1908. Although he never won the presidency, he did receive between 45 and 48 percent of the popular vote. Bryan was also a former U.S. Secretary of State and a renowned speaker on various social and religious issues.

### **Concern about Evolution Being Taught in Schools**

Deeply religious, Bryan became increasingly alarmed about the influence of Darwin's theory of evolution and its impact on students in public schools and society in general. Although the controversy between evolution and religion had been going on for decades, and Bryan had long been suspicious of the theory of evolution, it was not until 1904 that he publicly addressed Darwin's theory. But it would be almost another two decades before he became sufficiently concerned to make it a focus of his speaking and writing. In 1919, he gave a speech in Baltimore entitled "Back to God" in which he briefly discussed the threat posed by Darwin's theory, which elicited a positive reaction from his audience. A decisive event occurred in 1921 when he read a book published five years previously titled *The Belief in God and Immortality*, by James H. Leuba, a psychology professor. Leuba demonstrated that a college education greatly reduced the religious beliefs that students held before attending college. Leuba also noted that very few scientists believed in God. The belief that teaching the theory of evolution in schools undermined the religious faith of students made a powerful impact on Bryan and many others.

In his autobiography, Darrow writes about the impact of Leuba's work on Bryan:

Mr. Bryan's attention was called to a book by Professor James H. Leuba, in which he stated that more than half of the instructors of modern institutions of learning are agnostics. This caused Mr. Bryan considerable anguish, so for several years he made a point of speaking in university towns and propounding a series of

questions to professors and presidents of our schools of learning--questions concerning the origin of man, which could easily have been answered if the teachers had only looked at the first and second chapters of Genesis, by which Mr. Bryan marked the examination-papers of the instructors.

The more Mr. Bryan thought about this subject, the more excited he became. The children must be saved from the infidelity of the teachers and professors. Strange how anxious old folk are apt to be over "the children." The main reason for this is that children do not act like the old people. Mr. Bryan, being orthodox in his views, of course thought that the proper remedy in the premises was to "pass a law." This shows the psychology of a fundamentalist compared with the citizens of the effete monarchies of Europe, who have never even considered passing a law against teaching evolution.<sup>4</sup>

### **Influence of World War I**

Another decisive factor that turned Bryan into an avowed opponent of Darwin's theory was the mass slaughter of World War I. Bryan deplored the massive loss of life that resulted from the war. Mystified as to how "supposedly Christian nations could engage in such a brutal war," Bryan found answers in two books which identified "misguided Darwinian thinking" as the problem.<sup>5</sup> In *Headquarters Nights*, Vernon Kellogg, a well respected zoologist at Stanford University, described his experiences as a peace worker in post-war Germany during which he met German military leaders. First published in the *Atlantic Monthly* in 1917,

[Kellogg's work] made explicit the association of Darwinian theory, especially the depiction of nature as struggle, with German war ideology during World War I. Kellogg's anti-Darwinian and anti-German rhetoric influenced a number of biologists who sought to counteract the negative connotations of Darwinian theory.<sup>6</sup>

In *The Science of Power*, the philosopher Benjamin Kidd explored how Darwin's theory influenced German philosopher Friedrich Nietzsche, and how this was tied to German war making.<sup>7</sup> Bryan came to believe that German militancy was the logical result of the application of Darwin's theory of evolution to nation states. He saw Germany's rise to military power and subsequent use of that power as driven by notions of the survival of the fittest, in which the strong would rule over or eliminate the weak by military force.

### **True Threat Posed by the Theory of Evolution**

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<sup>4</sup> CLARENCE DARROW, *THE STORY OF MY LIFE* 245–46 (Charles Scribner's Sons 1932) [hereinafter *STORY OF MY LIFE*].

<sup>5</sup> EDWARD J. LARSON, *SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION* 40 (Basic Books 1997) [hereinafter *SUMMER FOR THE GODS*].

<sup>6</sup> Gregg Mitman, *Evolution as Gospel: William Patten, the Language of Democracy, and the Great War*, 81 *ISIS* 446 (1990).

<sup>7</sup> *SUMMER FOR THE GODS*, *supra* note 5, at 40.



These factors were enough to convince Bryan that the theory of evolution was far more dangerous than he previously believed. In 1922 he composed a more complete criticism of the theory in his lecture “The Menace of Darwinism.” Bryan later published this lecture and mailed thousands of copies around the country. Bryan’s distrust of the theory of evolution grew until he came to believe it to be the number one threat to America. He vigorously denounced the doctrine in speeches around the country. Bryan’s concerns about the dangers of the theory of evolution as applied to the human race were similar to earlier criticisms of the theory, in which “[m]any attacks were leveled at the effects of Darwinism rather than on the merits of the theory per se.”<sup>8</sup>

### **Taxpayers Should not be Forced to Support Destructive Teaching**

Especially galling to Bryan was the use of taxpayer dollars to support public institutions where a small cadre of elites taught evolution. As Bryan saw it, this doctrine denied the religious beliefs of millions of parents whose tax money was paying these same teachers’ salaries. Bryan also thought it absolutely unfair that the theory of evolution was being taught to children who could not be taught about the Bible and religious beliefs. He became actively involved in the drive to enact state legislation prohibiting the teaching of evolution in public schools, and soon was the most visible proponent of state anti-evolution legislation. Bryan spoke for many taxpayers when he asked, “What right . . . has a little irresponsible oligarchy of self-styled intellectuals to demand control of the schools of the United States in which twenty-five millions [sic] of children are being educated at an annual expense of ten billions of dollars?”<sup>9</sup>

As a leader in the anti-evolution movement, “Bryan was indispensable, bringing to it not only his name recognition and reputation, but also his astonishing energy.”<sup>10</sup> Starting in 1921, he spoke to audiences across the country and in 1923 he was invited to speak in support of anti-evolution legislation before eight state legislatures.<sup>11</sup> He also communicated his message to millions of his followers through publication of his beliefs in books, pamphlets and news columns syndicated around the country.

Although Bryan was an effective opponent of the theory of evolution, he was not a strict constructionist of the Bible like many other anti-evolutionists. Bryan did not interpret the Genesis story of creation and other Bible stories literally word for word as did many fundamentalists. He subscribed to the “day-age” theory of creation under which the days contained in Genesis could represent very long geological epochs perhaps lasting millions of years. The image of Bryan and some other fundamentalists is more complicated than that commonly portrayed:

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<sup>8</sup> Kenneth K. Bailey, *The Enactment of Tennessee’s Anti-Evolution Law 9* (June 13, 1949) (unpublished M.A. thesis, Vanderbilt University) (on file with author) [hereinafter *Anti-Evolution Law thesis*].

<sup>9</sup> WALTER LIPPMANN, *AMERICAN INQUISITORS: A COMMENTARY ON DAYTON 12-13* (1928) [hereinafter *COMMENTARY ON DAYTON*].

<sup>10</sup> MICHAEL LIENESCH, *IN THE BEGINNING: FUNDAMENTALISM, THE SCOPES TRIAL, AND THE MAKING OF THE ANTIEVOLUTION MOVEMENT 127* (2007) [hereinafter *IN THE BEGINNING*].

<sup>11</sup> *Id.*

By the late nineteenth century even the most conservative Christian apologists readily conceded that the Bible allowed for an ancient earth and pre-Edenic life. With few exceptions, they accommodated the findings of historical geology either by interpreting the days of Genesis 1 to represent vast ages in the history of the earth (the so-called day-age theory) or by separating a creation “in the beginning” from a much later Edenic creation in six literal days (the gap theory). Either way, they could defend the accuracy of the Bible while simultaneously embracing the latest geological and paleontological discoveries. William Jennings Bryan, the much misunderstood leader of the post-World War I antievolution crusade, not only read the Mosaic “days” as geological “ages” but allowed for the possibility of organic evolution—so long as it did not impinge on the supernatural origin of Adam and Eve.<sup>12</sup>

Although Bryan was greatly alarmed at what he perceived as the evil effects of teaching the theory of evolution to students, his views were tempered:

[I]n private, he confided to correspondents that he personally believed evolution to be true, at least for plants and animals, though not for human beings. Moreover, he always insisted that evolution should be taught in schools, though as theory rather than fact, and alongside rather than instead of creationist accounts. At no time did he endorse serious penalties for violation of any antievolution law.<sup>13</sup>

Bryan’s less militant anti-evolution beliefs would later cause him trouble in the Scopes trial. Bryan would be caught between his own more moderate views and the views of many of his supporters. Mainly through the actions of Clarence Darrow during the trial, Bryan would be forced to defend a literal interpretation of the Bible which left no room for the theory of evolution, but instead made Bryan appear an uneducated fundamentalist. When he tried to avoid this by giving nuanced answers about a literal interpretation of the Bible, Bryan antagonized many of his fundamentalist followers who viewed him as abandoning the literal interpretation of the Bible which underpinned their faith.

## **The Campaign to Enact Anti-Evolution Laws in the States**

The anti-evolution controversy in Tennessee was part of a much larger anti-evolution campaign. Concerned that the theory of evolution was being taught in public schools, a movement grew to influence state legislatures to prohibit the teaching of the theory in taxpayer-supported public schools. Most sources identify the anti-evolution campaign’s first victory in getting a state anti-evolution law enacted as Oklahoma in 1923. Passage was achieved by tying an anti-evolution amendment to a bill to provide free textbooks to students. The bill prohibited the inclusion of Darwin’s theory in the textbooks. It was a limited victory because it only pertained to textbooks for the first through eighth grades,

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<sup>12</sup> RONALD L. NUMBERS, *THE CREATIONISTS: FROM SCIENTIFIC CREATIONISM TO INTELLIGENT DESIGN* 7 (2006).

<sup>13</sup> *IN THE BEGINNING*, *supra* note 10, at 128.

which normally did not contain information on evolution anyway.<sup>14</sup> Nonetheless, Bryan saw it as a positive achievement and one worth emulating in other states.

One source<sup>15</sup> states that on March 5, 1921, the state of Utah passed a law that was in part aimed at the theory of evolution. The law made it “unlawful to teach in any of the district schools of this state while in session, any atheistic, infidel, sectarian, religious, or denominational doctrine and all such schools shall be free from sectarian control.”<sup>16</sup> The statute did allow “moral instruction tending to impress upon the minds of the pupils . . . good manners, truthfulness, temperance, purity, patriotism, and industry” as long as it was given as part of the regular school work.

Sources differ somewhat in describing how many states had proposed anti-evolution legislation and which states actually passed anti-evolution laws during the 1920s. One source states that even with strong anti-evolution sentiment in the South, such bills were defeated in Oklahoma, Arkansas, Missouri, Georgia, South Carolina, North Carolina, West Virginia, Minnesota, New Hampshire and Kentucky during the 1920s.<sup>17</sup> A few southern states took a different approach with the state boards of education in North Carolina, Georgia and Texas issuing rulings that restricted the teaching of evolution.<sup>18</sup> Another source states that prior to Tennessee’s enactment of an anti-evolution statute in 1925, only Oklahoma and Florida had banned the teaching of evolution.<sup>19</sup> In Florida, the legislature, heavily influenced by William Jennings Bryan, passed a concurrent resolution which was not legally binding and therefore provided no legal punishment for violations. According to another source, anti-evolution bills were introduced in 37 state legislatures from 1921 to 1929, with only three of these states actually enacting anti-evolution laws – Mississippi in 1926, Arkansas in 1928 and Texas in 1929.<sup>20</sup> This list of three states must be in addition to Tennessee in 1925. Yet another source states that during the mid-1920s there were “no fewer than forty-five antievolution bills” introduced in twenty-one states.<sup>21</sup> Of this number, the five southern states of Oklahoma, Florida, Tennessee, Mississippi, and Arkansas, would pass anti-evolution statutes.<sup>22</sup> The number of actual anti-evolution laws passed could easily have been higher, as several bills were defeated by a single vote. Out of the several states that passed such laws, it appears that Tennessee’s “was the strongest. It banned the teaching of Darwinism in any public school.”<sup>23</sup>

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<sup>14</sup> *Id.* at 121.

<sup>15</sup> ALVIN W. JOHNSON, *THE LEGAL STATUS OF CHURCH-STATE RELATIONSHIPS IN THE UNITED STATES: WITH SPECIAL REFERENCE TO THE PUBLIC SCHOOLS* 216 (1934).

<sup>16</sup> 1921 Utah Laws Ch. 95.

<sup>17</sup> Kenneth K. Bailey, *The Enactment of Tennessee’s Antievolution Law*, 16 J.S. HIST. 472, 473 n.4 (1950) [hereinafter Bailey, *Tennessee’s Antievolution Law*].

<sup>18</sup> *Id.* at 472.

<sup>19</sup> MARVIN OLASKY & JOHN PERRY, *MONKEY BUSINESS: THE TRUE STORY OF THE SCOPES TRIAL* 8 (Broadman & Hollman 2005) [hereinafter *MONKEY BUSINESS*].

<sup>20</sup> Dorothy Nelkin, *From Dayton to Little Rock: Creationism Evolves*, 7 SCI., TECH., & HUM. VALUES 47 (1982).

<sup>21</sup> IN THE BEGINNING, *supra* note 10, at 115.

<sup>22</sup> *Id.*

<sup>23</sup> GEORGE M. MARSDEN, *FUNDAMENTALISM AND AMERICAN CULTURE: THE SHAPING OF TWENTIETH-CENTURY EVANGELICALISM: 1870-1925*, 185 (1980).

## Kentucky

In 1921, Kentucky became a hotbed of anti-evolution activity, mainly through the actions of John W. Porter, pastor of the First Baptist Church of Lexington. Porter reached many of his followers through the Baptist publication *The Western Reporter* for which he occasionally served as editor.<sup>24</sup> Porter was instrumental in bringing William Bell Riley to Kentucky, and Riley would eventually make twenty-two visits to the state in his ongoing battle against evolution.<sup>25</sup> On January 19, 1922, William Jennings Bryan came to Kentucky to support the battle, speaking to large numbers of Kentuckians and giving a speech to a joint session of the Kentucky legislature. In addition, ordinary citizens of Kentucky were very active, and put pressure on the state legislature. A focal point of the anti-evolution campaign was a proposal promoted by University President Dr. Frank L. McVey to significantly enlarge the University of Kentucky. Many citizens were concerned that the taxpayer funded University was teaching the theory of evolution and destroying the religious faith of students.

On January 23, 1922, a bill was introduced in the Kentucky House that would “prohibit the teaching in public schools and other public institutions of learning, Darwinism, atheism, agnosticism or evolution as it pertains to the origin of man.”<sup>26</sup> If enacted, the bill would become a criminal statute with fairly significant penalties. Anyone convicted would be “fined not less than fifty nor more than five thousand dollars or confined in the county jail not less than ten days nor more than twelve months, or both fined and imprisoned in the discretion of the jury.”<sup>27</sup> The bill would also penalize public schools that “knowingly or willingly teach or permit to be taught” the same prohibited subjects, and any institution convicted would forfeit its charter and be fined not more than five thousand dollars.

Two days later, Senate bill 136 was introduced to prohibit the teaching in public schools of “any theory of evolution that derives man from the brute or any other form of life, or that eliminates God as the creator of man by a direct creative act.”<sup>28</sup> The bill banned textbooks containing the prohibited theories. It was less punitive because it did not include any jail sentence, with punishment a fine of “not less than fifty dollars and nor more than one thousand dollars.” However, any teacher convicted would “forfeit his position and place as such teacher or instructor and [would] be entitled to no salary, either past or future.”

University of Kentucky President McVey became the main opponent of the anti-evolutionist legislation. McVey sounded the alarm by contacting university leaders,

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<sup>24</sup> IN THE BEGINNING, *supra* note 10, at 123.

<sup>25</sup> *Id.* at 124–25.

<sup>26</sup> Alonzo W. Fortune, *The Kentucky Campaign Against the Teaching of Evolution*, 2 J. RELIGION 225, 229 (May 1922) (quoting H.R. 191, Gen. Assem. (Ky. 1922)), available at <http://www.jstor.org/stable/1195139>.

<sup>27</sup> *Id.* at 230.

<sup>28</sup> S. 136, Gen. Assem. (Ky. 1922).

educators and scientists around the country to inform them of the events in Kentucky.<sup>29</sup> Some did not take the threat seriously, including Nicholas Murray Butler, president of Columbia University. McVey was concerned enough that he basically worked full-time to defeat the legislation. He not only worked at getting support in the state legislature and from university alumni, he also worked with church leaders.

McVey's most important ally became E.Y. Mullins, president of the Southern Baptist Convention, who was "perhaps the best-known Southern Baptist of his day,"<sup>30</sup> and a strong believer in the importance of separation between church and state. Along with E.L. Powell, pastor of the First Christian Church in Louisville, Mullins proposed a legislative substitute that did not mention evolution. This substitute would allow evolution to be taught but prohibit teachers from attempting to destroy their students' religious beliefs.<sup>31</sup> Under the bill, no teacher could "directly or indirectly attack or assail or seek to undermine or weaken or destroy the religious beliefs and convictions of pupils" in public schools. Although President McVey opposed the bill as an intrusion into personal liberty and academic freedom, the Mullins compromise actually helped McVey's cause. When it was introduced into the Kentucky Senate, the compromise bill divided legislative support. McVey ultimately triumphed because the Senate anti-evolution bill never made it out of committee and the House bill was defeated by a vote of 42 to 41.<sup>32</sup>

Despite the loss, Bryan viewed it as a moral victory and informed J.W. Porter that such a close vote boded well for the movement, which would soon prevail across the nation and "drive Darwinism from our schools."<sup>33</sup> Interestingly, the agitation against teaching the theory of evolution in schools generated significant interest in learning about evolution. A contemporary account of the battle in Kentucky states:

[T]he controversy greatly stimulated investigation, thought, and discussion of all subjects which have any bearing on evolution. There has been so much demand for the works of Darwin, works on biology, and on geology that it has been almost impossible to secure any of these in the public libraries. In the second place, the term evolution has lost much of its objectionable connotation as the public has become better informed. It is not so much of a scare-term as it was a few months ago.<sup>34</sup>

## Florida

It was in his adopted state of Florida that Bryan had the most influence on a state legislature grappling with the evolution controversy. He and his wife had spent a significant part of their time in Florida since 1912. By 1923, Bryan had enough influence

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<sup>29</sup> *Id.* at 125.

<sup>30</sup> IN THE BEGINNING, *supra* note 10, at 126.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 126-27.

<sup>34</sup> Fortune, *supra* note 26, at 235.

with those in political power in the Florida legislature to get a resolution introduced in the Florida House denouncing the teaching of evolution in public schools. The House passed the resolution and the Senate concurred. Significantly, this was a resolution - so it did not have the force and effect of law. This was in keeping with Bryan's beliefs about the controversy because even though he viewed the teaching of evolution in public schools as a threat, he actually favored a much less restrictive and less punitive approach to dealing with it. In fact, it was Bryan who suggested the language for Florida's non-binding resolution:

That is the sense of the legislature of the state of Florida that it is improper and subversive to the best interest of the people of this state for any professor, teacher, or instructor in the public schools and colleges of this state, supported in whole or in part by public taxation, to teach or permit to be taught atheism or agnosticism, or to teach as true Darwinism, or any other hypothesis that links man in blood relationship to any other form of life.<sup>35</sup>

## Tennessee

By 1923, some members of the Tennessee legislature were sufficiently concerned about the teaching of Darwin's theory of evolution in Tennessee schools to take action. On March 16, 1923, Senator Whitfield introduced a bill that would prohibit teaching "certain hypotheses in institutions of learning (Atheism, Darwinism, and 'such theories')." <sup>36</sup> The bill was referred to the Education Committee. On the same day, Senator Rhodes introduced a joint resolution acknowledging Whitfield's bill and inviting William Jennings Bryan to address a joint session of the Tennessee legislature on the evolution issue. <sup>37</sup> The resolution passed the Senate and was sent to the House. Three days later, Representative Haynie introduced a bill into the House that would prohibit teaching in public schools any "hypothesis that links man in blood relationship to any other form of life." The bill easily passed the House and was sent to the Committee on Education. <sup>38</sup>

Although it seemed there was support for both bills, just a few days later, the Education Committees in both houses issued adverse reports after reviewing the bills. <sup>39</sup> The same day, the House tabled the joint resolution invitation to Bryan. Several newspapers did voice criticism of the proposed legislation, but surprisingly the *Memphis Commercial Appeal*, a conservative Tennessee newspaper, hardly mentioned the anti-evolution action in the legislature. Unlike in Kentucky the year before, there was not an organized effort to enact legislation prohibiting the teaching of evolution in Tennessee in 1923. <sup>40</sup>

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<sup>35</sup> H.R. Con. Res. 7, at 2200-01 (Fla. 1923).

<sup>36</sup> Anti-Evolution Law thesis, *supra* note 8, at 76 (citing SENATE JOURNAL OF THE SIXTY-THIRD GENERAL ASSEMBLY OF THE STATE OF TENNESSEE 599 (Nashville 1923)).

<sup>37</sup> *Id.* at 77.

<sup>38</sup> *Id.* at 77-78 (citing HOUSE JOURNAL OF THE SIXTY-THIRD GENERAL ASSEMBLY OF THE STATE OF TENNESSEE 666 (Nashville 1923)). This quote refers to H.R. 947.

<sup>39</sup> *Id.* at 78.

<sup>40</sup> *Id.*

The lack of concerted effort to enact anti-evolution legislation in Tennessee proved to be temporary. In 1924, W.B. Marr, a Tennessee attorney, invited Bryan to speak in Nashville. Bryan accepted Marr's invitation and on January 24, 1925, Bryan delivered a strong rebuke to evolution with his speech "Is the Bible True?"<sup>41</sup> As he would often do, Bryan emphasized that evolution was a theory and not a fact. Numerous members of Tennessee society were in attendance, including Governor Austin Peay. Bryan's speech was published and a group of his followers sent copies around the state. The next year when anti-evolution bills were introduced in the Tennessee legislature, Marr sent five hundred copies of Bryan's speech to the legislature.

### **"The Public Welfare Requiring It" – The Butler Act (Tennessee's Anti-Evolution Statute)**

On January 20, 1925, Senator John A. Shelton introduced a bill that would make it a felony to teach the theory of evolution in Tennessee public schools. A Methodist, lawyer, and Democratic politician, Shelton was also an admirer of Bryan and was likewise concerned about the effects of teaching evolution on religious beliefs.<sup>42</sup> After introducing his bill, Shelton wrote to Bryan informing him of the proposed legislation. Bryan replied with approval but suggested that the penalty provision be dropped to make it easier to pass; he believed that if a penalty provision was needed, one could be added later.<sup>43</sup> Bryan emphasized to Shelton, "The special thing that I want to suggest is that it is better not to have a penalty" because "our opponents, not being able to oppose the measure on its merits, are always trying to find something that will divert attention, and the penalty furnishes the excuse . . . . The second reason is that we are dealing with an educated class that is supposed to respect the law."<sup>44</sup>

The day after Shelton introduced his bill, John Washington Butler introduced an anti-evolution bill into the Tennessee House. Butler was a Macon County farmer and member of the Primitive Baptist Church. Butler became concerned about the theory of evolution in 1921 when a preacher told him of a young local woman who had attended a university and returned having lost her faith, now believing in evolution instead of God. This greatly alarmed Butler and he decided to run for the state legislature in order to fight the teaching of evolution in public schools. Butler was not the only one shocked to discover that teaching evolution in schools could undermine students' religious faith. Indeed, this was one of the major concerns for the whole anti-evolution movement. Butler was elected although he did not initially propose legislation banning the teaching of evolution. When Butler ran for a second term he pledged to introduce anti-evolution legislation, and he defeated his opponent who did not address the issue by a ten to one margin.<sup>45</sup>

The first three sections of the Butler bill, which constitute most of the bill, provide:

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<sup>41</sup> MONKEY BUSINESS, *supra* note 19, at 22.

<sup>42</sup> Anti-Evolution Law thesis, *supra* note 8, at 83.

<sup>43</sup> Bailey, *Tennessee's Antievolution Law*, *supra* note 17, at 475–76.

<sup>44</sup> SUMMER FOR THE GODS, *supra* note 5, at 54 (citing William Jennings Bryan Papers, William Jennings Bryan to John A. Shelton (Feb. 9, 1925) (Library of Congress, Washington, D.C. 1925)).

<sup>45</sup> Anti-Evolution Law thesis, *supra* note 8, at 85.

AN ACT prohibiting the teaching of the Evolution Theory in all the Universities, Normals and all other public schools of Tennessee, which are supported in whole or in part by the public school funds of the State, and to provide penalties for the violations thereof.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That it shall be unlawful for any teacher in any of the Universities, Normals and all other public schools of the State which are supported in whole or in part by the public school funds of the State, to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.

Section 2. Be it further enacted, That any teacher found guilty of the violation of this Act, Shall be guilty of a misdemeanor and upon conviction, shall be fined not less than One Hundred \$ (100.00) Dollars nor more than Five Hundred (\$ 500.00) Dollars for each offense.<sup>46</sup>

Butler's inclusion of a penalty provision would later prove crucial:

With no penalty, of course, there would be no martyrs to the cause of freedom—and no Scopes trial—simply obstinate schoolteachers flaunting the public will. Bryan could foresee the public relations impact of both courses. On the brink of victory, however, Tennessee crusaders ignored his words of caution.<sup>47</sup>

Shelton's bill was rejected by the Senate's judiciary committee because "it would not be the part of wisdom for the legislature to pass laws that even remotely affected the question of religious belief."<sup>48</sup> Most committee members thought it better to leave the issue to school boards and some questioned the constitutionality of such legislation.<sup>49</sup> Butler's bill fared better in the House. It was referred to the Committee on Education, which recommended it for passage on January 23. Six days later, the entire House approved the bill by a vote of 71 to five with five House members present but not voting on the measure.<sup>50</sup>

Although the anti-evolution bill was popular, it was not supported by everyone in Tennessee. The most interesting criticism after the House vote came from an unexpected source. The pastor of the First Methodist Church in Columbia, Dr. Richard Owenby, sharply criticized the Tennessee legislators. Owenby would have made Darrow proud with the scorn he heaped on them. In a sermon, Owenby told his congregation that the legislators were "making monkeys of themselves at the rate of 71 to 5."<sup>51</sup> He did not

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<sup>46</sup> An Act to Prohibit the Teaching of Evolution in all Schools in the State, H.R. 185, 64th Gen. Assem., Reg. Sess. (Tenn. 1925).

<sup>47</sup> SUMMER FOR THE GODS, *supra* note 5, at 54.

<sup>48</sup> Anti-Evolution Law thesis, *supra* note 8, at 86–87.

<sup>49</sup> *Id.* at 87.

<sup>50</sup> Bailey, *Tennessee's Antievolution Law*, *supra* note 17, at 476.

<sup>51</sup> Anti-Evolution Law thesis, *supra* note 8, at 89.



think a state legislature “could possibly devise a more asinine performance” and he told his audience that “the missing link . . . might be found near Capital Hill.”<sup>52</sup> Along with his criticism he called on the Tennessee Senate to defeat the bill.

A member of the Tennessee House was in the congregation during the sermon and accounts of it were published in two newspapers, the *Nashville Tennessean* and the *Columbia Herald*. Owenby’s sermon was so critical it prompted the Tennessee House to pass a resolution officially condemning his remarks as “unfair, unchristianlike and unpatriotic.”<sup>53</sup> While some legislators thought it best to ignore Owenby’s remarks, others thought they should respond. The resolution passed with at least one of the five representatives who voted against the Butler bill voting in favor of the resolution criticizing Owenby.<sup>54</sup>

When the Butler bill was sent over to the Senate, some believed that it would be defeated.<sup>55</sup> This appeared to be the case when the Senate Judiciary Committee rejected it as it had done with Shelton’s bill.<sup>56</sup> When the bill was read for the third and final time on the Senate floor, one of the opponents of the bill moved that it be tabled. But in a significant act, the speaker of the Senate, Lew D. Hill, rose and gave an impassioned plea for passage of the bill. Hill cited support for the bill that he had received from women around the state and the teacher’s association. At this point, Senator McGinness, the Chairman of the Judiciary Committee that had rejected the bill, suggested that consideration of the bill be delayed for five days, a request which was granted.

After the five day delay, Senator McGinness asked for another delay and requested that both the Shelton and Butler bills be referred back to the Judiciary Committee so they could be reconciled. This delay was also granted, and just four days later the legislature adjourned for a four-week recess.<sup>57</sup> This gave anti-evolution proponents ample time to mount pressure on the Tennessee legislature to enact the bill. After the recess, the Senate judiciary committee reversed its position on the Butler bill and recommended it for enactment.<sup>58</sup> On March 13, the Butler bill was debated for three hours in the Senate. One of the senators, poking fun at the bill, offered an amendment to “prohibit the teaching that the earth is round,” but Speaker Hill ruled it out of order as not being germane.<sup>59</sup> Another senator opposed to the bill stated that after listening to three hours of debate on it he was convinced that “we did come from monkeys.”<sup>60</sup>

Despite these humorous comments, many of the Senators’ constituents held very strong religious beliefs and supported the bill, so there was true debate. The leading opponent, Senator Giles Evans of Fayetteville, made arguments very similar to if not identical to

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 90.

<sup>55</sup> *Id.*

<sup>56</sup> Bailey, *Tennessee’s Antievolution Law*, *supra* note 17, at 478.

<sup>57</sup> Anti-Evolution Law thesis, *supra* note 8, at 95.

<sup>58</sup> Bailey, *Tennessee’s Antievolution Law*, *supra* note 17 at 480.

<sup>59</sup> *Id.* at 480–81.

<sup>60</sup> Anti-Evolution Law thesis, *supra* note 8, at 103.

some of the arguments that the Scopes defense would make during the trial. Senator Evans argued that the theory of evolution did not conflict with a liberal interpretation of the Bible: "I say that the theory of evolution does no violence to the Biblical story of the origin of man."<sup>61</sup> Evans also read a petition signed by numerous religious leaders from around the state that urged the legislature to reject the bill. Senator Cecil Sims argued against the bill on constitutional grounds.

It is commonly believed that the Tennessee legislature in 1925 was dominated by simple, uneducated farmers who tended towards religious fundamentalism. This stems from John Butler's background as a Primitive Baptist with little formal education. It is believed that Butler had only four years of formal education; the white illiteracy rate in his home county of Macon was twenty-two percent, which meant that Macon had the second lowest literacy rate in Tennessee.<sup>62</sup> However:

Of the 98 members of the House of Representatives, 42, or less than half professed to be full or part-time farmers. In the Senate, 4 of the 33 senators were full-time farmers, with two more professing to be part-time farmers. . . . There was only one Primitive Baptist other than Butler in the General Assembly; Methodists were the most numerous, followed by Baptists and Presbyterians, respectively. In occupation and religion, Butler did not typify the General Assembly of 1925.<sup>63</sup>

### **Governor Peay**

A final vote was taken and by a vote of 24 to six, the Senate followed the House in approving the bill. It was sent to Governor Peay to either sign or veto it. There was a great deal of speculation about what Governor Peay would do with the bill. He did meet with a delegation of citizens opposed to the bill and he also received many thousands of letters urging him to either sign or veto it. Politically, a Governor Peay needed legislative support for his agenda which included an important education bill, a very important factor that may have weighed on his decision. A veto would anger some legislators and many citizens of Tennessee who were in favor of anti-evolution legislation. In addition, both the Tennessee House and Senate had passed the bill with veto-proof majorities.

Given these political realities, on March 21, 1925, Governor Peay signed into law the bill which has become known as the Butler Act.<sup>64</sup> Given the considerable interest in the controversy, Governor Peay provided a signing statement:

Because of the unusual interest which has been manifested in . . . the "Anti-Evolution Bill," I ask to spread on your journals, the following statement in reference to this bill. Many earnest and interesting communications have been

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<sup>61</sup> Bailey, *Tennessee's Antievolution Law*, *supra* note 17 at 481 (citing NASHVILLE BANNER, Mar. 13, 1925).

<sup>62</sup> Anti-Evolution Law thesis, *supra* note 8, at 84.

<sup>63</sup> Bailey, *Tennessee's Antievolution Law*, *supra* note 17, at 488.

<sup>64</sup> The Tennessee Anti-Evolution Act, 1925 Tenn. Pub. Acts ch. 27.

received regarding it. As might be expected, many of these approved the bill and many of them disapproved it. Freedom of religion and strict separation of church and state are fixed principles in this country. This bill should be rejected if it contravenes either proposition. In my judgment, it does neither.<sup>65</sup>

Then to show that the Tennessee Constitution “records the belief of our people in God and a future life,” Governor Peay quoted from the Article 9, Section 3: “No person who denies the being of God or a future state of rewards and punishment, shall hold any office in the Civil Department of this State.”

For Peay as for Bryan, the rewards and punishments were found in revealed religion:

By what laws shall the rewards and punishments be meted to us in the future state? Obviously, the answer must be by those laws, which God has revealed to us. And the further answer must be that His laws have been revealed to us in the Holy Bible, if at all. It is this Bible which orders our conduct and by which we shall be judged for rewards or punishment in the future state. Therefore, our civil institutions under our constitution, are directly related to the Bible, and our whole scheme of government is inseparably connected with it by this provision in our organic law.<sup>66</sup>

Peay then moved to the public schools:

The minds of children are moulded and taught in these schools. Since our Constitution has recognized God, and if the Bible is His holy word directly governing our relationship to the future state of rewards and punishments, how is it possible for our school system to omit all attention to the Bible and to wholly ignore it? It is manifestly impossible.<sup>67</sup>

Peay then quoted from a 1915 Tennessee law that required ten verses of the Bible to be read “without comment” every day in every public school. Given the importance of the Bible, the need for the Butler Act was obvious because “the very integrity of the Bible in its statement of man’s divine creation, is denied by any theory that man descended or has ascended from any lower order of animals.”<sup>68</sup> The Butler Act “does no more than provide that such integrity shall not be negatived in the minds of our children on the fundamental point of man’s Divine creation.”<sup>69</sup> This only made sense since by law the Bible had to be read in Tennessee public schools.

Peay spoke for many fundamentalists when he declared that something very wrong was happening in the country:

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<sup>65</sup> Austin Peay, Message from the Governor (Mar. 23, 1925), in TENN. HOUSE OF REPRESENTATIVES, HOUSE JOURNAL 741-42 (1925 Reg. Sess.).

<sup>66</sup> *Id.* at 742.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 743.

<sup>69</sup> *Id.*

Right or wrong, there is a deep and wide-spread belief that something is shaking the fundamentals of the country, both in religion and morals. It is the opinion of many that an abandonment of the old fashioned faith and belief in the Bible, is our trouble in large degree.<sup>70</sup>

Concluding, Peay envisioned the Butler Act as a symbolic protest:

After a careful examination, I can find nothing of consequence in the books now being taught in our schools with which this bill will interfere in the slightest manner. Therefore, it will not put our teachers in any jeopardy. Probably the law will never be applied. It may not be sufficiently definite to permit of any specific application or enforcement. Nobody believes that it is going to be an active statute. But this bill is a distinct protest against an irreligious tendency to exalt so called science, and deny the Bible in some schools and quarters—a tendency fundamentally wrong and fatally mischievous in its effects on our children, our institutions and our country.<sup>71</sup>

A critical factor that helped in the passage of the Butler Act was its exclusive application to public schools. The bill was strongly supported by many citizens of Tennessee because they did not want their tax money funding instruction of a doctrine to their children that they believed directly contradicted their religious beliefs. This was a central theme of the anti-evolution movement that was championed by Bryan. As for the Tennessee legislature, “evidence indicates that most legislative supporters of the measure did not regard their action as an attempt to regulate what an individual might think, but rather as a step to control the action of employees of the state.”<sup>72</sup> It is important to note that the statute was not a blanket prohibition because it expressly applied only to “public schools of th[e] State which [we]re supported in whole or in part by the public school funds of the State . . . .”<sup>73</sup>

### **Thomas Jefferson and William Jennings Bryan**

The influential journalist Walter Lippmann commented on the Scopes trial three years later, comparing Bryan and the fundamentalists’ arguments to the views of Thomas Jefferson about religion and government. Lippmann was not at all on the side of the anti-evolutionists but he did take seriously their concerns and arguments. Lippmann examined Jefferson’s *Bill for Establishing Religious Freedom* drafted in 1779 which was enacted into law with barely any changes by the Virginia General Assembly in 1786.<sup>74</sup> Lippmann described the law, called *The Virginia Act For Establishing Religious Freedom*, as “the first law ever passed by a popular assembly giving perfect freedom of

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<sup>70</sup> *Id.* at 744.

<sup>71</sup> *Id.* at 745.

<sup>72</sup> Bailey, *Tennessee’s Antievolution Law*, *supra* note 17, at 490.

<sup>73</sup> 1925 Tenn. Pub. Acts, ch. 27, § 1.

<sup>74</sup> The Virginia Act For Establishing Religious Freedom, *available at* <http://religiousfreedom.lib.virginia.edu/sacred/vaact.html> (last visited March 15, 2010).

conscience, and by common consent it is regarded as one of the great charters of human liberty.”<sup>75</sup> Lippmann compared this law to Tennessee’s Butler Act and concluded that:

No two laws could be further apart in spirit and in purpose than these two. And yet at one point there is a strange agreement between them. On one vital matter both laws appeal to the same principle although they aim at diametrically opposite ends.

Lippmann focused on Jefferson’s words in a particular part of The Virginia Act: “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”<sup>76</sup> In analyzing the Butler Act, Lippmann wrote:

You will note that the Tennessee statute does not prohibit the teaching of the evolution theory in Tennessee. It merely prohibits the teaching of that theory in schools which the people of Tennessee are compelled by law to contribute money. Jefferson had said that it was sinful and tyrannical to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves. The Tennessee legislators representing the people of their state were merely applying this principle. They disbelieved in the evolution theory, and they set out to free their constituents of the sinful and tyrannical compulsion to pay for the propagation of an opinion which they disbelieved.<sup>77</sup>

Comparing Jefferson and Bryan, Lippmann wrote:

One hundred and forty years later, the political leader who in his generation professed to be Jefferson’s most loyal disciple, asked whether, if it is wrong to compel people to support a creed they disbelieve, it is not also wrong to compel them to support teaching which impugns the creed in which they do believe. Jefferson had insisted that the people should not have to pay for the teaching of Anglicanism. Mr. Bryan asked why they should be made to pay for the teaching of agnosticism.<sup>78</sup>

Interestingly, Darrow would write that “[o]f all the political leaders of the past, Thomas Jefferson made the strongest appeal to me.”<sup>79</sup> John Scopes called William Jennings Bryan “the greatest man produced in the United States since Thomas Jefferson.”

## **Generating a Controversy - Setting the Stage for the Scopes Trial**

The American Civil Liberties Union (ACLU) had been monitoring developments around the country looking for violations of civil liberties. The ACLU was looking for legal battles that would give the obscure organization, formed just five years earlier, a chance

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<sup>75</sup> COMMENTARY ON DAYTON, *supra* note 9, at 14.

<sup>76</sup> The Virginia Act For Establishing Religious Freedom.

<sup>77</sup> COMMENTARY ON DAYTON, *supra* note 9, at 12.

<sup>78</sup> *Id.* at 14.

<sup>79</sup> STORY OF MY LIFE, *supra* note 4, at 284.

to gain public attention. The ACLU leadership was aware of the anti-evolution movement and soon learned that Tennessee had passed an anti-evolution law. They immediately saw that the Tennessee statute could provide a test case for academic freedom. They wanted to challenge the law by taking a case to federal court and perhaps ultimately have the statute declared unconstitutional by the United States Supreme Court. The group advertised in Tennessee newspapers for someone willing to break the law and then receive legal support from the ACLU.

A mining engineer in Dayton, Tennessee named George Rappleyea, who was originally from New York, saw the ACLU advertisement in the May 4th edition of the *Chattanooga Times*:

We are looking for a Tennessee teacher who is willing to accept our services in testing this law in the courts. Our lawyers think a friendly test case can be arranged without costing a teacher his or her job. Distinguished counsel have volunteered their services. All we need now is a willing client.<sup>80</sup>

After seeing the ACLU ad, Rappleyea decided he also wanted to challenge the law in a test case. But Rappleyea had a different motive. He wanted to stir up a controversy that would bring visitors to Dayton where they would hopefully spend money, because the town badly needed an economic boost. Dayton, located in Rhea County, Tennessee is about 36 miles north of Chattanooga, 80 miles south of Knoxville and 139 miles southeast of Nashville. Since the 1890s the town had suffered a loss of jobs as well as population.

Rappleyea went to Robinson's Drugstore located on the main street of Dayton. The drugstore was a social hub in a town where adult entertainment and socializing was curtailed by prohibition. The drugstore was owned by Frank E. "Doc" Robinson who was also the chairman of the Rhea County School Board. Robinson and School Superintendent Walter White were present in the store. Rappleyea brought the ACLU ad to Robinson's attention because he knew Robinson was also interested in generating publicity for Dayton. Both Robinson and White came to think Rappleyea had a good idea. Later Rappleyea contacted the ACLU and confirmed that they would support a challenge to the Butler Act.

At about this point in the retelling of the Scopes trial legend there are several different versions of exactly how events unfolded. As a 2005 source puts it, "[t]he exact order of events that followed over the next few days, and even details of the events themselves, have been retold, reinterpreted, and spun to the point where no definitive account clearly emerges from the historical mist."<sup>81</sup> Despite the numerous versions, the following description drawn mainly from Scopes' autobiography contains some of the generally agreed upon details.

### **A Willing Client**

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<sup>80</sup> Some references call it the *Chattanooga Daily Times*.

<sup>81</sup> MONKEY BUSINESS, *supra* note 19, at 12.

The next day Rappalyea went back to Robinson's Drugstore and met Doc Robinson. They brought the issue of challenging the Butler Act up with others there including Mr. Brady, who ran the other Dayton drug store, Sue Hicks, a city attorney considered the "town's leading lawyer," and another attorney named Wallace Haggard. A different version of the events places Sue Hicks' brother Herbert at the scene as well. In any event, the Hicks brothers agreed to prosecute if they could find a teacher who had taught evolution during the brief time between when the anti-evolution law was enacted and the end of the school year. Haggard agreed to assist the prosecution. Central High School was the only high school in Rhea County, so their defendant would have to be a teacher at that school. They decided to contact W.F. Ferguson, the high school principal, who was also the biology teacher. Ferguson quickly turned down the invitation, as he was worried it would adversely affect his job. At some point, someone mentioned a 24-year old local high school teacher and football coach named John Scopes as a possible challenger. Rappalyea and Scopes knew each other, having met on a number of occasions in the small town, and Scopes had even attended two parties at Rappalyea's home during his time in Dayton. The group sent a young boy to fetch Scopes who was playing tennis with some of his students.

When Scopes arrived at Robinson's Drugstore, Rappalyea told him about their discussion. Rappalyea got right to the point and stated that the group had concluded it was impossible to teach biology without also teaching the theory of evolution. Scopes agreed with this logic. Robinson's Drugstore also sold school textbooks and on a nearby shelf Scopes found a copy of the biology textbook used in Tennessee high schools, *A Civic Biology: Presented in Problems* by George W. Hunter. Rappalyea asked Scopes if he had ever used the book in class. Scopes was not a biology teacher but he had filled in part-time on occasion for Ferguson, the regular biology teacher. Scopes said he had used Hunter's book during those times for review purposes. Robinson then told Scopes that he had violated the anti-evolution law. Scopes recounted in 1967, "I didn't know, technically, whether I had violated the law or not. I knew of the Butler Act; I'd never worried about it. . . . I assumed that if anyone had broken the law it was more likely to have been Mr. Ferguson."

Hunter's textbook at the center of the controversy was "the state-approved text, prescribed for use in all Tennessee high schools."<sup>82</sup> It was also "the best-selling text in the field..."<sup>83</sup> Darrow later quipped in his autobiography, "[i]t seems strange that the Dayton school board did not adopt the first and second chapters of Genesis as a modern textbook on biology."<sup>84</sup>

Doc Robinson showed Scopes the ACLU ad in the Chattanooga News and asked if he would agree to become a defendant to challenge the law in a test case. Reflecting on this moment over forty years later, Scopes wrote, "I realized that the best time to scotch the snake is when it starts to wiggle. The snake already had been wiggling a good long

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<sup>82</sup> SUMMER FOR THE GODS, *supra* note 5, at 90.

<sup>83</sup> *Id.* at 23.

<sup>84</sup> STORY OF MY LIFE, *supra* note 4, at 248.

time.”<sup>85</sup> Implying that it was not clear that he had actually violated the Butler Act, Scopes replied to Robinson and the others present, “[i]f you can prove that I’ve taught evolution, and that I can qualify as a defendant, then I’ll be willing to stand trial.”<sup>86</sup>

None of the planners who had summoned Scopes to the drugstore were actually concerned about whether Scopes had actually taught evolution. Robinson, as chairman of the school board, telephoned the Chattanooga News to inform them that they had arrested a teacher for teaching evolution. Not realizing what he had gotten himself into, Scopes left to finish his tennis match. The ACLU was also informed and they promised to publicize the news and provide financial and legal support. Rappalyea was first named as the prosecutor in the sense that he claimed that Scopes had violated the Butler Act. Later, Walter White would take Rappleyea’s place. Eager for publicity, Rappleyea went so far as to contact the famous British writer H. G. Wells to ask him to help defend Scopes, but Wells declined.

Scopes would write in his 1967 autobiography:

If I *had* been the regular biology teacher at Rhea County Central High School I wouldn’t have let the law restrict my teaching the truth. How could I have, considering my environmental influences? My father had read to me from Charles Darwin’s *Origin of Species*, *Descent of Man*, and *The Voyage of the Beagle*, which I had then finished reading myself, and, although not a trained scholar, I thought Darwin was right.<sup>87</sup>

A 1959 thesis about the case states that before the conversation with Scopes about whether he had taught evolution, White went to the law office of the Hicks brothers, Herbert and Sue, who were serving as city attorneys. White, as Superintendent of Schools, said he had a legal question for them. White asked if they thought that he should send out a questionnaire to all former and prospective teachers to find out their views about the theory of evolution before he did any re-hiring.<sup>88</sup> Sue Hicks responded that this was a difficult question and since no one had an actual copy of the new law nor did anyone know how it would be interpreted or enforced, White could ignore it for now.<sup>89</sup> According to this source, it was at this point that White and the Hicks brothers decided to go to Robinson’s drug store for refreshments. Soon after they arrived, Rappleyea came to the drugstore with John Scopes. Then the conversation turned to the anti-evolution bill and whether Scopes had violated it.

According to this version, Scopes said you could not teach Hunter’s Biology textbook without violating the new law. Sue Hicks, who was a friend of Scopes, looked through Hunter’s Biology text and said, “[i]f you taught that you violated the law and we could

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<sup>85</sup> JOHN T. SCOPES & JAMES PRESLEY, CENTER OF THE STORM: MEMOIRS OF JOHN T. SCOPES 59 (1967) [hereinafter CENTER OF THE STORM].

<sup>86</sup> *Id.* at 60.

<sup>87</sup> *Id.* at 53.

<sup>88</sup> Warren Allem, Backgrounds of the Scopes Trial at Dayton, Tennessee 59 (Aug., 1959) (unpublished M.A. thesis, University of Tennessee) (on file with author).

<sup>89</sup> *Id.* at 59-60.



prosecute you. What about it Scopes[?]"<sup>90</sup> Scopes replied, "I don't care. Go ahead."<sup>91</sup> Robinson then said, "Well, you can get John Godsey to defend you, and these boys and Wallace Haggard can prosecute you."<sup>92</sup> Then Sue Hicks wrote out a warrant and Rappleyea went in search of a justice of the peace; he immediately found Bert Wilbur for the job. They agreed to meet a week later after they had time to get a copy of the Butler Act and read it. Rappleyea then signed the complaint and went and found a constable, Perry Swafford, to serve the warrant. According to this version, the *Chattanooga Times* was called but whoever answered did not convey enough enthusiasm or did not realize the significance of the situation, so the *Nashville Banner* was contacted. It was the *Banner* that first ran with the story. The Associated Press and other news services published the story and within twenty-four hours it became news nationwide. The ACLU had succeeded in getting their test case, but it would be far different than the one they planned on.

The first lawyer to offer his services to Scopes was John R. Neal. Neal was a former law professor at the University of Tennessee who lost his job after fifteen years; he had also served two terms in the Tennessee legislature.<sup>93</sup> Scopes recalled that soon after news of his arrest spread, he was called to the Hotel Aqua in town where someone was waiting to meet him. When Scopes arrived, Neal came up to him and shook his hand, saying, "[b]oy, I am interested in your case and, whether you want me or not, I'm going to be here. I'll be available twenty-four hours a day."<sup>94</sup> Scopes quickly became very fond of Neal. Scopes noticed, as did others, Neal's eccentricity but he quickly learned to look beyond it. Scopes wrote in his autobiography that Neal was "one of the warmest-hearted men I have ever known."<sup>95</sup> Scopes also considered Neal's "coming to Dayton one of the fortunate things that happened to me that summer."<sup>96</sup>

On May 9, Scopes attended his preliminary hearing, where he was represented by John Neal and John Godsey. He was bound over for a grand jury set for August. Scopes soon left Tennessee and went back to Kentucky to visit his family. On May 25, a special grand jury was called by local judge John T. Raulston to speed up the legal process - so that no other Tennessee city could create a test case and steal Dayton's chance at fame. During the grand jury hearing, three of Scopes' students testified that he had taught evolution (Scopes recalled that seven of his students testified). The grand jury indicted Scopes for violating the Butler Act. He was arrested as a formality but was not detained. Scopes' bail was set at \$500 and paid by the owner of the *Baltimore Sun* newspaper.

## **Bryan and Darrow**

Bryan was a lawyer who had not practiced for decades. Most accounts of the Scopes trial state that Bryan volunteered to assist the prosecution in the upcoming trial. But in

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<sup>90</sup> *Id.* at 60.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 60-61.

<sup>93</sup> MONKEY BUSINESS, *supra* note 19, at 18.

<sup>94</sup> CENTER OF THE STORM, *supra* note 85, at 63.

<sup>95</sup> *Id.* at 63.

<sup>96</sup> *Id.* at 64.

Bryan's autobiography (finished by his wife Mary Baird Bryan) is a reprinted letter from Sue Hicks of the Dayton prosecution team that shows Bryan was asked to join the prosecution. The letter, written on May 14, 1925, states in part:

We have been trying to get in touch with you by wire to ask you to become associated with us in the prosecution of the case of the State against J.T. Scopes . . . . We will consider it a great honor to have you with us in this prosecution. We will have no difficulty in obtaining the consent of the attorney general and the circuit judge for you to appear in the case. . . . we will send you a copy of the text book taught in the school and a copy of the statute under which we are prosecuting Scopes.<sup>97</sup>

Whatever the actual facts of how Bryan got involved, it was Bryan's entry into the controversy that caught the attention of Clarence Darrow.

Interestingly, Darrow and Bryan were on the same side of most political and social issues in earlier times. During the 1896 presidential election, Bryan, a former Nebraska congressman, came to Chicago to attend the Democratic National Convention at the Chicago Coliseum. It was at this convention that Darrow first met Bryan. At the time, Bryan was thirty-six years old and Darrow was thirty-nine. On July 9, 1896, with Darrow looking on, Bryan delivered his famous "Cross of Gold" speech to the convention, considered by many to be the most famous political speech in the history of the United States. Darrow later wrote, "I have enjoyed a great many addresses, some of which I have delivered myself, but I never listened to one that affected and moved an audience as did that."<sup>98</sup> The speech was electrifying and Darrow said that it produced "the greatest ovation that I had ever witnessed."<sup>99</sup> The speech won Bryan his party's nomination for President.

At the time, Illinois Governor John Peter Altgeld was running for re-election as a Democrat. Altgeld was Darrow's mentor and good friend, and Altgeld persuaded a reluctant Darrow to run for Congress. Because his district was thought to be safely Democratic, Darrow did not campaign for himself but instead traveled to other districts to campaign for other Democratic candidates. Darrow recounts that the "district was overwhelmingly Democratic, and I felt sure that with Bryan for President and Altgeld for governor there would be no doubt of my election."<sup>100</sup> However, after the ballots were counted, Bryan lost the election to McKinley, Altgeld lost the governorship and Darrow lost his race by 300 votes. Darrow wrote in his autobiography that he lost by about one hundred votes.

Bryan was again the Democratic nominee for the 1900 presidential election and Darrow again campaigned for him. Bryan lost to McKinley for the second time, but received the

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<sup>97</sup> WILLIAM JENNINGS BRYAN & MARY BAIRD BRYAN, THE MEMOIRS OF WILLIAM JENNINGS BRYAN 483 (1925).

<sup>98</sup> STORY OF MY LIFE, *supra* note 4, at 91.

<sup>99</sup> *Id.* at 91.

<sup>100</sup> *Id.* at 92.

Democratic Party's nomination once again eight years later, in 1908. This time when Bryan asked Darrow to campaign for him by giving some speeches, Darrow declined.

Darrow grew to dislike Bryan over the years. Bryan's increasing visibility as the leader of the anti-evolution movement greatly antagonized Darrow, who was a fervent believer in science and human knowledge and greatly resented religious influences that hindered the pursuit of scientific knowledge. Perhaps Darrow was especially wary of Bryan because he knew how forceful and effective Bryan was as a speaker and leader of the masses. Darrow had a lifelong aversion to mobs or masses of people caught up in emotions, and combined with religious fervor, this movement must have greatly disturbed Darrow.

### **Clarence Darrow Enters the Controversy**

Among the many interesting aspects of the Scopes controversy is that the ACLU, which had instigated the controversy, fought to keep Darrow away from the trial. Although it sounds peculiar today, the ACLU thought Darrow was too radical. According to one account:

The ACLU was concerned that neither Scopes' civil rights nor freedom of speech greatly motivated Darrow, who saw Darwin's theory as a useful tool in his own mission against religion. Darrow's militant agnosticism concerned the ACLU's executive committee, which was not hostile to religion per se and thought Darrow could actually imperil Scopes' defense. ACLU officials knew Darrow would generate bad publicity because of his agnosticism and would displease liberal, religious constituents of the organization. One ACLU attorney stated that accepting Darrow's services was a mistake because it allowed fundamentalists to portray the event as religion vs. anti-religion, which was exactly how Darrow viewed the trial. It was, for him, the pinnacle of his lifelong war on religious intolerance.<sup>101</sup>

Darrow at first declined to get involved with the Scopes case because he recognized that his well-known agnostic views would not be welcomed by the ACLU; he had also just announced his retirement.<sup>102</sup> But he quickly changed his mind when he found out that William Jennings Bryan was going to assist the prosecution. In his autobiography Darrow wrote, "[f]or the first, the last, and the only time in my life, I volunteered my services in a case; it was in the Scopes case in Tennessee that I did this, because I really wanted to take part in it."<sup>103</sup> Darrow made clear that Bryan's involvement was the deciding factor: "At once I wanted to go. My object, and my only object, was to focus the attention of the country on the program of Mr. Bryan and the other fundamentalists in America. I knew that education was in danger from the source that has always hampered it—religious fanaticism."<sup>104</sup>

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<sup>101</sup> EDWARD CAUDILL, *THE SCOPES TRIAL: A PHOTOGRAPHIC HISTORY* 7 (2000).

<sup>102</sup> *SUMMER FOR THE GODS*, *supra* note 5, at 100.

<sup>103</sup> *STORY OF MY LIFE*, *supra* note 4, at 244.

<sup>104</sup> *Id.* at 249.

Arthur Garfield Hays had recently been appointed general counsel for the ACLU in New York and was tasked with defending Scopes. Hays knew he needed someone on the defense who knew the local culture and people in Tennessee. Accordingly, he appointed John Randolph Neal as chief counsel for the defense.<sup>105</sup> Scopes was a party to the discussions that led to Neal's appointment, and wrote that Neal "played as important a role as anyone in my defense."<sup>106</sup> Darrow claimed that one local lawyer was on Scopes' side but "at the last minute he ran away from the case in fear and trepidation. The sentiment of the town and the State was more than he could face."<sup>107</sup>

Darrow was consulting with Dudley Field Malone in New York when he learned of Bryan's decision to assist the prosecution in Dayton. Malone, an international divorce lawyer, had previously worked as Undersecretary of State under Bryan in the Wilson Administration. Malone "still harbored resentment against his former boss from those days."<sup>108</sup> Darrow and Malone agreed to offer their services to defend Scopes and sent a telegram to Neal, also releasing a copy to the press. The offer stated they were willing "without fees or expenses" to help defend Scopes.<sup>109</sup> Without consulting with the ACLU, Neal publicly accepted the offer.<sup>110</sup> This took the ACLU by surprise. Although the organization was instrumental in creating the controversy, it was unable to regain control over events.

For Scopes, the telegram from Darrow and Malone "was my first knowledge that some Class-A sluggers were willing to champion our cause."<sup>111</sup> However, the ACLU had chosen Bainbridge Colby, a New York attorney, to defend Scopes. Colby, who had formerly worked under Bryan, was a founder of the United States Progressive Party and also served as Woodrow Wilson's last Secretary of State. Scopes traveled to New York to meet with the ACLU about a month before the trial: "By then I had made up my mind that I wanted Clarence Darrow. It was going to be a down-in-the-mud fight and I felt the situation demanded an Indian fighter rather than someone who had graduated from the proper military academy."<sup>112</sup>

Scopes described the atmosphere during the meeting when Malone formerly offered his and Darrow's services:

Malone's brief speech triggered a bitter argument, most of it against accepting the Malone-Darrow offer. The arguments against Darrow were various; that he was too radical, that he was a headline hunter, that the trial would become a circus, that with Darrow in the case there would be no chance of getting it into the Federal courts.<sup>113</sup>

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<sup>105</sup> MONKEY BUSINESS, *supra* note 19, at 18.

<sup>106</sup> CENTER OF THE STORM, *supra* note 85, at 65.

<sup>107</sup> STORY OF MY LIFE, *supra* note 4, at 249.

<sup>108</sup> SUMMER FOR THE GODS, *supra* note 5, at 101.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> CENTER OF THE STORM, *supra* note 85, at 67.

<sup>112</sup> *Id.* at 70.

<sup>113</sup> *Id.* at 72.

So great was the ACLU's reluctance to have Darrow involved with the defense that the group did its best to keep Darrow away, even after Scopes had chosen Darrow.<sup>114</sup> When Scopes made it clear that he was sticking with Darrow, the ACLU leadership tried to adjust to his presence. However, according to one source Roger Baldwin, the founder of the ACLU, "pointedly refused to participate further and thereby missed his organization's most famous trial."<sup>115</sup> In contrast, Scopes stated that after the offer of Malone and Darrow's services, "[t]he only real support for Darrow that I could see came from Baldwin and Father Ryan."<sup>116</sup>

Darrow's strong agnosticism undoubtedly ratcheted up the controversy and ensured that it was going to be a battle of religion versus science. However, Darrow was also controversial because "[c]ountless Americans never forgave Darrow for his role in the Leopold-Loeb trial."<sup>117</sup> Many Americans were outraged over the senseless thrill-killing of fourteen-year-old Bobby Franks by Leopold and Loeb, two privileged men from wealthy families whom Darrow saved from being hanged. Darrow's controversial defense of Leopold and Loeb would later be referred to during the Scopes trial.

Despite this controversy, Clarence Darrow was in the fight now; it was the participation of Darrow and Bryan that set the stage for what has become known as the "Monkey Trial." Their presence in the case propelled the controversy into a media and public interest story that captivated the country and generated headlines around the world.

### **Darrow's View of the Controversy**

Darrow grew up in a household that cherished reading and knowledge. His father was a voracious reader and Darrow claims that when it came to books, "we had Darwin's as fast as they were published."<sup>118</sup> Thus it is not surprising that Darrow, a strong supporter of learning and science, dismissed the Tennessee law:

From any point of view, the law was silly and senseless. At the time of its passage, even in the states of Tennessee and Mississippi the schools were teaching that the earth was round instead of flat, and the day and night were due to the revolution of the earth on its axis and not from the sun and moon going around it, or being drawn across the horizon.<sup>119</sup>

### **Darrow's Views on Religion**

Darrow viewed organized religion largely with contempt and he was not afraid to express his views. His views about religion were surely formed in his childhood. In his semi-

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<sup>114</sup> SUMMER FOR THE GODS, *supra* note 5, at 101.

<sup>115</sup> *Id.* at 102.

<sup>116</sup> CENTER OF THE STORM, *supra* note 85, at 72.

<sup>117</sup> SUMMER FOR THE GODS, *supra* note 5, at 106.

<sup>118</sup> STORY OF MY LIFE, *supra* note 4, at 250.

<sup>119</sup> *Id.* at 247.

autobiographical novel *Farmington* he wrote a chapter devoted to “The Church,” in which he describes the influence of the church on his hometown and its people.

Darrow’s mother made him attend church regularly, and he seems to equate mandatory church attendance with child abuse: “I could not understand then, nor do I today, why we were made to go to church; surely our good parents did not know how we suffered, or they would not have been so cruel and unkind.”<sup>120</sup> After he survived church, Darrow was still not free because he had to attend Sunday school:

But the one thing that most impresses me as I look back on the day-school and the Sunday-school where we spent so many of our childhood hours is the unreality of it all. Surely none of the lessons seemed in any way related to our lives. None of them impressed our minds, or gave us a thought or feeling about the problems we were soon to face.<sup>121</sup>

Darrow’s strong dislike of organized religion and Bryan in particular is evident in his 1932 autobiography: “Mr. Bryan was the logical man to prosecute the case. He had not been inside a courtroom for forty years, but that made no difference, for he did not represent a real case; he represented religion, and in this he was the idol of all Morondom.”<sup>122</sup>

Despite Darrow’s despise of the fundamentalist efforts to dictate what was taught in public schools, he remained consistent in his view that people, even fundamentalists like Bryan and his followers, were not responsible for their actions or beliefs. Darrow said of these people:

[N]o right-thinking person can blame them, but can only be sorry for their plight, and combat the spirit of fanaticism and cocksureness that has brought them to such a state. I truly felt sorry for Mr. Bryan. I had to a certain extent followed him through his career, had recognized his idealism and zeal and force, and it was a shock to me to see this concentrated energy and power turned to wormwood and gall through failure and despair and bigotry.<sup>123</sup>

### **Darrow Goes to Tennessee**

The Scopes controversy and the evolution versus religion struggle raised passionate emotions on both sides. Darrow was the target of vilification by some. A Tennessee pastor stated that he “had been searching literature and the pages of history in an effort to find someone with whom he might class Darrow, but as yet had not been able to place him but in one class, and that of the Devil.”<sup>124</sup>

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<sup>120</sup> CLARENCE DARROW, *FARMINGTON* 107 (2d ed. 1904).

<sup>121</sup> *Id.* at 117.

<sup>122</sup> *STORY OF MY LIFE*, *supra* note 4, at 249.

<sup>123</sup> *Id.* at 277.

<sup>124</sup> *SUMMER FOR THE GODS*, *supra* note 5, at 123 (quoting *Pastor Compares Darrow, Devil*, *KNOXVILLE JOURNAL*, July 1, 1925, at 2).

Darrow was entering a highly charged controversy and it was well known that he was an agnostic. It is likely that many in Tennessee and around the country either confused this with or equated this with being an atheist – or simply did not care if there was a distinction between the two. Since he was entering a part of the country that H. L. Mencken would label the “Bible belt,” it would not be surprising if Darrow’s presence angered those who held strong religious beliefs. But when Darrow actually traveled to Dayton, he found that the people treated him very well. He did not get the grand reception that Bryan did when he arrived in Dayton, but:

Still, there were some people at the depot to meet me; I was received most kindly and courteously, at that. As a matter of fact, all through the event down there people treated us with extreme consideration in many ways, in spite of the fact that they must have been shocked by my position in the case.<sup>125</sup>

In another demonstration of goodwill before the trial, a local banker left his home for a family retreat and let Darrow and his group stay there during the trial. Arthur Garfield Hays recalled that despite Darrow’s notoriety among religious believers, he won many over with his personality:

At the beginning, Bryan was the hero of Dayton, and the towns-people looked at Darrow with foreboding. Within a few days, however, Darrow’s kindness, charm, and good humor were compared by the people of Dayton with Bryan’s solemnity, dignity, and show of virtue. Messenger boys who came to us would receive tips of quarters or half dollars; they got no tips from Bryan. Darrow would eat in a public restaurant, attend public affairs, even a high-school dance; Bryan ate at home, attended funerals and religious services. Darrow talked with individuals; Bryan preached to groups. The people came to prefer the human being to the messiah. They had been brought up on Bryan’s ideas but they liked Darrow’s behavior.<sup>126</sup>

### **Pre-Trial Strategies**

The battle between Bryan and Darrow began well before the trial. After he joined the Scopes defense team, Darrow immediately went after Bryan. In numerous speeches before the trial, Darrow emphasized how important the trial was and how significant the threat was to intellectual freedom. Darrow sought to cast Bryan as the personification of the threat to individual liberty and Darrow “characteristically presented this threat as emanating from religious bigotry, making antievolution laws appear particularly ominous . . . .”<sup>127</sup>

Darrow portrayed the prosecution as honest but zealous, putting the threat they posed in stark terms:

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<sup>125</sup> STORY OF MY LIFE, *supra* note 4, at 252.

<sup>126</sup> ARTHUR GARFIELD HAYS, CITY LAWYER: THE AUTOBIOGRAPHY OF A LAW PRACTICE 213 (1942).

<sup>127</sup> SUMMER FOR THE GODS, *supra* note 5, at 103.

They are opening the doors for a reign of bigotry and heresy equal to anything in the Middle Ages. No man's belief will be safe if they win. They will not be satisfied with even a belief in Christ and Christianity, but will enforce their own sort of belief in them.<sup>128</sup>

Bryan prepared for the trial by focusing attention on the basic question of who should control public education. The clear answer, he thought, was taxpayers who fund the schools and their elected representatives, not an outside minority that scoffed at the religious beliefs of parents concerned about what their children learned at school. Darrow believed that Bryan changed tactics and turned to the majority rule issue because he saw that the defense would win the evolution arguments in court. However, Bryan did state early on that the case could be decided without debating the merits of evolution.<sup>129</sup> According to one authoritative account, while Bryan never publicly changed his views that the trial was about the right of the taxpayers to control what is taught in their schools, in private Bryan "hoped to discredit the theory of evolution through expert testimony."<sup>130</sup>

The pre-trial barbs continued in Dayton. Darrow recalled:

When Mr. Bryan arrived in Dayton he was met by a throng of people. From the newspaper accounts one would judge the whole country was out to receive the defender of the faith. His reception proved that he was the ruler of "the Bible belt." The newspaper representatives flocked around him for crumbs of information, asking what he thought would be the outcome of the combat; and among other statements by him he said that this case was to be 'a fight to the death.' The next morning I read Mr. Bryan's reply with some surprise. I had not realized that it was to be such a conflict.<sup>131</sup>

The defense also engaged in pre-trial legal maneuvering. If it was up to the defense team, Dayton would not be the location for the upcoming trial. The defense wanted to remove the case to one of the federal courts in Chattanooga, Knoxville or Nashville so it could test the constitutionality of the Butler Act in federal court. But a federal judge rejected their motion, and so Dayton was safely the center of attention.

### **The Evolution Controversy and Race**

A less known aspect of the evolution controversy is how contemporary blacks viewed the issues and the Scopes trial. There was a small group of predominately secular black leaders and commentators who held far different religious views than the majority of blacks, who identified very strongly with their belief in God. In addition to scoffing at the piety of marginalized blacks, these secular leaders perceived a fear of racial equality in the anti-evolution movement. They believed that the battle between evolution and

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<sup>128</sup> MONKEY BUSINESS, *supra* note 19, at 31.

<sup>129</sup> *Id.*

<sup>130</sup> SUMMER FOR THE GODS, *supra* note 5, at 129.

<sup>131</sup> STORY OF MY LIFE, *supra* note 4, at 251.



religion was not purely science versus faith. They were convinced that the fear of evolution was not prompted solely by the threat to religion, but also because it threatened the underpinnings of racial segregation and discrimination. According to one historian:

Unlike almost every white commentator at the time and every historian since, many African American editorialists claimed that racial discomfort lay behind Tennessee's decision to outlaw evolution. In the course of the Tennessee antievolution trial, therefore, secular African American leaders proclaimed their support for John Scopes and identified racial improvement with the progress of science in America.<sup>132</sup>

To this secular black minority, white fear of Charles Darwin's theory of evolution was really a fear that the Jim Crow theory of racial superiority was scientifically wrong:

Secular black commentators charged that the goad to the antievolution movement, from the top on down, was fear of Darwinism's racial implications. If black and white had a common ancestry, as evolutionary theory suggested, then the South's elaborate racial barriers might seem arbitrary rather than God-given.<sup>133</sup>

Another source stated that among the anti-evolution groups, "[o]ne of the most stressed notions which went around was that evolution made a Negro as good as a white man—that is, threatened White Supremacy."<sup>134</sup> Another scholar states that this "may . . . have been true, but it is difficult to document from the publications of the time."<sup>135</sup>

Despite evidence that some of the support for the anti-evolution movement was based on fear of racial equality between blacks and whites, there is considerable evidence that many pro-evolution leaders did not believe that the races were equal and instead believed that whites were the superior race. Ironically, this is displayed graphically in the very book that was at the root of the controversy in the Scopes trial. The classroom textbook that Scopes used and which formed the basis for the charge that he taught evolution in class was itself a clear example of racial bigotry. This textbook, *A Civic Biology: Presented in Problems* by George W. Hunter, was "the official Tennessee biology text."<sup>136</sup> Tennessee schools first began to use Hunter's textbook in 1909, ten years before the state commission officially adopted it.<sup>137</sup>

The section on evolution in Hunter's biology textbook that created such a controversy is only three pages long. This small section on evolution ends with a paragraph entitled "The Races of Man," which states:

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<sup>132</sup> Jeffrey P. Moran, *Reading Race into the Scopes Trial: African American Elites, Science, and Fundamentalism*, 90 J. AM. HIST. 891, 893 (2003) [hereinafter Moran, *The Scopes Trial*].

<sup>133</sup> *Id.* at 899.

<sup>134</sup> W.J. CASH, *THE MIND OF THE SOUTH* 347 (1941).

<sup>135</sup> RONALD L. NUMBERS, *DARWINISM COMES TO AMERICA* 67 (1998).

<sup>136</sup> Moran, *The Scopes Trial*, *supra* note 132, at 903–04.

<sup>137</sup> MONKEY BUSINESS, *supra* note 19, at 89.

**The Races of Man.**—At the present time there exist upon the earth five races or varieties of man, each very different from the other in instincts, social customs, and, to an extent, in structure. These are the Ethiopian or negro type, originating in Africa; the Malay or brown race, from the islands of the Pacific; the American Indian; the Mongolian or yellow race, including the natives of China, Japan, and the Eskimos; and finally, the highest type of all, the Caucasians, represented by the civilized white inhabitants of Europe and America.<sup>138</sup>

Hunter's textbook credited Darwin with providing proof for the theory of progress that was "decidedly anthropocentric and heavily laced with the scientific racism of the day."<sup>139</sup>

### **Darrow, Religion and Race**

Darrow was clearly sympathetic to the black experience of racial inequality and on numerous occasions he used his considerable legal talents to help blacks in court and his renowned oratorical skills to plead for racial equality in speeches. Darrow's most important efforts on behalf of blacks would come later in 1925 and in 1926 in the Sweet trials in Detroit. There, Darrow and Arthur Garfield Hays successfully defended a number of black defendants accused of murdering a white man when a mob of whites had attempted to drive a black family from a white neighborhood.

A vast majority of blacks in this time period turned to religion as the bedrock upon which they found the strength to endure virulent racism and poverty. Darrow, a well known critic of organized religion and religious leaders, was also very vocal in advising the black community to turn away from religion and the church. Darrow's message was shared by some leading black intellectuals of the time, who viewed religion as a hindrance rather than a solution to racial equality. Darrow and this minority of important black intellectual leaders counseled blacks against believing in and relying on religion and religious faith as a way to better their lives.

An interesting example of this dynamic involving Darrow, race and religion occurred in 1925, during the period in between the two Sweet trials in Detroit. During a NAACP fundraising event in Detroit to raise money for the Sweet defense and other cases, Darrow spoke before a black audience. According to the *New York Amsterdam News*, a leading black newspaper, Darrow told the audience: "You are too blooming pious. Many people get consolation out of religion; but if the Lord was going to do something for you he would have done it long ago. I would have more confidence in him if there wasn't a white and colored Y.M.C.A."<sup>140</sup> He also told the audience that "[t]he sooner Negroes

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<sup>138</sup> GEORGE W. HUNTER, *A CIVIC BIOLOGY: PRESENTED IN PROBLEMS 196* (1914). The book also includes brief discussions of Darwin's theory of cross-pollination of flowers by insects on pages 40–41, his theory of natural selection on page 253, and a short biography of Darwin on pages 404–406.

<sup>139</sup> SUMMER FOR THE GODS, *supra* note 5, at 23.

<sup>140</sup> NEW YORK AMSTERDAM NEWS, Dec. 16, 1925, XVII, No. 3.

find out that they can't depend on Daniel and the Lord and get busy for themselves the better off they will be."<sup>141</sup>

According to Edward Larson:

Relatively little comment about the trial survives from African Americans. A few black evangelists, such as Virginia's John Jasper, endorsed Bryan's position, while the NAACP, which worked regularly with the ACLU, participated in some of the ACLU's New York meetings on the trial. In any event, the outcome would not affect African Americans, because Tennessee public schools enforced strict racial segregation and offered little to black students beyond elementary instruction.<sup>142</sup>

### **Women and the Evolution Controversy**

Women played an important role in the evolution controversy. Although the leaders of the anti-evolution movement were all men, women as a group were strongly against evolution, with one estimate asserting that women represented seventy percent of the anti-evolutionists.<sup>143</sup> Women were prominent in contacting Tennessee House members to voice their support for the Butler Act. During the legislative process leading up to the enactment of Tennessee's anti-evolution law, nearly all the letters to the newspapers in support of the bill came from women, while most of the letters against the law came from men.<sup>144</sup>

Why would women be so prominent in the anti-evolution movement? It appears many believed evolution instruction interfered with their role as mothers and protectors of their children. Like the prohibition movement, the anti-evolution movement "was a female-dominated reform movement that invoked a mother's duty to protect her children and make the state an extension of maternal moral influence."<sup>145</sup>

### **Circus Atmosphere**

Besides the clash between Darrow and Bryan near the end of the trial, the most enduring visual aspect of the event was the circus-like atmosphere during the run-up to the trial and the trial itself. It is likely that many people in Dayton as well as throughout the country were not well acquainted with the finer points of Darwin's theories. However, it is likely that everyone who had heard of the theory had some notion that it tried to account for the origin of the human race by tying it to the animal kingdom, with man as the end result of a long evolution from some lower form of life. Because primates were the closest animals to humans, the monkey (or chimpanzee) quickly became the symbol

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<sup>141</sup> *Id.*

<sup>142</sup> SUMMER FOR THE GODS, *supra* note 5, at 122.

<sup>143</sup> JEFFREY P. MORAN, THE SCOPES TRIAL: A BRIEF HISTORY WITH DOCUMENTS 70 (2002). (citing Rollin Lynde Hartt, *What Lies Beyond Dayton*, NATION, July 22, 1925, at 111) [hereinafter SCOPES TRIAL: A BRIEF HISTORY].

<sup>144</sup> *Id.* at 71.

<sup>145</sup> *Id.*

for the trial. So popular was the monkey, linked to the trial, that it prompted a surge in attendance at zoos across the country.

Numerous accounts of the controversy that summer describe it as taking on a circus-like atmosphere. Contributing to the festive mood, merchants displayed pictures of primates in their stores to advertise wares, the local constable placed a ““Monkeyville Police”” sign on his motorcycle and Robinson’s drugstore, where the event was hatched, offered “simian” sodas.<sup>146</sup> Real monkeys made periodic appearances including “Joe Mendi,” a trained chimpanzee that wore a suit and provided entertainment such as playing a mall piano. Joe Mendi was brought from New York to Memphis and Dayton. Mendi was billed as the “\$100,000 chimpanzee with the Intelligence of a Five-Year Child” and his promoters advertised that “[e]very man has a perfect right to decide for himself as to whether his ‘family tree’ bore cocoanuts or not.”<sup>147</sup> Coincidentally, a Dayton store was already named the J.R. Darwin’s Everything to Wear Store. Not one to pass up such an opportunity, Mr. Darwin, the owner of the store, capitalized on his name. He displayed a sign that read “DARWIN IS RIGHT inside” and claimed that his clothes were the “fittest,” cleverly referencing Darwin’s “survival of the fittest” theory.

Scopes recounts that Bryan’s presence had a sobering effect on the carnival atmosphere of Dayton. According to Scopes, when Bryan arrived “most of the citizens followed his lead and assumed more sedate roles. The monkey signs went down and the religious posters started going up.”<sup>148</sup> Robinson’s Drugstore continued to sell “Monkey fizz and a simian watch [that] could be bought for sixty-five cents. But generally speaking, with the arrival of Bryan, the theme in Dayton had changed fast, from the monkey business to the God business, and from chuckles and smiles to a semblance of seriousness.”<sup>149</sup>

Rappleyea succeeded in drawing a great deal of attention to tiny Dayton. However, his dreams of igniting an economic boom from tourism did not pan out. “Only about five hundred visitors stayed in Dayton during the trial, and almost half of these were associated with the media.”<sup>150</sup> This was far below the estimates of visitors expected to descend upon Dayton.

The *Chicago Tribune*’s WGN radio sent personnel to the trial for the first national broadcast of an American court trial, generating interest in the case nationwide.<sup>151</sup>

## **State of Tennessee v. John Thomas Scopes**

The prosecution consisted of Herbert and Sue Hicks, Tom Stewart, Ben B. McKenzie, his son J. Gordon McKenzie, Wallace Haggard and William Jennings Bryan. The defense

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<sup>146</sup> SUMMER FOR THE GODS, *supra* note 5, at 105.

<sup>147</sup> SCOPES TRIAL: A BRIEF HISTORY, *supra* note 143, at 1.

<sup>148</sup> CENTER OF THE STORM, *supra* note 85, at 84.

<sup>149</sup> *Id.*

<sup>150</sup> SUMMER FOR THE GODS, *supra* note 5, at 147.

<sup>151</sup> R. M. Cornelius, *Their State Drew All the World: A New Look at the Scopes Evolution Trial*, XL TENN. HIST. Q. 129, 132 (1981).

team included Dudley Field Malone, Arthur Garfield Hays, John Neal and Clarence Darrow. Darrow and Bryan met that first morning, shook hands and briefly conversed. Early on in the trial, Judge Raulston began referring to both Stewart and Ben McKenzie as “General” in reference to their service as Attorney-General (Stewart held the office at the time). Darrow was referred to as “Colonel” as was Bryan. Bryan had actually been a colonel during the Spanish-American War, although he did not participate in the conflict.

### **Day One - Friday July 10, 1925**

One of the most famous trials in American history began on Friday July 10, 1925. The following summary including quotes comes from the 1925 publication of the trial transcript titled *The World's Most Famous Court Trial, Tennessee Evolution Case; A Complete Stenographic Report of the Famous Court Test of the Tennessee Anti-evolution Act, of Dayton, July 10 to 21, 1925, Including Speeches and Arguments of Attorneys.*<sup>152</sup> The trial opened that morning with a prayer given by Reverend Cartwright. The defense did not like having a prayer in a case involving religious controversy, but did not make an issue of it — at least not right away. The first order of business after the prayer was to empanel a grand jury to re-indict Scopes. It appears that the original grand jury indictment was not properly done and both sides were “anxious that the record be kept straight and regular, [and] that no technical objection may be made to it in the appellate court.” Judge Raulston charged the new grand jury by reading the Butler Act. Because it was alleged that Scopes had taught a doctrine denying the story of the Divine creation of man, the judge also read the first chapter of Genesis.

Judge Raulston instructed the grand jurors that their task was simply to determine whether Scopes violated the Act, and not to “inquire into the policy or wisdom of this legislation.” He also informed them that a violation of the Butler Act was a misdemeanor; although the statute did not classify the degree of misdemeanor violation, he said:

I regard a violation of this statute as a high misdemeanor, . . . I make no reference to the policy or constitutionality of the statute, but to the evil example of the teacher disregarding constituted authority in the very presence of the undeveloped mind whose thought and morals he directs and guides.

After Scopes was re-indicted, Clarence Darrow rose to ask the judge questions about the defense’s expert witnesses. The defense planned to introduce expert testimony by scientists on the theory of evolution and by theological scholars on various interpretations of the Bible. The defense had lined up nationally known experts including scientists, zoologists, geologists and educators who were willing to travel to Dayton. The defense correctly anticipated that the prosecution would object to the admissibility of expert testimony and Darrow wanted to get that matter out of the way before these experts traveled all the way to Dayton. The defense and prosecution conferred on the matter and Stewart announced to the court that the defense’s efforts to introduce expert testimony would be “resisted by the state as vigorously as we know how to resist it.”

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<sup>152</sup> Quotes are not cited to a particular page.

The battle over whether to allow expert testimony for the defense would turn out to be one of the main battles in the trial. Whether Scopes actually taught evolution and whether he violated the Butler Act in doing so quickly became minor issues. From the start, “the issue was not whether Scopes was guilty but whether the defense could offer evidence to prove that the theory of evolution was valid and that it did not conflict with the Bible.”<sup>153</sup>

Stewart recommended they pick a jury first before arguing the expert testimony issue, but he also asked the court to adjourn for the day because the defense had traveled a great distance and were not yet acclimated to the heat. Darrow even pushed the issue several times by requesting that they adjourn for the rest of the day. But Judge Raulston decided that they should stay in session for two hours to begin the jury selection process.

### **Jury Selection**

Judge Raulston began the examination of each potential juror. Each juror was asked whether they were related by blood or marriage to the defendant Scopes or Walter White, the person named to bring the complaint against Scopes.

Darrow was ever mindful of how important jury selection was in a trial. It was one of the keys to his success in tough cases. He knew that the citizens of Dayton took their religious beliefs seriously: “We realized that a jury drawn from Dayton, Tenn., would not permit a man to commit such a heinous crime as Scopes had been guilty of and allow him to go scot-free.”<sup>154</sup> However, Darrow did not have to agonize over jury selection in Dayton. Unlike any of his other cases, this time he and the other members of the defense team wanted his client convicted so they could appeal the case to a higher court. An acquittal would leave the constitutionality of the law unchallenged.

Despite the low stakes involved in picking this particular jury, Darrow did challenge several jurors. Darrow questioned J.P. Massingill, a preacher, by directly asking whether he preached against evolution:

Q—Did you ever preach on evolution?

A—Yes. I haven’t as a subject; just taken that up; in connection with other subjects. I have referred to it in discussing it.

Q—Against it or for it?

A—I am strictly for the Bible.

Q—I am talking about evolution. I am not talking about the Bible. Did you preach for it or against it?

A—Is that a fair question, judge?

Court—Yes, answer the question.

A—Why, of course.

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<sup>153</sup> PAOLO E. COLETTA, WILLIAM JENNINGS BRYAN, VOL. 3: POLITICAL PURITAN, 1915-1925, 244 (1969) [hereinafter POLITICAL PURITAN].

<sup>154</sup> STORY OF MY LIFE, *supra* note 4, at 260.

Darrow also got Massingill to admit that he believed evolution is contrary to the Bible and that Scopes had taught evolution. Darrow challenged the preacher for cause and the judge excluded him.

There was no shortage of potential jurors. Scopes wrote that “[m]any were anxious to become jurors, not for the pay they would earn but to have ringside seats.”<sup>155</sup> Ironically, those chosen for jury duty actually missed most of the trial, including many of its most dramatic moments, because the jury was often dismissed while the attorneys on both sides argued legal issues before the judge.

Scopes described the jury selection process, showing great insight into Darrow’s trial technique:

Darrow handled the jury selection for the defense and accepted several men who he probably was certain were against him. This did not bother him; he made a point of complimenting a man who had given what seemed to be a straight answer. It was part of Darrow’s philosophy of choosing juries; he would take a juror who seemed opposed to him if he thought the man was honest. Darrow’s thinking was that, as long as a man was honest, he could reach him through reason and bring him to see other viewpoints, in spite of any residual prejudices.<sup>156</sup>

The jury of twelve men was selected in about two and a half hours. This is one of the strongest indications that Darrow was not concerned about his client being convicted. It would have taken many days to select a jury if his goal was to prevent Scopes from being convicted. After the jury was selected, Scopes noted:

I knew every man on the jury, by sight if not by name, and, going by what they revealed in court, it was safe to assume that I had an excellent chance of being convicted—which, after all, was what we expected, so that we could appeal the verdict and get into the Federal courts. There were six Baptists, four Methodists, one Disciple of Christ . . . and one who didn’t belong to a church.<sup>157</sup>

Mary Baird Bryan accompanied her husband to the trial and afterwards described the jury selection process in a letter:

The selection of the jury was exceedingly interesting to me. They succeeded in filling it up, but almost all with mountain men, and there is only one man on the jury who is not a church member, and all are Bible readers except one who admitted he could not read. Darrow did the cross questioning and several were not permitted on the jury because of too great devotion to the church. If this trial had been held in some Western states, say Arizona or New Mexico, Darrow would have had no difficulty in finding plenty of men who were not church members

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<sup>155</sup> CENTER OF THE STORM, *supra* note 85, at 106.

<sup>156</sup> *Id.* at 106-107.

<sup>157</sup> *Id.* at 106.

and who never read their Bibles, but these fellows were planted on solid ground. .  
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## Summer Heat

Tensions during the highly charged legal and religious controversy were exacerbated by the oppressive summer heat. Although the first modern electrical air conditioning was invented in 1902 by Willis Haviland Carrier, it would be many years before air conditioning became a required fixture of buildings. The scorching temperature in Tennessee that summer was a constant presence during the trial and was commented on in numerous accounts. It was inevitable given the religious dimensions of the case that comparisons with biblical Hell would be made. Darrow, ever the wit, wrote in his autobiography that “[c]ertainly Tennessee can never be blamed if our souls were not saved that hot summer, in that torrid land that might have inspired one to beware of ever going to a hotter clime.”<sup>159</sup> Darrow was clearly awed by the extreme heat. As he recalled, “Tennessee must be very close to the equator; or maybe the crust is very thin under this little sin-fearing section, or, where could such hellish heat come from?”<sup>160</sup>

John Scopes also wrote about the summer heat:

Dayton in 1925 was as hot as any hell the white-headed evangelist, T.T. Martin, might have conjured up. It was midsummer; the sun baked the sidewalks and its heat boiled into the courtroom, becoming a constant source of annoyance and discomfort. By the time court convened each morning around nine o’clock, the sun was already high, and by noon the room on the second floor was so ovenlike that collars wilted right along with their wearers.<sup>161</sup>

During the course of the trial, Dudley Field Malone intrigued courtroom spectators and gained their respect by keeping his suit jacket on despite the heat, only removing it for his main speech of the trial.

## Day Two – Monday July 13, 1925

The second day of the trial was especially important in terms of the defense strategy. Soon after the opening prayer, Neal moved to quash and dismiss the indictment against Scopes. A successful movement to quash the indictment would have fulfilled the defense’s goal because it would have been done on constitutional grounds. But Neal’s motion was placed on hold until after the indictment was read. When Neal began to explain the defense motion, he told the court that even though they were moving to quash and dismiss the indictment, they actually wanted the court to hold off ruling on that until after the trial. The prosecution objected to that request and so Neal proceeded to read the motion. The motion alleged specific violations of various sections of the Tennessee

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<sup>158</sup> POLITICAL PURITAN, *supra* note 153, at 245-46.

<sup>159</sup> STORY OF MY LIFE, *supra* note 4, at 255.

<sup>160</sup> *Id.* at 256.

<sup>161</sup> CENTER OF THE STORM, *supra* note 85, at 101.



Constitution. Although references were made to the U.S. Constitution, the defense concentrated on arguing that the statute violated the Tennessee Constitution.

The emphasis on the Tennessee Constitution rather than the federal constitution was necessary because it would be two decades before the United States Supreme Court would use the incorporation doctrine to hold that some protections under the Bill of Rights also applied to the states. Just a month before, the United States Supreme Court handed down its first decision announcing the incorporation doctrine in the case of *Gitlow v. New York*.<sup>162</sup> Benjamin Gitlow was an activist who had been expelled from the Socialist party; in 1919, he became a founding member of the Communist Labor Party, which later merged into the Communist Party. Gitlow and James Larkin, an Irish activist, were arrested and convicted under New York State Criminal Anarchy Act for distributing copies of a "left-wing manifesto" that advocated the overthrow of the government by force.

In *Gitlow*, the Court ruled:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.<sup>163</sup>

Although it took years, the Supreme Court “began the process of incorporation in its decision in *Gitlow v. New York*.”<sup>164</sup> Interestingly, Clarence Darrow had defended Benjamin Gitlow in his criminal trial, but did not participate in the subsequent appeals that eventually ended in the U.S. Supreme Court. Scopes’ defense team would later cite the *Gitlow* decision in their appellate brief to the Supreme Court of Tennessee.

After reading the motion, Neal again asked the court to reserve ruling on the motion until later. The defense wanted a delayed ruling on their motion because they believed that their evidence would “be of enlightening character” to the court and the jury. General Stewart insisted that the motion be ruled on without delay. Neal argued that contrary to popular belief among the public and even lawyers, the trial judge had the power and the duty to rule on constitutional issues because this power was not reserved to just appellate courts.

### **Defense Motion to Quash Indictment**

Neal then proceeded to give brief explanations of the defense’s legal arguments based on the motion to quash. Neal argued that the Butler Act violated Section 17 of the Tennessee Constitution, which states, “[n]o bill shall become a law which embracers more than one subject, that subject to be expressed in the title.” Neal argued that because the caption of

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<sup>162</sup> *Gitlow v. People of State of New York*, 268 U.S. 652, 45 S.Ct. 625 (1925).

<sup>163</sup> *Gitlow*, 268 U.S. 652, at 666.

<sup>164</sup> William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. CIN. L. REV. 125, 204 n.3 (1988).

the Act prohibits teaching “the Evolution Theory” while the body of the Act prohibits teaching “any theory that denies the story of the Divine Creation of man as taught in the Bible . . .,” the Act is in violation of Section 17. Neal emphasized to the judge that “probably four-fifths of the law which the Tennessee supreme court has ultimately held unconstitutional . . . has been based upon this particular provision.” The defense would point to this discrepancy between the caption and body of the Butler Act several times.

Next, Neal argued that the Butler Act violated Section 13, Article II of the Tennessee Constitution, which acknowledges the importance of “[k]nowledge, learning and virtue” and directs that “it shall be the duty of the general assembly in all future periods of this government, to cherish literature and science.” The defense would make repeated references to the duty of the legislature to “cherish literature and science.” The defense believed banning evolution instruction to be the antithesis of cherishing science.

Neal then came to Section 3, Article 1, which he described as the “most sacred provision of the constitution of Tennessee.” Neal then read the article, which provides:

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

According to Neal, the State of Tennessee had the power to control its schools, but not to violate the freedom of religion embodied in that provision of their constitution. Neal argued the Butler Act violated this freedom of religion because it made “mandatory the teaching of a particular doctrine that comes from a particular religious book” and in doing so established a preference for a particular religion.

### **Hays Offers Hypothetical Law**

Arthur Garfield Hays followed Neal. Hays argued that the statute was too vague and that it exceeded the police power of the state. To illustrate his point, Hays used a hypothetical law he entitled: “An act prohibiting the teaching of the heliocentric theory in all the universities, normals, and all other public schools of Tennessee which are supported in whole or in part by the public school funds of the state . . .” Hays’ Act would prohibit teaching “any theory that denies the story that the earth is the center of the universe, as taught in the Bible, and to teach instead, that the earth and planets move around the sun.”

In a bit of overkill, Hays’ Act made violations a felony punishable by death. Aside from the death penalty, Hays argued that the only difference between his act and the Butler Act was public acceptance: the Copernican theory is “so well fixed scientifically that the earth and planets move around the sun” and is “so well established that it is a matter of common knowledge.” Hays believed that the theory of evolution was as much a scientific fact as the Copernican theory.

Hays argued that the Butler Act was unconstitutional because it was an unreasonable exercise of the police power of the state. According to Hays: “To my mind, the chief point against the constitutionality of this law is that it extends the police powers of the state unreasonably and is a restriction upon the liberty of the individual.”

General McKenzie countered for the prosecution with an argument that could just as easily have come from Bryan:

Under the laws of the land, the constitution of Tennessee, no particular religion can be taught in the schools. We cannot teach any religion in the schools, therefore you cannot teach any evolution, or any doctrine, that conflicts with the Bible. That sets them up exactly equal. No part of the constitution has been infringed by this act.

In dismissing the defense’s argument about the statutory rule of construction, McKenzie pointed out the defense lawyers were from out of town:

The questions have all been settled in Tennessee, and favorable to our contention. If these gentlemen have any laws in the great metropolitan city of New York that conflict with it, or in the great white city of the northwest that will throw any light on it, we will be glad to hear it. They have many great lawyers and courts up there.

This rankled Malone, who interjected, “I would like to say here . . . I do not consider further allusion to geographical parts of the country as particularly necessary, such as reference to New Yorkers and to citizens of Illinois. We are here, rightfully as American citizens.” Judge Raulston tried to placate Malone by explaining that everything McKenzie said was meant to be humorous. McKenzie then sought to assure the defense that he meant no harm by his remarks. McKenzie also ridiculed the defense’s argument that they had to bring in expert testimony to help interpret the statute: “The smallest boy in our Rhea county schools, 16 years of age, knows as much about it as they would after reading it once or twice.”

### **Bible versus Koran**

Darrow got involved in the arguments during the afternoon session. He reiterated the argument that there was a conflict between the caption and body of the statute. Darrow asserted that the statute gives a preference for the Bible which violates the provision of the Tennessee Constitution protecting the freedom of worship. Darrow asked why it did not give preference to the Koran. Stewart was apparently astonished at the question. He told the court, “[i]f your honor please, the St. James version of the Bible is the recognized one in this section of the country. The laws of the land recognize the Bible; the laws of the land recognize the law of God and Christianity as a part of the common law.” Malone picked up on this line of argument and pressed Stewart to answer whether the statute

gives preference to the Bible over the Koran. An exasperated Stewart finally responded, “[w]e are not living in a heathen country, so how could it prefer the Bible to the Koran?”

### ***Myer v. Nebraska and Leeper v. State***

Hays repeatedly argued that the statute is a violation of the police powers of the state. Stewart acknowledged that this was the only defense argument that the state might “seriously” consider. At this point the state referred to an important U.S. Supreme Court decision - *Myer v. Nebraska*,<sup>165</sup> which was decided in 1923. Meyer, who taught German in a Lutheran school, was convicted under a Nebraska law similar to some other state laws that prohibited the teaching of modern foreign languages to grade school children. The Court held that the statute violated the Fourteenth Amendment's Due Process clause.

Stewart explained to Judge Raulston that in *Meyer*, the Supreme Court held the Nebraska statute unconstitutional because it affected all the schools – both public and private. Stewart then quoted from the case:

The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instruction in English is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy.

Stewart placed a great deal of emphasis on the *Meyer* decision and on the 1899 Tennessee case of *Leeper v. State*.<sup>166</sup> Leeper, also a teacher, was convicted of violating the “Uniform Text-Book Act” for using an unapproved geography textbook. The Supreme Court of Tennessee held that the text-book act was constitutional. The court ruled that the power of the Legislature to regulate and control the public schools is based upon its police powers. The court also stated:

[I]t is impossible to conceive of the existence of a uniform system of public schools without power lodged somewhere to make it uniform, and, in the absence of express constitutional provisions, that power must necessarily reside in the legislature; and hence it has the power to prescribe the course of study, as well as the books to be used . . . .

Stewart argued that *Leeper*, when combined with the ruling in *Meyer v. Nebraska*, presented a very strong case that the Butler Act was constitutional. To Stewart it was logical that if the courts ruled the legislature had the police power to administer the public schools and determine curriculum and textbooks, then it could prohibit instruction on the theory of evolution. Stewart, referring to *Meyer* and *Leeper*, told the court:

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<sup>165</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>166</sup> *Leeper v. State*, 103 Tenn. 500, 53 S.W. 962 (Tenn. 1899).

That is the very crux of this lawsuit. That is absolutely the question involved here, if Your Honor please. And the case of Leeper against the state of Tennessee—on this case, and the case of Leeper against the state of Tennessee we are willing to risk our rights.

Hays asked how Scopes got the book he taught from, implying of course that Scopes was using a state approved biology textbook.

### **“Colonel” Darrow**

Darrow then requested to speak. At this time, Judge Raulston bestowed the title “Colonel” on Darrow. By this time in the trial, Darrow had already come to like McKenzie. Darrow said:

I know my friend, McKenzie, whom I have learned not only to admire, but to love in our short acquaintance, didn’t mean anything in referring to us lawyers who come from out of town. For myself, I have been treated with the greatest courtesy by the attorneys and the community.

Darrow then announced: “I shall always remember that this court is the first one that ever gave me a great title of ‘Colonel’ and I hope it will stick to me when I get back north.” Judge Raulston replied: “I want you to take it back to your home with you, Colonel.”

Darrow’s remarks were genuine; he would recount in his 1932 autobiography how well he liked McKenzie. Although there were heated legal arguments during the trial, Darrow wrote in his autobiography that most of the lawyers on the side of the State “were courteous and kindly and we all got along exceedingly well.” He went on:

[E]specially General Ben MacKenzie and his son, whom we took to be stolid Scotchmen, became most agreeable and even lovable, so that a strong affection developed between us which I am sure will continue so long as we live. After all, men in all lands and at all times have been found human and loving outside their religious attitudes.<sup>167</sup>

With these pleasantries over, Darrow then took a dig at Bryan by referring to the fact that both sides had attorneys who came from out of town: “[O]n the other side we have a distinguished and very pleasant gentleman who came from California and another who is prosecuting this case, and who is responsible for this foolish mischievous and wicked act, who comes from Florida.” Darrow began his major speech of the trial during which he primarily argued the Butler Act was unconstitutional because the State of Tennessee was establishing a particular religious viewpoint in the public schools.

Darrow and others often used humor during the trial. Darrow brought up the *Leeper* case and said, “[m]y fellow is a leper too, because he taught evolution.” The trial transcript mentions numerous times that Darrow elicited laughter from the crowd over something

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<sup>167</sup> STORY OF MY LIFE, *supra* note 4, at 252-53.

he said. While making a legal point, he referred to the case of *Ragio v. State*<sup>168</sup> in which the Supreme Court of Tennessee held unconstitutional a state statute that made it a “misdemeanor for any one, engaged in the business of a barber, to shave, shampoo, cut hair, or keep open their bath-rooms on Sunday.” Referring to the *Ragio* case, he said:

Well, of course, I suppose it would be wicked to take a bath on Sunday, I don't know, but that was not the trouble with this statute. It would have been all right to forbid the good people of Tennessee from taking a bath on Sunday, but that was not the trouble. A barber could not give a bath on Sunday, anybody else could. No barber shall be permitted to give a bath on Sunday, and the supreme court seemed to take judicial notice of the fact that people take a bath on Sunday just the same as any other day. Foreigners come in there in the habit of bathing on Sundays just as any other time, and they could keep shops open, but a barber shop, no. The supreme court said that would not do, you could not let a hotel get away with what a barber shop can't.

### **Darrow Finishes with a Warning**

Despite his humor, Darrow ended with a grim warning of where legislation like the Butler Act would lead:

To strangle puppies is good when they grow up into mad dogs, maybe. I will tell you what is going to happen, and I do not pretend to be a prophet, but I do not need to be a prophet to know. Your honor knows the fires that have been lighted in America to kindle religious' bigotry and hate.

Darrow was interrupted by the judge, who wanted to adjourn for the day. Darrow insisted that he be able to talk for five more minutes and concluded:

If today you can take a thing like evolution and make it a crime to teach it in the public school, tomorrow you can make it a crime to teach it in the private schools, and the next year you can make it a crime to teach it to the hustings or in the church. At the next session you may ban books and the newspapers. Soon you may set Catholic against Protestant and Protestant against Protestant, and try to foist your own religion up on the minds of men. If you can do one you can do the other. Ignorance and fanaticism is ever busy and needs feeding. Always it is feeding and gloating for more. Today it is the public school teachers, tomorrow the private. The next day the preachers and the lecturers, the magazines, the books, the newspapers. After while, your honor, it is the setting of man against man and creed against creed until with flying banners and beating drums we are marching backward to the glorious ages of the sixteenth century when bigots lighted fagots to burn the men who dared to bring any intelligence and enlightenment and culture to the human mind.

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<sup>168</sup> *Ragio v. State*, 86 Tenn. 272, 6 S.W. 401 (Tenn. 1888).

The court was adjourned after Darrow's speech. Darrow's speech received a great deal of praise. According to a 1997 book, Darrow countered Stewart's arguments in a "brilliant rebuttal."<sup>169</sup> The Chicago Tribune called it one of the greatest speeches in Darrow's career. Even the prosecution attorney Ben McKenzie said it was "the greatest speech that I have ever heard on any subject in my life."<sup>170</sup>

H.L. Mencken's coverage of the trial and the citizens of the Dayton area was intentionally sarcastic and dismissive. He reported on Darrow's speech:

The net effect of Clarence Darrow's great speech yesterday seems to be precisely the same as if he had bawled it up a rainspout in the interior of Afghanistan. That is, locally, upon the process against the infidel Scopes, upon the so-called minds of these fundamentalists of upland Tennessee. You have but a dim notion of it who have only read it. It was not designed for reading, but for hearing. The clanging of it was as important as the logic. It rose like a wind and ended like a flourish of bugles. The very judge on the bench, toward the end of it, began to look uneasy. But the morons in the audience, when it was over, simply hissed it.<sup>171</sup>

Darrow recounted in his autobiography the strategy for the Scopes trial:

I made a complete and aggressive opening in the case. I did this for the reason that we never at any stage intended to make any arguments in the case. We knew that Mr. Bryan was there to make a closing speech about "The Prince of Peace."<sup>172</sup>

### **Day Three – Tuesday, July 14, 1925**

When the court announced that Reverend Stribling would say the opening prayer, Darrow stunned many court observers when he formally objected. Darrow explained the defense's concern:

[T]he nature of this case being one where it is claimed by the state that there is a conflict between science and religion, above all other cases there should be no part taken outside the evidence in this case and no attempt by means of prayer or in any other way to influence the deliberation and consideration of the jury of the facts in this case.

Stewart argued in favor the opening prayer:

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<sup>169</sup> SUMMER FOR THE GODS, *supra* note 5, at 162.

<sup>170</sup> *Id.* at 165.

<sup>171</sup> H.L. Mencken, *Darrow's Eloquent Appeal Wasted on Ears That Heed Only Bryan*, BALTIMORE EVENING SUN, July 14, 1925.

<sup>172</sup> STORY OF MY LIFE, *supra* note 4, at 259.

[T]he state makes no contention, that this is a conflict between science and religion . . . it is quite proper to open the court with prayer if the court sees fit to do it, and such an idea extended by the agnostic counsel for the defense is foreign to the thoughts and ideas of the people who do not know anything about infidelity and care less.

Malone, a Catholic, took exception to this, stating, "I respect my colleagues, Mr. Darrow's right to believe or not believe as long as he is as honest in his unbelief as I am in my belief." Malone stated that the defense did not object to the court opening the first day of the trial with a prayer but they did object to it opening each day in that manner because it contributed to a hostile atmosphere for the defense. Malone asked the court if in every prior case it handled it opened every single day of trial with a prayer. Stewart jumped in and said, "[s]o far as creating an atmosphere of hostility is concerned, I would advise Mr. Malone that this is God fearing country." Malone responded, "And it is no more God fearing country than that from which I came." The judge then stepped in to stop the argument. The court overruled the defense's objection and the opening prayer was given. Darrow later asked that the record show the defense objected to the opening prayer for the rest of the trial so they would not need to voice an objection each morning. The judge then adjourned the court so he could study and render a decision on the defense's previous motion to quash and dismiss the indictment.

When court reconvened several hours later, Hays aroused Stewart's anger by asking the court to hear a petition signed by numerous religious organizations, churches and synagogues. The petition requested that if the judge continued opening each day with a prayer, he pick clergy from other denominations so there could be a mix of fundamentalist prayers with those of other faiths. Hays explained that this did not mean they were reversing their objection to the opening prayer, but if the opening prayer was to be given, they wanted the process stated in the petition to be used. Judge Raulston referred the petition to the pastor's association and let them choose who would give each morning's prayer.

### **Judge Angered by Alleged News Leak**

At this point the judge made the accusation that someone had leaked his decision concerning the defense's motion to quash the indictment. He had gotten word that newspapers around the country were reporting that he had ruled against the defense's motion. Judge Raulston concluded that there was a leak of information since he had not announced his decision and only he and the court stenographer knew what it was. Judge Raulston suspected it was a member of the press corps and ordered them to meet with him to discuss the matter. Court was adjourned and during the meeting with the press, the judge appointed several members of the press to investigate the leak and report back to him.

### **Day Four – Wednesday, July 15, 1925**



This may have been the hottest day of the trial. Neal objected to the opening prayer as soon as it was over. This prompted Sue Hicks, who had remained quiet for most of the trial, to argue that they had an agreement that the defense's objection would be noted in the record and there was no need for a formal objection each morning. Sue Hicks stated:

We are trying to avoid any religious controversy and we maintain that there is no religious controversy in this case. Their very opposition contradicts their own-selves. They say, your honor, that evolution is not—does not contradict the Bible—does not contradict Christianity. Why are they objecting to prayers if it doesn't contradict the Bible—doesn't contradict Christianity?

Judge Raulston defended the morning prayer, explaining that no bias was intended, and overruled the defense's objection. Darrow reiterated the defense's objection for the record.

### **Press Leak Solved**

At this point, the results of the press investigation into the news leak of Judge Raulston's decision were announced. The investigation revealed that a young reporter named Mr. Hutchinson had run into the judge on the way to the hotel, carrying paperwork with him. Mr. Hutchinson asked if the papers contained the judge's decision. Judge Raulston replied that they did not but that the decision was with the stenographer. The reporter then asked if he would announce the decision later that day and the judge said he intended to. Finally, the reporter asked if after the decision was announced the court would be adjourned until the next day. The judge answered that yes, it would. From this the reporter logically deduced that the only reason court would be adjourned until the next day would be if the judge overruled the defense motion – otherwise, the trial would have ended with that decision. Hutchinson was called before the judge, but after the judge was assured by other reporters that Hutchinson had no sinister motive and was highly regarded by everyone, the judge let the matter go. He told the press to ask him directly for information, agreeing to answer directly when he could.

### **Darrow Not an Infidel**

Darrow announced to the court that he took exception to Stewart calling him an infidel. He made clear that he was not taking exception to being called an agnostic but in fact considered that a compliment. However, he did not think such references should be made in front of the jury as it could influence the jurors. Judge Raulston sided with Darrow on this point and directed that no further references be made to the religious beliefs of counsel in the presence of the jury.

### **Motion to Quash the Indictment Overruled**

The judge then proceeded to read his lengthy decision overruling the defense motion to quash the indictment. Judge Raulston read each legal argument raised by the defense and then gave his decision overruling each argument. Raulston basically agreed with the

prosecution's rebuttals to all of the defense's arguments that the Butler Act violated various sections of the Tennessee Constitution.

In addressing the defense's arguments that the Butler Act violated the Fourteenth Amendment to the U.S. Constitution, the court cited *Meyer v. Nebraska*, *Leeper*, and a U.S. Supreme Court opinion decided the previous month, *Pierce v. Society of Sisters*.<sup>173</sup> *Pierce* was a constitutional challenge to Oregon's Compulsory Education Act of 1922, which required parents or guardians to send children between the ages of eight and sixteen to public school in the district where they resided. The Society of Sisters was an Oregon corporation that facilitated care for orphans, educated youths, and established and maintained academies or schools. The Court held in a unanimous decision that under the doctrine of *Meyer v. Nebraska*,<sup>174</sup> the Oregon act unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control. According to the Court, "the fundamental liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."

Judge Raulston ruled that "[u]nder the holdings in the Oregon case and in the Nebraska case, and in the Leeper Tennessee case, the court is satisfied that the act involved in the case at bar does not violate the Fourteenth amendment to the constitution of the United States."

They seldom heard from McElwee, but he rose to state that the defense took exception to the ruling, in order to create a record for appeal. The court then adjourned until the afternoon.

### **Afternoon Session – Jury Brought In**

The heat was so intense that during the noon recess, Scopes and two of the prosecutors, William Bryan Jr. and Wallace Haggard went swimming in a mountain pond. They ended up coming back late and Scopes was scolded by Hays: "Where in the hell have you been?"<sup>175</sup> Hays then lectured Scopes that he had to appear promptly in court to avoid a technical error and possibly even arrest.

Finally, the jury was brought in to begin. Because of the crowd of people that packed the courtroom, the prosecution had difficulty finding their student witnesses who would testify that Scopes had taught them evolution. Some in the crowd had grabbed the chairs set aside for the prosecution. This prompted McKenzie to ask the court to direct the audience not to carry off the chairs of the attorneys. He said, "[w]e are a necessary evil in the courtroom . . . ." When the jurors were brought in, a juror announced the unanimous request for electric fans, saying, "[the] heat is fearful." McKenzie replied that they would gladly help but the treasury did not have enough money. Malone volunteered to pay for some fans.

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<sup>173</sup> *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

<sup>174</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>175</sup> CENTER OF THE STORM, *supra* note 85, at 139.

Neal entered a not guilty plea for Scopes. Stewart made a very brief opening statement for the state. Malone gave the defense's opening statement, explaining that the prosecution needed to prove two things: "First—That Scopes taught a theory that denies the story of the divine creation of man as taught in the bible, and Second—That instead and in the place of this theory he taught that man is descended from a lower order of animals." Setting the stage for the battle over expert witnesses, Malone predicted that the defense would "prove by credible testimony that there is more than one theory of creation set forth in the Bible and that they are conflicting."

### **Malone Quotes Bryan**

Malone then read from an introduction that Bryan wrote to Thomas Jefferson's Statute of Religious Freedom. Malone wanted to show that in previous years Bryan was more tolerant of viewpoints that clashed with his religious beliefs and that he agreed with Jefferson that legislation should not be used to try and control the beliefs of others. Malone also rejected the prosecution's interpretation of evolution:

The prosecution has twice since the beginning of the trial referred to man as descended from monkeys. This may be the understanding of the theory of evolution of the prosecution. It is not the view, opinion or knowledge of evolution held by the defense. No scientist of any preeminent standing today holds such a view. The most that science says today is that there is an order of men like mammals which are more capable of walking erect than other animals, and more capable than other animals in the use of the forefeet as hands.

Stewart objected to the use of Bryan's name and the court sustained the objection. Malone explained why he quoted Bryan:

These words, your honor, were written twenty years ago by a member of the prosecution in this case, whom I have described as the evangelical spokesman of the prosecution, and we of the defense appeal from his fundamentalist views of today to his philosophical views of yesterday, when he was a modernist to our point of view.

Bryan did not take offense, but the court insisted that his name not be used. Stewart also objected to framing the trial as a religious question and to reading any theories of evolution.

### **Examination of Witnesses**

The first witness examined was Walter White. Stewart's direct examination of White quickly established that Scopes taught from Hunters' biology textbook; the book was entered into evidence as Exhibit 1. White recounted the scene at Robinson's drugstore where the group discussed the Butler Act and Scopes, "admitted that he had taught [the

theory of evolution]. He said that he couldn't teach the book without teaching that and he could not teach that without violating the statute."

### **"What is the Bible?"**

Stewart then offered into evidence the King James version of the Bible "as explanatory of what the act relates to when it says 'Bible.'" This prompted Hays to question, "What is the Bible? Different sects of Christians disagree in their answers to this question." Hays then discussed the various Bibles that were in existence and argued that expert testimony was needed to establish that the King James Version was the "Bible" so the jury could decide whether the expert was correct. Darrow pressed the prosecution on which particular Bible they wanted to offer as evidence and Stewart stated it was "Holman's Pronouncing Edition of the Holy Bible . . . of 1611, known as the authorized or King James version." Hays objected because the prosecution was interpreting the statute as prohibiting instruction of a theory that was contrary to the St. James version of the Bible. According to Hays:

If the court should take judicial notice of this exhibit as the Bible, you must likewise take judicial notice that there are various Bibles. And the King James' version is not necessarily the Bible and when they introduce one book in evidence, we are saying there are several different books called the Bible. It is not relevant unless those books are the same. You know there is a Hebrew Bible, of some thirty nine books; and there is a Protestant Bible, and a Catholic Bible—the Protestant of sixty-six and the Catholic of eighty books; and you have the King James' version, and a revised version and there are 30,000 differences between the King James' version and it. . . .Who is to say that the King James version is the Bible? The prosecution will have to prove what Bible it is, and they will have to state the theory as taught in the Bible, and I presume the prosecution will be able to point out which theory of the creation as taught in the Bible they relied upon in prosecuting Mr. Scopes.

The court ruled that the Bible offered by Stewart could be certified because it was the Bible in common usage. The judge assured the defense they should be able to obtain a copy of that Bible at Robinson's drugstore or in another town. The King James version of the Bible became Exhibit 2.

### **Darrow Cross-Examines Witnesses**

During Darrow's cross-examination, White clarified how Hunter's biology textbook became the official biology textbook. White explained that the Tennessee Board of Education did not adopt books - this was the responsibility of the Tennessee Textbook Commission. The Commission officially adopted Hunter's textbook in 1919, but the contract expired August 31, 1924. However, no other book was selected, so it was still the official textbook in 1925.

Darrow had some fun cross-examining Howard Morgan, one of Scopes' students who testified that Scopes had taught evolution:

Q—Now, Howard, what do you mean by classify?

A—Well, it means classify these animals we mentioned, that men were just the same as them, in other words—

Q—He didn't say a cat was the same as a man?

A—No, sir; he said man had a reasoning power; that these animals did not.

Q—There is some doubt about that, but that is what he said, is it?

After questioning Morgan about some aspects of biology taught by Scopes, Darrow asked, "Well, did he tell you anything else that was wicked?" Darrow ended his questioning by asking, "It has not hurt you any, has it?"

Darrow asked another witness who had learned about evolution at school, a seventeen-year-old student named Harry Shelton, "You didn't leave church when he told you all forms of life began with a single cell?"

Darrow caused more laughter when he cross-examined "Doc" Robinson. After ascertaining that Robinson was selling the offending biology textbook in his drugstore, Darrow asked, "And you were a member of the school board?" When Robinson replied yes, many in the court laughed and Darrow followed with, "I think someone ought to advise you that you are not bound to answer these questions." Stewart then interjected, "The law says teach not, sell."

Darrow's cross-examination of Doc Robinson included a detailed look at the section on the theory of evolution in Hunter's *A Civic Biology* textbook. Major parts of this section were examined and read into the record. Stewart then asked that the first two chapters of Genesis be read into the record. Soon after this, the state rested its case.

### **The Defense's Case – Darrow does not put Scopes on the Stand**

The jury was removed from the courtroom and the defense put on its first witness - Dr. Maynard M. Metcalf, a zoologist from John Hopkins University. Before Darrow could begin any substantive questioning of Metcalf, Stewart interrupted to inform the defense that in Tennessee, if the defendant did not take the stand first he would not be allowed to testify later. Darrow replied, "Well, you have already caught me on it." However, the judge said it was a technicality and the defense could withdraw Metcalf and put Scopes on the stand. But Darrow conceded, "Your honor, every single word that was said against this defendant was true." Scopes wrote, "I sat speechless, a ringside observer at my own trial, until the end of the circus."<sup>176</sup> Scopes was aware of the strategy involved with the decision not to testify:

Darrow had been afraid for me to go on the stand. Darrow realized that I was not a science teacher and he was afraid that if I were put on the stand I would be

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<sup>176</sup> CENTER OF THE STORM, *supra* note 85, at 136.

asked if I actually taught biology. He knew there was a chance it could provide a traumatic setback for the defense; although I knew something of science in general, it would be quite another matter to deal exhaustively with scientific questions on the witness stand. He also knew there was nothing I could say that would benefit our cause.<sup>177</sup>

Scopes had no illusions that he was the most important actor in the drama playing out in the courtroom: “I did little more than sit, proxylike, in freedom’s chair that hot, unforgettable summer—no great feat, despite the notoriety it has brought me. My role was a passive one that developed out of my willingness to test what I considered a bad law.”<sup>178</sup>

### **Defense’s First and Only Witness – Scientist with Religious Beliefs**

Metcalf was a good choice as the defense’s first witness because he was an established scientist - and a religious man. He exemplified the defense’s contention that science and religion could co-exist in their respective realms. Depending on the scientific and religious interpretations used, the theory of evolution need not conflict with the Bible and religious beliefs. Darrow led Metcalf through a detailed description of his scientific education and accomplishments, followed by a discussion about his religious beliefs. Metcalf said he was a member of the Congregationalist Church, and was currently a member of the United Church in Oberlin Ohio. He was involved in church activities and had taught Bible classes for three years. Darrow then asked Metcalf:

Q—Are you an evolutionist?

A—Surely, under certain circumstances that question would be an insult, under these circumstances I do not regard it as such.

Q—Do you know any scientific man in the world that is not an evolutionist?

Stewart objected to this question. This resulted in a dispute about whether Metcalf could testify as to what the majority of scientists believed about evolution. Eventually Darrow rephrased the question: “What would you say, practically all scientific men were or were not evolutionists?” Metcalf answered:

I am acquainted with practically all of the zoologists, botanists and geologists of this country who have done any work; that is, any material contribution to knowledge in those fields, and I am absolutely convinced from personal knowledge that any one of these men feel and believe, as a matter of course, that evolution is a fact, but I doubt very much if any two of them agree as to the exact method by which evolution has been brought about, but I think there is— I know there is not a single one among them who has the least doubt of the fact of evolution.

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<sup>177</sup> *Id.* at 187-88.

<sup>178</sup> *Id.* at 4.

Stewart objected to placing this testimony in the record where journalists and ultimately jury members might see it. The judge agreed and instructed the court stenographers not to provide that part of the transcript to news reporters. The jury was also dismissed so there was no danger that they would hear trial testimony on the speakers outside the courtroom.

Darrow proceeded to question Metcalf on the details of evolution. Darrow led Metcalf through a question and answer session covering the definition of evolution, inorganic and organic matter, the age of certain fossils, how life began, and the classification of mammals. The day ended with Metcalf stating that the theory of evolution applied to man as it did to animals and plants. Metcalf was the only defense expert to testify in court.

### **Day Five – Thursday, July 16, 1925**

The trial was set to resume with Darrow's direct examination of Dr. Metcalf. This day would involve the most contentious issue of the trial—whether the defense could introduce expert testimony. While Metcalf had already spent time on the witness stand, the court still had to determine whether his testimony – and that of other experts – would be admissible for purposes of the jury's consideration.

### **Basic Legal Dispute – Why the Defense Wanted Expert Testimony**

The defense argued that the Butler Act only prohibited teaching the specific doctrine of evolution that denied divine creation of man. The defense argued it needed expert testimony to show that evolution did not necessarily conflict with the Bible, as there were many different interpretations of the Bible. The prosecution strongly objected, arguing that the Butler Act prohibited teaching any theory of human evolution. The prosecution believed the trial should only address the narrow legal issue of whether Scopes taught evolution, an issue for which no outside experts were needed. The prosecution also wanted to exclude expert testimony because they had been unable to secure any reputable experts for their side.

Immediately after Darrow asked Dr. Metcalf his first question, involving the evolution of man, Stewart interrupted with a request to confine the testimony. He believed enough scientific testimony had been given by the defense's expert for Judge Raulston to rule on whether such evidence should be admitted. In defending the defense's need for expert testimony, Darrow explained:

We expect to show by men of science and learning—both scientists and real scholars of the Bible—men who know what they are talking about—who have made some investigation—expect to show first what evolution is, and, secondly, that any interpretation of the Bible that intelligent men could possibly make is not in conflict with any story of creation, while the Bible, in many ways, is in conflict with every known science, and there isn't a human being on earth believes it literally. We expect to show that it isn't in conflict with the theory of evolution. We expect to show what evolution is, and the interpretation of the Bible that prevails with men of intelligence who have studied it.

## **Judge Concerned Courtroom Floor Could Collapse**

William Jennings Bryan, Jr. then rose to argue that the expert testimony should be excluded. Bryan argued in very legal terms, citing cases and other sources to support his position. After Bryan's argument, the judge raised concerns about the courtroom floor bearing too much weight. He did not want the lawyers who "indulge in a lot of wit" to cause the spectators to laugh and move around, because the floor could possibly collapse.

Darrow and the defense team fought hard to get expert testimony into the trial. The prosecution fought hard to exclude it. The prosecution argued that the statute prohibited any instruction of the theory of evolution as applied to humans, regardless of whether or not it conflicted with Bible. Accordingly, expert testimony on the issue of a conflict was not needed and should not be allowed in. Darrow argued to the judge that the defense wanted to show:

[A]ny interpretation of the Bible that intelligent men could possibly make is not in conflict with any story of creation, while the Bible, in many ways is in conflict with every known science, and there isn't a human being on earth who believes it literally. We expect to show that it isn't in conflict with the theory of evolution.

In his autobiography, Darrow wrote, "[W]e expected to introduce evidence by experts as to the meaning of the word 'evolution' and whether it was inconsistent with 'religion' under correct definition of both words."<sup>179</sup>

During the morning session and at the start of the afternoon session, Judge Raulston announced that due to the great crowd of people, there was a tremendous weight on the floor. He asked for order in the court so as not to cause a collapse.

## **Bryan Speaks – Takes Aim at Darrow and Evolution**

Largely silent up to this point, Bryan rose to present his view of the case. According to the transcript, Bryan must have scored numerous points during his speech because his words were often interrupted by laughter and applause. Referring to Darrow he said, "The principal attorney has often suggested that I am the arch-conspirator and that I am responsible for the presence of this case and I have almost been credited with leadership of the ignorance and bigotry which he thinks could alone inspire a law like this."

Bryan addressed the legal arguments regarding the caption and body of the Butler Act, arguing the law was sound. As Bryan saw it, the defense's use of experts came too late. That type of evidence should have been given to the legislature before the bill was passed. A trial was not the proper forum to debate whether the law should have been passed. Bryan resented outsiders coming to Tennessee to lecture its citizens about a law passed by their elected representatives.

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<sup>179</sup> STORY OF MY LIFE, *supra* note 4, at 260.



As Bryan saw it, the Butler Act merely leveled the playing field. It was a logical case of who should control what is taught in the public schools of Tennessee. Bryan asked:

[Y]ou see in this state they cannot teach the Bible. They can only teach things that declare it to be a lie, according to the learned counsel. These people in the state—Christian people—have tied their hands by their constitution. . . . we will not teach that Bible, which we believe even to our children through teachers that we pay with our money. . . . The question is can a minority in this state come in and compel a teacher to teach that the Bible is not true and make the parents of these children pay the expenses of the teacher to tell their children what these people believe is false and dangerous?

Trying to show that Darrow was not as knowledgeable about some issues as he should be, Bryan said: “Little Howard Morgan—and, your honor, that boy is going to make a great lawyer some day. I didn’t realize it until I saw how a 14-year old boy understood the subject so much better than a distinguished lawyer who attempted to quiz him.”

Bryan pointed out in contrast to Darrow and Morgan that man’s origin from a single cell was not evolution but simply normal growth.

Bryan then gave a long impassioned speech against evolution. A constant theme of his attack against evolution was its detraction from the dignity and special status of humans; humans are closer to God because they were made in his image and this theory simply reduced man to another class of mammal. To Bryan, “[T]he Christian believes man came from above, but the evolutionist believes he must have come from below. And that is from a lower order of animals.” He presented Hunter’s biology text to Judge Raulston, and then began to criticize parts of the evolution section. Bryan specifically referred to a chart on page 194 that illustrated a human being’s family tree. Getting excited, he exclaimed:

There is that book! There is the book they were teaching your children that man was a mammal and so indistinguishable among the mammals that they leave him there with thirty-four hundred and ninety-nine other mammals. Including elephants? Talk about putting Daniel in the lion’s den? How dared those scientists put man in a little ring like that with lions and tigers and everything that is bad! Not only the evolution is possible, but the scientists possibly think of shutting man up in a little circle like that with all these animals, that have an odor, that extends beyond the circumference of this circle, my friends.

Bryan hammered home perhaps his main criticism of teaching children the theory of evolution—that it undermined the religious faith of children instilled by their parents. Bryan clearly explained the threat to religion:

Tell me that the parents of this day have not any right to declare that children are not to be taught this doctrine? Shall not be taken down from the high plane upon which God put man? Shall be detached from the throne of God and be compelled

to link their ancestors with the jungle, tell that to these children? Why, my friend, if they believe it, they go back to scoff at the religion of their parents. And the parents have the right to say that no teacher paid by their money shall rob their children of faith in God and send them back to their homes, skeptical, infidels, or agnostics, or atheists.

Bryan criticized Darwin specifically as he quoted from one of Darwin's most influential works, *The Descent of Man*. Referring to Darwin's theory that humans branched off from old world monkeys at some point in the past, he emphasized, "Not even from American monkeys, but from old world monkeys." He also repeated his past criticism that the theory of evolution was not worthy of being called a theory because it was a mere hypothesis. Bryan cited Huxley, Darwin's chief defender, who said evolution could not rise to the dignity of a theory until a species was discovered that had evolved according to the hypothesis. He also pointed out that Darwin himself had found it strange that with two to three million species, he and others had not been able to find one species that they could trace to another. Bryan mentioned his membership in the American Academy for the Advancement of Science and railed against the lack of evidence for evolution theory:

[T]oday there is not a scientist in all the world who can trace one single species to any other, and yet they call us ignoramuses and bigots because we do not throw away our Bible . . . . they cannot find a single species that came from another, and yet they demand that we allow them to teach this stuff to our children, that they may come home with their imaginary family tree and scoff at their mother's and father's Bible.

### **Bryan Criticizes Darrow's Defense of Leopold and Loeb**

Bryan added to his arguments by criticizing Darrow's defense of Leopold and Loeb the year before. Bryan read directly from a copy of Darrow's plea to save Leopold and Loeb from execution. Darrow had, among other defenses, blamed the murder at least in part on the teaching of Nietzsche at the University of Chicago where the defendants attended school. Bryan believed that Nietzsche followed the theory of evolution and the survival of the fittest to its logical conclusion. Bryan claimed that Nietzsche praised Darwin and held him to be "one of the three great men of this century" along with Napoleon. Bryan stated:

[W]e have the testimony of my distinguished friend from Chicago in his speech in the Loeb and Leopold case that 50,000 volumes had been written about Nietzsche, and he is the greatest philosopher in the last hundred years, and have him pleading that because Leopold read Nietzsche and adopted Nietzsche's philosophy of the superman, that he is not responsible for the taking of human life.

Darrow objected that Bryan was misquoting him. Bryan offered to read directly from the transcripts, and informed the audience that transcript copies were for sale in Dayton, where he had purchased several. Bryan then read from his copy of Darrow's plea:

I will guarantee you can go down to the University of Chicago today—into its big library and find over 1,000 volumes of Nietzsche, and I am sure I speak moderately. If this boy is to blame for this, where did he get it? Is there any blame attached because somebody took Nietzsche’s philosophy seriously and fashioned his life on it? And there is no question in this case but what it is true. Then who is to blame? The university would be more to blame than he is. The scholars of the world would be more to blame than he is. The publishers of the world—and Nietzsche’s books are published by one of the biggest publishers in the world—are more to blame than he is. Your honor, it is hardly fair to hang a 19-year old boy for the philosophy that was taught him at the university.

Darrow countered that Bryan’s reference to his plea in defense of Leopold and Loeb was incomplete. The plea should have included Darrow’s statement, “I do not believe that the universities are to blame I do not think they should be held responsible.”

### **Dudley Field Malone Gives Finest Speech of the Trial**

Scopes recounted how he had heard Malone ask Darrow and Hays if he could respond to Bryan instead of Darrow, and they both agreed. Malone caught everyone’s attention at this point. He had already gained the admiration of the audience with his ability to withstand the heat without once taking his suit coat off, unlike every other participant. Scopes recalled the moment:

[N]o one had ever seen him with his coat off, and now as he rose to answer Bryan he performed the most effective act anyone could have thought of to get the audience’s undivided attention: He took off his coat. He folded it neatly and laid it carefully on the counsel’s table. Every eye was upon him before he had said a single word.<sup>180</sup>

Malone then proceeded to give the performance of his life. Malone argued in favor of scientific inquiry and pursuit of knowledge instead of religious restrictions on knowledge. Malone, once Bryan’s subordinate, concluded his speech with words that elicited great emotion from the audience:

There is never a duel with the truth. The truth always wins and we are not afraid of it. The truth is no coward. The truth does not need the law. The truth does not need the forces of government. The truth does not need Mr. Bryan. The truth is imperishable, eternal, and immortal, and needs no human agency to support it. We are ready to tell the truth as we understand it and we do not fear all the truth that they can present as facts. We are ready. We are ready. We feel we stand with progress. We feel we stand with science. We feel we stand with intelligence. We feel we stand with fundamental freedom in America. We are not afraid. Where is the fear? We meet it, where is the fear? We defy it . . . .

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<sup>180</sup> CENTER OF THE STORM, *supra* note 85, at 147-48.

Malone gave a performance that some spectators found even more powerful and significant than Darrow's. Scopes described the scene: "The courtroom went wild when Malone finished. The heavy applause he had received during the speech was nothing compared to the crowd's reaction now at the end. The judge futilely called for order."<sup>181</sup> Scopes was astonished at the effect Malone's words had on the audience. "Malone took the crowd away from Bryan the Invincible, even though Bryan had wrapped up the audience and marked it his. Soon the spectators were cheering Malone. It was so dramatic that a transcript couldn't tell it."<sup>182</sup>

Stewart finished the day by arguing why the testimony of defense experts should be excluded. After his legal arguments, Stewart turned to religion. "They say it is a battle between religion and science, and in the name of God, I stand with religion because I want to know beyond this world that there may be an eternal happiness for me and for all." Stewart denounced "teaching that infidelity, that agnosticism, that which breeds in the soul of the child, infidelity, atheism, and drives him from the Bible that his father and mother raised him by . . . ." He declared, "I say, bar the door, and not allow science to enter." Stewart first paid Darrow a compliment and then proceeded to vilify him:

Mr. Darrow says he is an agnostic. He is the greatest criminal lawyer in American today. His courtesy is noticeable—his ability is known—and it is a shame, in my mind, in the sight of a great God, that mentality like his has strayed so far from the natural goal that it should follow—great God, the good that a man of his ability could have done if he had aligned himself with the forces of right instead of aligning himself with that which strikes its fangs at the very bosom of Christianity.

But it was Malone's brilliant speech that still electrified the atmosphere. Scopes recounted that after court adjourned and the courtroom emptied only he, Bryan and Malone remained. Bryan said, "Dudley, that was the greatest speech I have ever heard." To which Malone responded, "Thank you . . . I am sorry it was I who had to make it."<sup>183</sup> Scopes and others believed Malone's speech contributed to Bryan's willingness to go on the stand later in the trial and subject himself to Darrow's questioning. According to Scopes:

Bryan was never the same afterward and if there were any turning points in the trial that day was one. Dudley Field Malone had shattered his former chief's unbounded optimism, which Darrow is commonly credited with having done later in the trial. Bryan had reached his peak before Darrow ever got him on the stand. If anything, Malone's debilitating coup probably made Bryan want to go on the stand, in the vain hope of regaining some of his tarnished glory.<sup>184</sup>

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<sup>181</sup> *Id.* at 154.

<sup>182</sup> *Id.* at 149.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

Scopes was deeply impressed by Malone's speech. Writing more than forty years after he witnessed Malone's performance, Scopes recalled:

His reply to Bryan was the most dramatic event I have attended in my life. The intervening decades have produced nothing to equal it; nor do I expect to see anything like it in my remaining years.<sup>185</sup>

A Bryan biographer wrote of Malone's speech, "Men, unmoved even by Darrow, could not restrain their cheers."<sup>186</sup> Darrow said that Malone was "particularly brilliant" in his reply to Bryan.<sup>187</sup> None other than John Butler, the author of the Butler Act under which Scopes was prosecuted, stated that Malone gave the "finest speech of this century."<sup>188</sup>

### **Day 6 – Friday, July 17, 1925**

Judge Raulston began the day with a decision regarding the admissibility of defense expert testimony. After a discussion of the legal issues, Judge Raulston concluded:

In the final analysis this court, after a most earnest and careful consideration, has reached the conclusions that under the provisions of the act involved in this case, it is made unlawful thereby to teach in the public schools of the state of Tennessee the theory that man descended from a lower order of animals. If the court is correct in this, then the evidence of experts would shed no light on the issues. Therefore, the court is content to sustain the motion of the attorney-general to exclude the expert testimony.

Since expert testimony constituted the core of the defense's strategy, they quickly excepted to the ruling. Hays wanted the judge to hear the expert testimony out of the jury's presence so the defense could try to convince the judge that his earlier ruling (that the Butler act was constitutional) was in error. The expert testimony would also build a record for appealing the decision to exclude such testimony from the trial. Over Stewart's objections, Judge Raulston agreed to hear the experts. This prompted Bryan to ask if the prosecution would be able to cross-examine the experts. Darrow strongly objected to this request. He argued that the defense was only building a record for appeal of what they would have attempted to prove at trial had they been allowed to bring in their experts. For this reason, the prosecution should not be able to cross-examine the defense experts.

The judge explained the defense could enter affidavits stating what the experts intended to say, but the prosecution would have the opportunity to cross-examine any expert taking the stand. Tempers, exacerbated by the heat, flared numerous times during the trial, as they did when the following exchange took place:

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<sup>185</sup> *Id.* at 156.

<sup>186</sup> LAWRENCE R. LEVINE, DEFENDER OF THE FAITH, WILLIAM JENNINGS BRYAN: THE LAST DECADE, 1915-1925 346 (1965) [hereinafter DEFENDER OF THE FAITH].

<sup>187</sup> STORY OF MY LIFE, *supra* note 4, at 261.

<sup>188</sup> ANNE JANETTE JOHNSON, THE SCOPES "MONKEY TRIAL," (DEFINING MOMENTS) 73 (2007).

The Court—Colonel, what is the purpose of cross-examination?  
Mr. Darrow—The purpose of cross-examination is to be used on the trial.  
The Court—Well, isn't it an effort to ascertain the truth?  
Mr. Darrow—No, it is an effort to show prejudice. Nothing else. Has there been any effort to ascertain the truth in this case? Why not bring the jury and let us prove it?  
The Court—Courts are a mockery—  
Mr. Darrow—They are often that, your honor.  
The Court—When they permit cross-examination for the purpose of creating prejudice.  
Mr. Darrow—I submit, your honor there is no sort of question that they are not entitled to cross-examine, but all this evidence is to show what we expect to prove and nothing else, and can be nothing else.  
The Court—I will say this: If the defense wants to put their proof in the record, in the form of affidavits, of course they can do that. If they put the witness on the stand and the state desires to cross-examine them, I shall expect them to do so.  
Mr. Darrow—We except to it and take an exception.  
The Court—Yes, sir; always expect this court to rule correctly.  
Mr. Darrow—No, sir, we do not.  
The Court—I suppose you anticipated it?  
Mr. Darrow—Otherwise we should not be taking our exceptions here, your honor. We expect to protect our rights in some other court. Now, that is plain enough, isn't it? Then we will make statements of what we expect to prove. Can we have the rest of the day to draft them?  
The Court—I would not say—  
Mr. Darrow—If your honor takes a half day to write an opinion—  
The Court—I have not taken—  
Mr. Darrow—We want to make statements here of what we expect to prove. I do not understand why every request of the state and every suggestion of the prosecution should meet with an endless waste of time, and a bare suggestion of anything on our part should be immediately over-ruled.  
The Court—I hope you do not mean to reflect upon the court?  
Mr. Darrow—Well, your honor has the right to hope.  
The Court—I have the right to do something else, perhaps.  
Mr. Darrow—All right; all right.

Judge Raulston eventually gave the defense the rest of the day to prepare the expert statements. The judge took notice of Darrow's testy exchange but let it pass, at least for the time being, and recessed the court until the following Monday.

### **Day 7 – Monday, July 20, 1925**

Many observers thought the case was over after Judge Raulston announced his ruling excluding the expert witnesses for the defense. Indeed, many reporters, including H.L. Mencken, left after the sixth day of the trial. Mencken wrote on Saturday:

All that remains of the great cause of the State of Tennessee against the infidel Scopes is the formal business of bumping off the defendant. There may be some legal jousting on Monday and some gaudy oratory on Tuesday, but the main battle is over, with Genesis completely triumphant. . . .<sup>189</sup>

But Mencken and many court observers could not have been more wrong. What would happen on this day of the trial would ensure that it would go down in history as the “Trial of the Century.”

### **Darrow Held in Contempt**

After the morning prayer, Judge Raulston quickly showed that Darrow’s’ comments on Friday were not forgotten. After the jury was excluded, Judge Raulston said, “On last Friday, July 17, contempt and insult were expressed in this court, for the court and its orders and decrees . . . .” He then repeated verbatim the exchange he had with Darrow on that day. Judge Raulston informed those present, “The court has withheld any action until passion had time to subdue” and to ensure that the jury was not present. Then he stated:

It has been my policy on the bench to be cautious and to endeavor to avoid hastily and rashly rushing to conclusions. But in the face of what I consider an unjustified expression of contempt for this court and its decrees, made by Clarence Darrow, on July 17, 1925, I feel that further forbearance would cease to be a virtue, and in an effort to protect the good name of my state, and to protect the dignity of the court . . . I am constrained and impelled to call upon the said Darrow, to know what he has to say why he should not be dealt with for contempt.

The judge then ordered Darrow served and required he appear to answer the next day. The judge also set a \$5000 bond. Darrow told the judge, “Now, I do not know whether I could get anybody, your honor.” But Neal assured the court the bond would be paid. A lawyer named Frank Spurlock from Chattanooga volunteered to cover the bond for Darrow. Spurlock would later work for the defense when it appealed the Scopes case to the Supreme Court of Tennessee.

Hays then repeatedly tried to get into evidence the statement Governor Peay gave when he signed the Butler bill into law. Stewart fought against it, as he had fought against any evidence that did not relate directly to whether or not Scopes violated the statute. Judge Raulston excluded the governor’s statement based on a separation of powers argument, explaining that it was the judicial branch and not the executive branch that had the power to interpret the law.

Hays wanted to read the testimony of their experts or at least summaries of the testimony. Stewart repeatedly objected to this because he believed the defense’s purpose was to engage in an elitist educational campaign to enlighten the backward citizens of

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<sup>189</sup> H.L. Mencken, *Battle Now Over, Mencken Sees; Genesis Triumphant and Ready for New Jousts*, BALTIMORE EVENING SUN, July 18, 1925, at 1.

Tennessee. Darrow also got involved in the argument and insisted that the defense had the right to “state in open court” what they expected to prove. Stewart was adamant that the defense should not be allowed to read the statements, arguing instead they should simply offer them into the record by giving them to the court stenographer. After considerable discussion, Judge Raulston sided with the defense and gave them an hour to read summaries of their statements. Hays then proceeded to read summaries of expert statements from Bible scholars who believed that the Bible should not be interpreted literally word for word, and that the theory of evolution was not necessarily in conflict with the Bible.

### **Darrow Apologizes to the Court**

At the beginning of the afternoon session, Stewart announced that over the noon hour he had conferred with the defense about the contempt citation against Darrow, who had a statement to make about the matter. Darrow then made an extended apology for his remarks. Darrow began:

Your honor, quite apart from any question of what is right or wrong in this matter which your honor mentioned and which I will discuss in a moment-quite apart from that, and on my own account if nothing else was involved, I would feel that I ought to say what I am going to say. Of course, your honor will remember that whatever took place was hurried, one thing, followed another and the truth is I did not know just how it looked until I read over the minutes as your honor did and when I read them over I was sorry that I had said it.

Darrow told the judge that he had made up his mind later on Friday that he would apologize to the court come Monday morning. Darrow said that he had seen a newspaper story stating he was purposely trying to incite a contempt charge; he refrained from apologizing in the morning because he knew the judge would want to speak about the matter. Darrow then got to the substance of his apology:

I have been practicing law for forty-seven years and I have been pretty busy and most of the time in court I have had many a case where I have had to do what I have been doing here-fighting the public opinion of the people, in the community where I was trying the case- even in my own town and I never yet have in all my time had any criticism by the court for anything I have done in court. That is, I have tried to treat the court fairly and a little more than fairly because when I recognize the odds against me, I try to lean the other way the best I can and I don't think any such occasion ever arose before in my practice.

I am not saying this, your honor, to influence you, but to put myself right. I do think, however, your honor, that I went further than I should have done. So far as its having been premeditated or made for the purpose of insult to the court I had not the slightest thought of that. I had not the slightest thought of that. One thing snapped out after another, as other lawyers have done in this case, not, however, where the judge was involved, and apologized for it afterwards, and so far as the



people of Tennessee are concerned, your honor suggested that in your opinion-I don't know as I was ever in a community in my life where my religious ideas differed as widely from the great mass as I have found them since I have been in Tennessee. Yet I came here a perfect stranger and I can say what I have said before that I have not found upon anybody's part-any citizen here in this town or outside, the slightest discourtesy. I have been treated better, kindlier and more hospitably than I fancied would have been the case in the north, and that is due largely to the ideas that southern people have and they are, perhaps, more hospitable than we are up north...

I am quite certain that the remark should not have been made and the court could not help taking notice of it and I am sorry that I made it ever since I got time to read it and I want to apologize to the court for it.

### **Judge Accepts Darrow's Apology**

The crowd applauded Darrow's apology. Judge Raulston asked if anyone else had anything to say on behalf of "Colonel Darrow" but no one responded. Judge Raulston explained that had this been a private matter between himself and Colonel Darrow, he would have let it pass, but had to take notice of it since it was directed at the court. He explained that he had to uphold the great name of Tennessee. Judge Raulston then accepted Darrow's apology and included a short sermon on the matter:

My friends, and Col. Darrow, the Man that I believe came into the world to save man from sin, the Man that died on the cross that man might be redeemed, taught that it was godly to forgive and were it not for the forgiving nature of Himself I would fear for man. The Savior died on the cross pleading with God for the men who crucified Him.

I believe in that Christ. I believe in these principles. I accept Col. Darrow's apology. I am sure his remarks were not premeditated. I am sure that if he had time to have thought and deliberated he would not have spoken those words. He spoke those words, perhaps, just at a moment when he felt that he had suffered perhaps one of the greatest disappointments of his life when the court had held against him. Taking that view of it, I feel that I am justified in speaking for the people of the great state that I represent when I speak as I do to say to him that we forgive him and we forgot it and we commend him to go back home and learn in his heart the words of the Man who said: "If you thirst come unto Me and I will give thee life.

After the contempt charge was dismissed, the judge decided to move the court proceedings outside. There had been rumors during the trial that the large crowd was causing cracks to appear in the ceiling downstairs, and Judge Raulston had several times said he was afraid of the building. While Scopes thought fear of a floor collapse was a

good story, he thought the oppressive heat inside the courtroom was the real reason for the move.<sup>190</sup>

### **Hays Read Summaries of Expert Testimony**

After the court was re-assembled on the courthouse lawn, Hays requested permission to read the summaries that had been prepared of their expert witness testimony. Hays noted that the defense attorneys did not take a position on these matters, but simply wanted to show what “learned Biblical scholars” had to say in regard to interpretations of the Bible and the theory of evolution. He started with Rabbi Rosenwasser’s statement about different translations of the Bible, and presented another expert’s opinion that evolution and the Bible are not in conflict when the Bible is properly interpreted. The judge allowed Hays to read some statements by Dr. Metcalf even though he had previously testified for the defense. It turned out in the end that Dr. Metcalf was the only defense expert allowed to testify. Hays explained the statements of their experts would show “the Bible is both a literal and figurative document, [and] that God speaks by parables, allegories, sometimes literally and sometimes spiritually.”

Hays then read statements from their scientific experts. The statements contained details of estimates of the earth’s age, and details about the theory of evolution. Hays also read a letter written in 1922 by President Woodrow Wilson to Professor Winterton C. Curtis, another defense expert: “[O]f course, like every other man of intelligence and education, I do believe in organic evolution. It surprises me that at this late date such questions should be raised.”<sup>191</sup> This letter from President Wilson would also be cited by the defense in their brief to the Supreme Court of Tennessee.

But before the jury was brought in, another religious controversy arose. Darrow objected to a large sign near where the jury would sit that read, “Read Your Bible.” This resulted in another set of arguments between both sides, as the prosecution saw no reason the sign should be removed. Eventually Judge Raulston sided with the defense, and the sign was removed.

### **“The defense desires to call Mr. Bryan as a witness”**

Next was an event that would go down in history. The court, prosecution lawyers and spectators were stunned when Hays announced, “The defense desires to call Mr. Bryan as a witness . . .” B.G. McKenzie objected, so the judge told the defense that Mr. Bryan would be protected from revealing confidential information. Bryan agreed to be questioned but insisted that Darrow, Malone and Hays also be put on the stand. Darrow said he did not want Bryan sworn in. Accounts differ as to whether it was actually Hays or Darrow who called Bryan to the stand. Darrow wrote in his autobiography, “Then I called Mr. W.J. Bryan as an expert on the meaning of the word ‘religion.’”<sup>192</sup> But most accounts - including the court transcripts and Scopes’ autobiography - state that it was

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<sup>190</sup> SUMMER FOR THE GODS, *supra* note 5, at 186.

<sup>191</sup> Letter from President Woodrow Wilson to Professor Winterton C. Curtis (Aug. 29, 1922).

<sup>192</sup> STORY OF MY LIFE, *supra* note 4, at 265.

Hays who called Bryan to testify. Regardless of who called Bryan to the stand, it was Darrow who questioned him.

Darrow recalled, “At once every lawyer for the prosecution was on his feet objecting to the proceeding.”<sup>193</sup> Scopes wrote that the prosecution adamantly objected to putting Bryan on the stand as a witness, and Judge Raulston “probably would have ruled with Stewart, had Bryan himself not been on his feet, *demanding* his right to testify.”<sup>194</sup> Scopes believed Bryan wanted to take the stand to “recoup the glory he had lost after Malone’s blistering attack,” but also because Bryan had come to Dayton to defend “revealed religion” and Bryan believed he “could hold his own as an expert on the Bible.”<sup>195</sup>

A 2005 book on the Scopes trial indicates yet another reason for Bryan’s willingness to take the stand: just a week earlier it was reported that Columbia University had proposed barring public school students who did not get a Darwinian education. In response, Rhea County Superintendent of Schools Walter White proposed founding the Bryan University in Dayton, Tennessee.<sup>196</sup> A Florida philanthropist pledged \$10,000 to the project and Bryan, who was already thinking about going on a speaking tour about creationism, may have been “eager to jump at the unexpected chance to expand on his beliefs as a witness for the defense.”<sup>197</sup> The school was founded as Bryan College in 1930 and is still in existence today.<sup>198</sup>

Interestingly, the moment that Bryan was called to the stand by the defense was captured by WGN microphones and broadcast to radio listeners in Chicago. Some reporters had already left the hot courtroom, completely unaware of what was to happen:

[They] missed an exchange which the listening audience heard in its every detail—the surprise move by the defense which brought William Jennings Bryan to the witness stand, as an expert on the Bible, to be questioned by Clarence Darrow. This encounter was, perhaps, the most dramatic confrontation of the trial, and it may stand today as the trial’s most historically important single event. And the exchange was broadcast live.<sup>199</sup>

However dramatic Bryan’s call to the stand appeared, it was no surprise to the defense team. Over the weekend Darrow had planned to call Bryan as a witness, because he was going to get a “Bible expert on the stand” despite Judge Raulston’s rulings.<sup>200</sup> Darrow

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<sup>193</sup> *Id.* at 265.

<sup>194</sup> CENTER OF THE STORM, *supra* note 85, at 166 (emphasis in original).

<sup>195</sup> *Id.*

<sup>196</sup> MONKEY BUSINESS, *supra* note 19, at 148.

<sup>197</sup> *Id.*

<sup>198</sup> See <http://www.bryan.edu/>.

<sup>199</sup> James W. Wesolowski, *Before Canon 35: WGN Broadcasts the Monkey Trial*, 2 JOURNALISM HIST. 76, 78 (1975) (noting that the original programs were not recorded so the broadcasts are lost).

<sup>200</sup> MONKEY BUSINESS, *supra* note 19, at 147.

even rehearsed the confrontation with a potential expert witness, Harvard geologist Kirtley Mather, who played the part of Bryan.<sup>201</sup>

### **Bryan on the Stand**

When Bryan took the stand, Darrow proceeded to ask his first question: “You have given considerable study to the Bible, haven’t you, Mr. Bryan?” To which Bryan replied, “Yes, sir, I have tried to.” It was Bryan’s interpretation of the Bible that would be the target of Darrow’s examination. Darrow knew some of Bryan’s biblical interpretations because they had been published in the past. Darrow wanted Bryan to say everything in the Bible should be literally interpreted.

Darrow questioned Bryan for about two hours, asking about various parts of the Bible and trying to show that literal interpretations were nonsensical. Bryan quickly found himself in a bind. If he stubbornly stuck to a literal interpretation by stating he believed everything exactly as written in the Bible, Darrow would make him look foolish. But if Bryan tried a more sophisticated approach and explained that some of the stories in the Bible could be seen as parables or illustrations, he would in effect be admitting that not all parts of the Bible should be taken literally. If he took this approach he would alienate his fundamentalist supporters who did interpret the Bible literally.

Darrow began by questioning Bryan about the story of Jonah being swallowed by a whale. He then moved on to other stories in the Bible. He asked if Bryan believed that Joshua made the sun stand still. After Darrow and Bryan argued back and forth about whether Joshua made the sun stand still, as it states in the Bible, Stewart interrupted and strenuously objected to the questioning. However, Judge Raulston let the questioning continue. Darrow and Bryan continued to debate the story of Joshua and then moved to the story of the flood. Darrow tried repeatedly to get Bryan to admit that the Bible was subject to different interpretations. Right from the start, Bryan refused to admit that everything in the Bible should be interpreted literally, arguing instead it should be understood as illustrative:

Q—You claim that everything in the Bible should be literally interpreted?

A—I believe everything in the Bible should be accepted as it is given there: some of the Bible is given illustratively. For instance: "Ye are the salt of the earth." I would not insist that man was actually salt, or that he had flesh of salt, but it is used in the sense of salt as saving God's people.

Q—But when you read that Jonah swallowed the whale--or that the whale swallowed Jonah-- excuse me please--how do you literally interpret that?

A—When I read that a big fish swallowed Jonah--it does not say whale....That is my recollection of it. A big fish, and I believe it, and I believe in a God who can make a whale and can make a man and make both what He pleases.

Q—Now, you say, the big fish swallowed Jonah, and he there remained how long--three days-- and then he spewed him upon the land. You believe that the big fish was made to swallow Jonah?

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<sup>201</sup> *Id.*

A—I am not prepared to say that; the Bible merely says it was done.

Q—You don't know whether it was the ordinary run of fish, or made for that purpose?

A—You may guess; you evolutionists guess.

Q—But when we do guess, we have a sense to guess right.

A—But do not do it often.

Darrows spent considerable time quizzing Bryan about the concept of time used in the Bible.

Q—Would you say that the earth was only 4,000 years old?

A—Oh, no; I think it is much older than that.

Q—How much?

A—I couldn't say.

Q—Do you say whether the Bible itself says it is older than that?

A—I don't think the Bible says itself whether it is older or not.

Q—Do you think the earth was made in six days?

A—Not six days of twenty-four hours.

Q—Doesn't it say so?

A—No, sir.

There were numerous testy exchanges between Darrows and Bryan. Both were clearly angry at each other at times. Stewart objected again, and Bryan followed with:

The purpose is to cast ridicule on everybody who believes in the Bible, and I am perfectly willing that the world shall know that these gentlemen have no other purpose than ridiculing every Christian who believes in the Bible.

Darrows responded: "We have the purpose of preventing bigots and ignoramuses from controlling the education of the United States and you know it, and that is all."

Later Darrows went back to the concept of Biblical time:

Q—Then, when the Bible said, for instance, "and God called the firmament heaven. And the evening and the morning were the second day," that does not necessarily mean twenty-four hours?

A—I do not think it necessarily does.

Q—Do you think it does or does not?

A—I know a great many think so.

Q—What do you think?

A—I do not think it does.

Q—You think those were not literal days?

A—I do not think they were twenty-four-hour days.

Q—What do you think about it?

A—That is my opinion--I do not know that my opinion is better on that subject than those who think it does.

Q—You do not think that?

A—No. But I think it would be just as easy for the kind of God we believe in to make the earth in six days as in six years or in 6,000,000 years or in 600,000,000 years. I do not think it important whether we believe one or the other.

Q—Do you think those were literal days?

A—My impression is they were periods, but I would not attempt to argue as against anybody who wanted to believe in literal days.

Of this exchange, Scopes wrote:

These were astonishing answers. When Bryan admitted the earth had not been made in six days of twenty-four hours, the Fundamentalists gasped. The Bible had used plain language, stating that the earth was made in six days. . . . It seemed incredible that William Jennings Bryan, the Fundamentalist knight on the white charger, had betrayed his cause by admitting to the agnostic Darrow that the world hadn't been made in six days! It was the great shock that Darrow had been laboring for all afternoon.<sup>202</sup>

Another source supports Scopes' assessment of this part of the confrontation between Darrow and Bryan: "For the first time it became evident to many of Bryan's followers that their leader did not accept the Bible literally at all times."<sup>203</sup> As a result of his debate with Darrow, "If Bryan lost popularity among some of Dayton's residents due to the trial, it was not because they had been converted to Darrow's side, but because they were deeply disappointed at the concessions Bryan made under Darrow's questioning."<sup>204</sup>

### **Bryan Not Afraid of Agnostics and Atheists**

Several times Bryan stated that his purpose in taking the stand was to show that he was not afraid to defend his faith against Darrow and others who ridiculed religious beliefs. At one point Bryan stated:

The reason I am answering is not for the benefit of the superior court. It is to keep these gentlemen from saying I was afraid to meet them and let them question me, and I want the Christian world to know that any atheist, agnostic, unbeliever, can question me anytime as to my belief in God, and I will answer him.

Later Bryan declared:

Your honor, they have not asked a question legally and the only reason they have asked any question is for the purpose, as the question about Jonah was asked, for a chance to give this agnostic an opportunity to criticize a believer in the world of God; and I answered the question in order to shut his mouth so that he cannot go

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<sup>202</sup> CENTER OF THE STORM, *supra* note 85, at 178.

<sup>203</sup> DEFENDER OF THE FAITH, *supra* note 186, at 349.

<sup>204</sup> *Id.* at 352-53 n.73.

out and tell his atheistic friends that I would not answer his questions. That is the only reason, no more reason in the world.

At the end of the two hour confrontation, the following exchange took place:

Mr. Bryan—Your honor, I think I can shorten this testimony. The only purpose Mr. Darrow has is to slur at the Bible, but I will answer his question. I will answer it all at once, and I have no objection in the world, I want the world to know that this man, who does not believe in God, is trying to use a court in Tennessee—  
Mr. Darrow—I object to that.  
Mr. Bryan—to slur at it, and while it will require time, I am willing to take it.  
Mr. Darrow—I object to your statement. I am exempting you on your fool ideas that no intelligent Christian on earth believes.

Scopes describes the scene during this exchange: “They were standing and glaring at each other. The afternoon, filled with alternating humor and hostility, now at climax. Emotions had reached a bursting point.”<sup>205</sup>

At this point, Judge Raulston adjourned the court until the next morning. According to several sources, “Raulston acted none too soon; several mountain men had grabbed their rifles and were ready to shoot Darrow if he took hold of Bryan.”<sup>206</sup>

### **Darrow Recounts the Duel with Bryan**

In his autobiography written seven year later, Darrow described his battle with Bryan: “I began by asking him concerning his qualifications to define religion, and especially fundamentalism, which was the State religion of Tennessee.”<sup>207</sup> Bryan explained his religious activities and his anti-evolution efforts. Darrow wrote of proceeding to question Bryan about his fundamentalist ideas on the Bible and religion. Darrow noted his questions were “practically the same” as questions he had published two years earlier in a Chicago paper for Bryan to answer.<sup>208</sup> Darrow published the questions in response to questions that Bryan had submitted to the press, directed at the President of Wisconsin University, and published in the *Chicago Tribune* in July 1923. Darrow recalled, “Needless to say, when I ventured those questions two years before I got not answer.”<sup>209</sup>

Darrow remembered that Bryan was interviewed back then; in the interview, he claimed not to have read the questions and stated he had no quarrel with agnostics (like Darrow) but with pretend Christians. Darrow believed that it would not have done Bryan any good to have read the questions two years earlier, because he still would have been “compelled to choose between his crude beliefs and the common intelligence of modern times.”<sup>210</sup>

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<sup>205</sup> CENTER OF THE STORM, *supra* note 85, at 182.

<sup>206</sup> Burton W. Folsom, Jr., *The Scopes Trial Reconsidered*, 12 CONTINUITY 103, 123 (1988).

<sup>207</sup> STORY OF MY LIFE, *supra* note 4, at 266.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 267.

Darrow described his examination of Bryan: “Now Bryan twisted and dodged and floundered, to the disgust of the thinking element, and even his own people.”<sup>211</sup> Darrow believed his battle with Bryan had influenced some of the spectators, because after the court adjourned for the day, it became evident that the audience had been thinking, and perhaps felt that they had heard something worth while.” He continued: “Much to my surprise, the great gathering began to surge toward me. They seemed to have changed sides in a single afternoon. A friendly crowd followed me toward my home. Mr. Bryan left the grounds practically alone.”<sup>212</sup> Darrow believed that Bryan’s followers thought he had deserted them when he stated that the first six days of Genesis could actually be millions of years.

Darrow’s examination of Bryan perhaps bothered Stewart more than anyone else, including Bryan. By the time the two hour ordeal was over, Stewart had had more than enough and would not endure anymore. That night he told Bryan he should not submit to any more questioning, nor should he call Darrow or other defense lawyers to the stand.<sup>213</sup> But Bryan wanted to examine the defense attorneys so he could show that Darrow and others were motivated by a desire to attack revealed religion. Bryan disagreed with Stewart’s recommendation, but Stewart warned that if he persisted, Judge Raulston would end questioning or the state would dismiss its case against Scopes.<sup>214</sup>

### **Day Eight – Tuesday, July 21, 1925**

Judge Raulston refused to permit further questioning of Bryan and ruled that Bryan’s testimony would be stricken from the record. Judge Raulston explained that in an effort to be “absolutely fair” to both sides, he had gone too far in allowing Mr. Bryan to be questioned. He justified his ruling by explaining that Bryan’s testimony would not aid a higher court in determining whether his previous rulings - such as barring expert testimony - were made in error. Just as the prosecution had throughout the trial, Judge Raulston now explained:

[T]he issue now is whether or not Mr. Scopes taught that man descended from a lower order of animals. It isn’t a question of whether God created man by the process of development and growth. These questions have been eliminated from this court and the only question we have now is whether or not this teacher, this accused, this defendant, taught that man descended from a lower order of animals. As I see it, after due deliberation, I feel that Mr. Bryan’s testimony cannot aid the higher court in determining that question. . . . I am pleased to expunge this testimony, given by Mr. Bryan on yesterday from the records of this court and it will not be further considered.

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> SUMMER FOR THE GODS, *supra* note 5, at 190.

<sup>214</sup> *Id.*



Not surprisingly, Darrow objected. He had not finished questioning Bryan and wanted to make an exception. Stewart, who had not displayed much patience during the trial, was in no mood to do so now. He told Darrow, "Make your exception and don't begin an argument about it." When Darrow asked for a clarification from the court, Judge Raulston explained that the record of Darrow's examination of Bryan would only come before an appellate court if that court issued a writ for it.

### **Darrow's Final Strategic Move**

Darrow then implemented his final strategy, which greatly upset Bryan's trial plans. Darrow explained that "we have no witnesses to offer, no proof to offer on these issues that the court has laid down here, that Mr. Scopes did teach what the children said he taught, that man descended from a lower order of animals." Darrow then moved that the jury be brought in and instructed to find the defendant guilty. This would mean that the defense would not make a closing statement. Even more importantly, it prevented the prosecution from making their closing statement. This "deprived Bryan of delivering the monumental summation of the case he had been working on in Florida before he even came to Dayton."<sup>215</sup>

Bryan immediately suspected Darrow's strategic move was intended to deprive him of the opportunity to make a dramatic closing to his followers. Before the jury was called, Bryan did ask to speak. Darrow objected, but the judge agreed to hear Bryan.

Bryan said he would have to trust the press to report the previous day's events accurately, and offered to provide reporters a list of the questions that he would have asked the defense attorneys if given the opportunity. Darrow said it would be better if Bryan questioned the defense attorneys in front of the press so the press would have both questions and answers. But Bryan simply wanted to provide his side of the issue:

I think it is hardly fair for them to bring into the limelight my views on religion and stand behind a dark lantern that throws light on other people, but conceals themselves. I think it is only fair that the country should know the religious attitude of the people who come down here to deprive the people of Tennessee of the right to run their own schools.

Darrow objected, but the court overruled him. Malone then took issue with Bryan's statement that the defense was hiding and afraid to reveal their religious views. General McKenzie suggested that Bryan and the defense have a joint discussion about the matter outside of court. Instead, Malone then asked for the jury to be brought in.

### **Jury Called**

The jury was called in and seated. Outside of the hearing of the jury and spectators, Darrow argued the defense's request for a jury instruction stipulating that Scopes was guilty was under the law was not a plea or admission of guilt. Darrow explained that the

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<sup>215</sup> *Id.* at 154-55.

defense had not been permitted to make their case because expert testimony was excluded, and so there was no logical reason to continue the trial – the outcome was inevitable. He also said that it was “probably the best result,” clearly implying that the defense’s plan was to appeal the Butler Act to a higher court on constitutional grounds. With the prosecution in agreement, Darrow suggested that instead of his usual formal charge to the jury, the judge use Stewart’s idea. Stewart explained that both sides wanted the case to be appealed to a higher court. He asked Judge Raulston to charge the jury, but to explain that the court did not object to a guilty verdict and hoped the case would be appealed to a higher court.

### **Darrow Speaks to the Jury**

The judge then read an extended charge to the jury. Stewart then said that Mr. Darrow has something to say. Darrow spoke:

May I say a few words to the jury? Gentlemen of the jury, we are sorry to have not had a chance to say anything to you. We will do it some other time. Now, we came down to offer evidence in this case and the court has held under the law that the evidence we had is not admissible, so all we can do is to take an exception and carry it to a higher court to see whether the evidence is admissible or not. As far as this case stands before the jury, the court has told you very plainly that if you think my client taught that man descended from a lower order of animals, you will find him guilty, and you heard the testimony of the boys on that questions and heard read the books, and there is no dispute about the facts. Scopes did not go on the stand, because he could not deny the statements made by the boys.

I do not know how you may feel, I am not especially interested in it, but this case and this law will never be decided until it gets to a higher court, and it cannot get to a higher court probably, very well, unless you bring in a verdict. So, I do not want any of you to think we are going to find any fault with you as to your verdict. I am frank to say, while we think it is wrong, and we ought to have been permitted to put in our evidence, the court felt otherwise, as he had a right to hold. We cannot argue to you gentlemen under the instructions given by the court--we cannot even explain to you that we think you should return a verdict of not guilty. We do not see how you could. We do not ask it. We think we will save our point and take it to the higher court and settle whether the law is good, and also whether he should have permitted the evidence. I guess that is plain enough.

### **Confusion Over Who Can Set Fine – Judge or Jury?**

Before the jury left to deliberate, Stewart brought up an issue involving a section of the jury instructions. Under the instructions, if the jury found Scopes guilty and believed his offense required a greater punishment than the statutory \$100 minimum, then the jury would have to impose a higher fine that did not exceed \$500. But if the jury believed the \$100 minimum fine was sufficient, then all they had to do was return a verdict of guilty

and the judge would impose the \$100 fine. Stewart was not sure this was legally correct because he thought it was the jury's duty to impose the fine.

Judge Raulston responded that he thought under Tennessee law the court could impose minimum fines, noting, "[T]hat is our practice in whisky cases, the least fine in a transporting case is \$100." Stewart mentioned that they had more whisky cases than any other type of criminal case, to which Darrow, who hated prohibition, quipped, "That is encouraging." Judge Raulston told Stewart that there was no reason the jury could not fix the minimum fine if they so chose, but the court believed it could also set the minimum fine according to common practice. Stewart was still not sure if this was correct, but Darrow said that either way, the defense would not object. The defense would later regret this legal confusion.

### **Scopes Convicted and Gets to Speak for First Time in Trial**

The jury deliberated for only about nine minutes before finding Scopes guilty. The judge fined him \$100 before realizing that Scopes never had a chance to state why he should not be punished. So, for the first time during the trial, Scopes was heard:

Your honor, I feel that I have been convicted of violating an unjust statute. I will continue in the future, as I have in the past, to oppose this law in any way I can. Any other action would be in violation of my ideal of academic freedom--that is, to teach the truth as guaranteed in our constitution, of personal and religious freedom. I think the fine is unjust.

Nevertheless, Judge Raulston imposed the \$100 fine and court costs. The judge's decision to set the minimum fine instead of requiring the jury to do so, a seemingly trivial legal issue, would later haunt the defense during its appeal to the Supreme Court of Tennessee. Malone then asked about a bond, which the judge set at \$500 because it was a misdemeanor case. Malone announced the defense had accepted an offer from the *Baltimore Evening Sun* to post the bond.

### **Participants Speak Final Words**

Malone then asked to speak on behalf of the defense, in order "to thank the people of the state of Tennessee, not only for their hospitality, but for the opportunity of trying out these great issues here." This generated applause from the audience. Hays then asked if the court could extend the term for thirty days to ensure the defense had enough time to create their record for appeal. Judge Raulston said that under the statute he could extend it for sixty days, but he preferred not to because that would take it past the time the Supreme Court met. Hays kept reiterating that the defense did not want to lose their rights on appeal, but the Judge said he would extend the term for thirty days and if they needed more time they could request it. The issue of the thirty day time limit would also have severe repercussions for the defense's appeal. There was additional discussion of the procedures for creating the record for appeal, after which the court asked if anyone else had anything to say.

## **Bryan's Final Remarks**

Several newspaper reporters expressed their thanks to the court for the hospitality they received. Gordon McKenzie spoke to the out-of-town reporters, who had helped the prosecution take a broader look at issues. Though they disagreed on matters, there was no animosity between them. A member of the Tennessee bar thanked the counsel who came from out of state to participate in the trial. Neal thanked the judge and the prosecution. Then Bryan asked to speak:

I don't know that there is any special reason why I should add to what has been said, and yet the subject has been presented from so many viewpoints that I hope the court will pardon me if I mention a viewpoint that has not been referred to. Dayton is the center and the seat of this trial largely by circumstance. We are told that more words have been sent across the ocean by cable to Europe and Australia about this trial than has ever been sent by cable in regard to anything else happening in the United States. That isn't because the trial is held in Dayton. It isn't because a schoolteacher has been subjected to the danger of a fine \$100.00 to \$500.00, but I think illustrates how people can be drawn into prominence by attaching themselves to a great cause. Causes stir the world. It is because it goes deep. It is because it extends wide, and because it reaches into a future beyond the power of man to see.

Here has been fought out a little case of little consequence as a case, but the world is interested because it raises an issue, and that issue will some day be settled right, whether it is settled on our side or the other side. It is going to be settled right. There can be no settlement of a great cause without discussion, and people will not discuss a cause until their attention is drawn to it, and the value of this trial is not in any incident of the trial, it is not because of anybody who is attached to it, either in an official way or as counsel on either side. Human beings are mighty small, your honor. We are apt to magnify the personal element and we sometimes become inflated with our importance, but the world little cares for man as an individual. He is born, he works, he dies, but causes go on forever, and we who participated in this case may congratulate ourselves that we have attached ourselves to a mighty issue.

## **Darrow's Final Remarks**

Not wanting Bryan to have the last word, Darrow asked for permission to speak. Darrow also graciously thanked the prosecution and the people of Tennessee and the "the kind, and I think I may say, general treatment of this court, who might have sent me to jail, but did not." But Darrow then responded directly to Bryan, reiterating his belief that the issue was the battle between progress and knowledge and narrow-minded religion:

Of course, there is much that Mr. Bryan has said that is true. And nature-nature, I refer to does not choose any special setting for more events. I fancy that the place

where the Magna Carta was wrested from the barons in England was a very small place, probably not as big as Dayton. But events come along as they come along. I think this case will be remembered because it is the first case of this sort since we stopped trying people in America for witchcraft because here we have done our best to turn back the tide that has sought to force itself upon this--upon this modern world, of testing every fact in science by a religious dictum. That is all I care to say.

George Rappleyea then made remarks which would turn out to be prophetic:

I especially wish to pay my respects and thanks and take this opportunity, perhaps the last I shall have, to Mr. Bryan for relieving me of the embarrassing position I was in as original prosecutor, and carrying through what he thought was right in spite of the criticisms that he has had. Mr. Bryan, I thank you.

### **Judge Raulston's Final Remarks**

Judge Raulston then provided some rambling and somewhat ambiguous remarks, but spoke with clear religious conviction:

My fellow citizens, I recently read somewhere what I think was a definition of a great man, and that was this: That he possesses a passion to know the truth and have the courage to declare it in the face of all opposition. It is easy enough, my friends, to have a passion to find a truth, or to find a fact, rather, that coincides with our preconceived notions and ideas, but it sometimes takes courage to search diligently for a truth, that may destroy our preconceived notions and ideas. . . .

Now, my friends, the man—I am not speaking in regard to the issues in this case, but I am speaking in general terms—that a man who is big enough to search for the truth and find it, and declare it in the face of all opposition is a big man.

. . . We do not measure greatness by the size of the village or the town . . . . But greatness depends upon the principles that are involved. . . . the great Dred Scott bill, one of the most famous lawsuits ever tried in America, a case that drew public attention, perhaps, from the whole world simply involved the liberty of one colored man. . . .

Now, my friends, the people in America are great people. We are great people. We are great in the South, and they are great in the North. We are great because we are willing to lay down our differences when we fight the battle out and be friends. And, let me tell you, there are two things in this world that are indestructible that man cannot destroy, or no force in the world can destroy.

One is truth. You may crush it to the earth but it will rise again. It is indestructible, and the causes of the law of God. Another thing indestructible in

America and in Europe and everywhere else, is the word of God, that He has given to man, that man use it as a waybill to the other world. Indestructible, my friends, by any force because it is the word of the Man, of the forces that created the universe, and He has said in His word that "My word will not perish" but will live forever.

I am glad to have had these gentlemen with us. This little talk of mine comes from my heart, gentlemen. I have had some difficult problems to decide in this lawsuit, and I only pray to God that I have decided them right. If I have not, the higher courts will find the mistake. But if I failed to decide them right, it was for the want of legal learning, and legal attainment, and not for the want of a disposition to do everybody justice. We are glad to have you with us.

### **Hays Offers Judge Copy of Darwin's Origin of Species**

Hays then asked, "May I, as one of the counsel for the defense, ask your honor to allow me to send you the 'Origin of Species and the Descent of Man,' by Charles Darwin?" Amid laughter, Judge Raulston responded, "Yes; yes."

### **Monkey Trial Ends with a Prayer**

The bailiff instructed the crowd to exit slowly, without blocking the aisles, and the judge asked Brother Jones to say a benediction: "May the grace of our Lord Jesus Christ, the love of God and the communication and fellowship of the Holy Ghost abide with you all. Amen." Judge Raulston concluded, "The court will adjourn sine die." And so, with a prayer, the Monkey Trial came to an end.

### **Aftermath**

Bryan did not rest after the trial, but continued his crusade. Just hours after the trial ended, he released questions directed at the defense attorneys asking their views on God, the Bible, immortality and miracles. Darrow immediately replied with his agnostic viewpoints.

On July 26, 1925, just five days after the trial, William Jennings Bryan died in his sleep. Although Bryan's health had been poor – he suffered from diabetes - news of his death was shocking. There was a great outpouring of grief by his many admirers. It appeared to many that Bryan died a martyr, fighting against the infidels and atheists to protect innocent children from the evils of a Godless belief system. The timing of his death, just five days after the trial, created a legend that Darrow's cross-examination had contributed to Bryan's death. H.L. Mencken in private declared, "We killed the son of a bitch." But for public consumption, he said that God had thrown a thunderbolt down to kill Clarence Darrow but missed and hit Bryan instead.

Darrow described how he first heard the news on the day after the defense motioned for appeal:

I went to the Big Smoky Mountains in search of a breeze. On Sunday, at sunset, as I was turning back from the walk we had taken to the top, I was met by a reporter with the news of Mr. Bryan's death. The newspapers, next morning, carried the announcement that he . . . had eaten an unusually heavy Sunday dinner and had gone to this bedroom for a nap, and when the family went to call him they found him dead. The irony of fate—a man who for years had fought excessive drinking lay dead from indigestion caused by over-eating.<sup>216</sup>

### **Bryan's Last Speech**

Bryan was not able to deliver his prepared address during the trial. But just hours before he died, he had made arrangements to have the address published. It was titled *Bryan's Last Speech: Undelivered Speech to the Jury in the Scopes Trial*.<sup>217</sup> In this speech, Bryan sought to clarify what he saw as the real issues and debunk the arguments of the evolutionists. As he had all along, Bryan argued the issue was who could control public schools. Very early in this final speech, Bryan explained:

Let us now separate the issues from the misrepresentations, intentional and unintentional, that have obscured both the letter and the purpose of the law. This is not an interference with freedom of conscience. A teacher can think as he pleases and worship God as he likes, or refuse to worship God at all. He can believe in the Bible or discard it; he can accept Christ or reject him. This law places no objections or restraints upon him. . . . he can, so long as he acts as an individual, say anything he likes on any subject. This law does not violate any rights guaranteed by any constitution to any individual. It deals with the defendant, not as an individual, but as an employee, an official or public servant, paid by the state, and therefore under instructions from the state.

As he had during the trial, Bryan rejected the accusation that supporters of the Butler Act were bigots:

It need hardly be added that this law did not have its origin in bigotry. It is not trying to force any form of religion on anybody. The majority is not trying to establish a religion or to teach it—it is trying to protect itself from the efforts of an insolent minority to force irreligion upon the children under the guise of teaching science. What right has a little irresponsible oligarchy of self-styled "intellectuals" to demand control of the schools of the United States, in which 25,000,000 of children are being educated at an annual expense of nearly \$2,000,000,000?

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<sup>216</sup> STORY OF MY LIFE, *supra* note 4, at 269-70.

<sup>217</sup> WILLIAM JENNINGS BRYAN, BRYAN'S LAST SPEECH: UNDELIVERED SPEECH TO THE JURY IN THE SCOPES TRIAL (1925). Bryan's Last Speech is reprinted in *The World's Most Famous Court Trial, Tennessee Evolution Case; A Complete Stenographic Report of the Famous Court Test of the Tennessee Anti-evolution Act, of Dayton, July 10 to 21, 1925, Including Speeches and Arguments of Attorneys*. The summary of this speech is from this reprint. Specific page references are not given.

Christians must, in every state of the union, build their own colleges in which to teach Christianity; it is only simple justice that atheists, agnostics and unbelievers should build their own colleges if they want to teach their own religious views or attack the religious views of others.

Bryan repeated his argument against teaching evolution as proven fact:

Evolution is not truth; it is merely a hypothesis—millions of guesses strung together. It had not been proven in the day of Darwin; he expressed astonishment that with two or three million species, it had been impossible to trace any species to any other species. It had not been proven in the days of Huxley, and it has not been proven up to today.

Bryan also repeatedly called evolutionists to task for not providing sufficient proof for people to abandon religion:

If the results of evolution were unimportant, one might require less proof in support of the hypothesis, but before accepting a new philosophy of life, built upon a materialistic foundation, we have reason to demand something more than guess; "we may well suppose" is not a sufficient substitute for "thus saith the Lord."

### **Bryan Indicts the Theory of Evolution**

Bryan identified four indictments against the theory of evolution: 1) it disputes the Bible's account of creation; 2) carried to its logical end it contradicts all the truths of the Bible and leads to agnosticism and then atheism; 3) it diverts attention from important problems by dwelling on "trifling speculation"; 4) it discourages action to solve mankind's problems because it paralyzes hope for reform. Bryan wrote:

Our first indictment against evolution is that it disputes the truth of the Bible account of man's creation and shakes faith in the Bible as the word of God. This indictment we prove by comparing the process described as evolutionary with the text Genesis.

Our second indictment is that the evolutionary hypothesis carried to its logical conclusion, disputes every vital truth of the Bible. Its tendency, naturally, if not inevitably, is to lead those who really accept it, first to agnosticism and then to atheism. Evolutionists attack the truth of the Bible, not openly at first, but by using weasle-words like "poetical," "symbolical," and "allegorical" to search out the meaning of the inspired record of man's creation.

Our third indictment against evolution is that it diverts attention from pressing problems of great importance to trifling speculation. While one evolutionist is trying to imagine what happened in the dim past, another is trying to pry open the door of the distant future.



Our fourth indictment against the evolutionary hypothesis is that, by paralyzing the hope for reform, it discourages those who labor for the improvement of man's condition. Every upward-looking man or woman seeks to life the level upon which mankind stands, and they trust that they will see beneficent changes during the brief span of their own lives. Evolution chills their enthusiasm by substituting eons for years. It obscures all beginnings in the mists of endless ages."

### **Darwin Driven from God by Theory of Evolution**

Bryan used Darwin himself as the first example of how evolution drove believers away from the word of God. Bryan stated, "We call as our first witness Charles Darwin. He began life as a Christian." Bryan then quoted from a letter Darwin had written which referred to the period from 1828 to 1831: "I did not then in the least doubt the strict and literal truth of every word in the Bible." Since he had planned to deliver his speech in court, Bryan included this line: "It may be a surprise to your honor and to you, gentlemen of the jury, as it was to me, to learn that Darwin spent three years at Cambridge studying for the ministry."

As he did during the Scopes trial, Bryan also used Darrow's defense of Leopold and Loeb to make his points. Among other factors, Darrow blamed Nietzsche's philosophy for influencing Leopold and Loeb to kill Bobby Franks. Darrow had argued the University, its libraries and the professors that taught Nietzsche's philosophy were more to blame than Leopold and Loeb. To be fair to Darrow, Bryan did point out that after he appeared to blame the University for teaching Nietzsche, Darrow said that he believed they were not to blame either. According to Darrow, the University's role was to teach - even if some students were unduly affected. But as Bryan pointed out, if Leopold, Loeb and the University were not to blame, then nobody was. To Bryan:

This is a damnable philosophy, and yet it is the flower that blossoms on the stalk of evolution. Mr. Darrow thinks the universities are in duty bound to feed out this poisonous stuff to their students and when the students become stupefied by it and commit murder neither they nor the universities are to blame. I protest against the adoption of any such a philosophy in the state of Tennessee.

### **Darrow Replies to Bryan's Last Speech**

Darrow commented on Bryan's speech in his autobiography:

Right after the trial, Mr. Bryan had delivered to the newspaper representatives copies of the address that he had meant to make to the jury, but they had declined to carry it. However, after his death, some of them did publish it. It was loaded with the religious aphorisms that he had revelled in for so many years.<sup>218</sup>

### **Bryan kept the Faith**

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<sup>218</sup> STORY OF MY LIFE, *supra* note 4 at 270.

Although he did not fight in the Spanish-American War, Bryan served as a colonel of a Nebraska militia unit during this time period, so he was buried in Arlington National Cemetery. On his tombstone is engraved, "He kept the Faith."

Later in recalling the aftermath of Bryan's death, Darrow wrote:

Mr. Bryan lost his hold in Tennessee when he testified in court, but his tragic end, which came so soon after, restored him to their hearts. Great throngs of people visited the little house in Dayton to take a last look at their hero. All the people of that section seemed to be at the funeral. Then he was taken by a special car to Arlington. The train stopped at all the towns on the route. It took a long time to make the journey, for everywhere a large concourse of mourning friends stood waiting, sometimes for hours, with wreaths and furled flags, in sorrowful remembrance of their lost leader. This out-turning of admirers ended only when they laid him in his grave. I am sincere in saying that I am sorry that he could not have seen all this devotion that followed him to his resting-place.<sup>219</sup>

### **Darrow v. Bryan – Who Won?**

Much has been written about the courtroom confrontation between Darrow and Bryan. It has been described as "the most famous, and one of the most misrepresented, episodes in the Scopes trial and one of the most legendary episodes in American legal history."<sup>220</sup> The accounts vary greatly in describing which side won. The further one moves from Dayton, Tennessee in 1925, both in terms of time and geographic distance, the more the accounts generally favor Darrow. Contemporary accounts are much more favorable to Bryan, with some claiming that Bryan won or at least held his own. Accounts written later claim that Darrow won and succeeded in making Bryan look bad on the stand. However, even the contemporary accounts differed somewhat depending on whether they came from national newspapers or from Tennessee papers.

For later accounts it seems to make a difference whether the commentator actually read the transcripts of the two hour exchange between Darrow and Bryan and the contemporary accounts of the trial. Alan Dershowitz wrote of the Bryan versus Darrow duel:

As usual, the real story, as told in the trial transcript and in contemporaneous accounts, was more complex and far more interesting. The actual William Jennings Bryan was no simple-minded literalist, and he certainly was no bigot. He was a great populist who cared deeply about equality and about the down-trodden.<sup>221</sup>

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<sup>219</sup> *Id.* at 271.

<sup>220</sup> MONKEY BUSINESS, *supra* note 19, at 118.

<sup>221</sup> ALAN M. DERSHOWITZ, AMERICA ON TRIAL: THE CASES THAT DEFINE OUR HISTORY 263 (2004) [hereinafter AMERICA ON TRIAL].

Dershowitz also gives Bryan more credit than many other writers: “All in all, a reading of the transcript shows Bryan doing quite well defending himself, while it is Darrow who comes off quite poorly—in fact, as something of an antireligious cynic.”<sup>222</sup>

A 2005 account of the trial described it as a draw:

Though Bryan had given credible answers to every question he knew and honestly admitted those he didn’t, the Great Commoner failed to land the knockout blow he doubtless expected to score when he took the stand. Darrow hadn’t tripped up Bryan or tricked him into making extrabiblical claims, nor had he backed him into a corner.<sup>223</sup>

A study of the press coverage of the trial explained:

In the press, Darrow could successfully present evidence against the hypothesis he was attempting to disprove. But Bryan hardly could do the same because of the nature of his evidence. As a result, Bryan failed, in the press, to present evidence against evolution, whereas Darrow succeeded against a literal interpretation of Genesis.<sup>224</sup>

### **Defense Strategy for Appeal - Darrow Still too Radical**

Darrow’s hostile examination of Bryan and his objections to the morning prayer were viewed by many modernist Christians as an unnecessary attack on religion. Many who did not support the anti-evolution movement nonetheless regretted Darrow’s participation in the trial. Pre-trial predictions that Darrow would turn the trial into a battle between religion and enlightenment, instead of adhering to the ACLU’s narrower goal of protecting academic freedom, proved accurate. The ACLU was well aware that Darrow’s trial actions generated significant criticism, which would not help their appeal to the Supreme Court of Tennessee. As they did before the trial, the ACLU tried to remove Darrow from or at least lessen his role as part of the defense for the appeal. They tried to this by “urging more ‘priority’ for Tennessee counsel.”<sup>225</sup> The ACLU wrote to Neal, suggesting that during the appeal to the Supreme Court of Tennessee, “there ought to be more of Neal and less of Darrow.”<sup>226</sup> Legally, Neal could remove Darrow because he was the chief defense counsel. The ACLU also asked some liberal religious leaders to write letters to Darrow or Neal expressing the view that Darrow’s presence would hurt the appeal.<sup>227</sup>

### **Darrow Will not be Pushed Out**

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<sup>222</sup> *Id.* at 266.

<sup>223</sup> MONKEY BUSINESS, *supra* note 19, at 152.

<sup>224</sup> 114 EDWARD CAUDILL, THE ROOTS OF BIAS: AN EMPIRICIST PRESS AND COVERAGE OF THE SCOPES TRIAL 34 (1989).

<sup>225</sup> SUMMER FOR THE GODS, *supra* note 5, at 208.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

Darrow got wind of the ACLU's efforts and let them know he had no intention of being pushed out of the case. The ACLU Associate Director Forrest Bailey had been instrumental in trying to get Darrow removed. Bailey apologized to Darrow, claiming the matter was a "misunderstanding" about local counsel and untruthfully denying he requested that Darrow be asked to withdrawal from the case.<sup>228</sup> Darrow agreed with Bailey on the need for a qualified Tennessee attorney in the appeal; because he did not think Neal was up to the challenge, he suggested Robert Keebler (an attorney from Memphis who had vocally denounced the Butler Act as a member of the Tennessee Bar), or Frank Spurlock (an attorney from Chattanooga who had offered to post Darrow's bail when he was indicted for contempt).<sup>229</sup> Both Keebler and Spurlock would be listed as counsel for the appeal.

The ACLU hatched yet another plan to replace Darrow. This plan required the ACLU to turn over control of the case to a committee of well-known attorneys who would select as counsel Charles Evans Hughes, a former Justice on the United States Supreme Court and the Republican presidential nominee in 1916.<sup>230</sup> When Hays learned of this plan, he angrily rejected it. Hays believed Darrow and Malone should be credited for their work on the case; he also didn't want the conservative lawyers to take credit for the work of the liberal and radical attorneys who took the case to trial.<sup>231</sup>

Scopes confirmed the existence of efforts to remove Darrow:

There had been some maneuvering to get Darrow and Hays, who were considered radical, out of the case for the appeal. I opposed this, of course, because I didn't think it would have been right to shelve them then after what they had gone through in the lower court. They had absorbed the burden of the shock, and during the down-in-the-mud fight had borne the responsibility that no one else had wanted. It wasn't a matter of their being radicals; they had already done the hardest part of the chore and they were acquainted with the details.<sup>232</sup>

### **Appeal of *Tennessee v. Scopes***

Scopes appealed his conviction to the Supreme Court of Tennessee. Despite the behind-the-scenes maneuvering, Darrow served as counsel during this appeal along with John Neal, Dudley Field Malone, Arthur Garfield Hays and several other attorneys.<sup>233</sup> William Jennings Bryan, Jr., the son of Darrow's trial nemesis, continued to serve as counsel for the State of Tennessee as he did during the trial.

### **Neal Misses Filing Deadline**

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 208-209.

<sup>230</sup> *Id.* at 209.

<sup>231</sup> *Id.*

<sup>232</sup> CENTER OF THE STORM, *supra* note 85, at 237.

<sup>233</sup> These attorneys included Frank Spurlock, Frank McElwee, Robert S. Keebler, Samuel J. Rosensohn, and Walter H. Pollak.

Neal, the eccentric law professor, made a crucial error. He missed the deadline for filing the bill of exception with the Tennessee Supreme Court. The State filed a preliminary motion on October 5, 1925 to strike from the record the bill of exceptions because it was not filed on time.<sup>234</sup> The trial record documented Judge Raulston's instruction: "Upon motion the court is pleased to grant defendant 60 days from July 21, 1925, in which to prepare, perfect, and file his bill of exceptions." But according to the Supreme Court of Tennessee Judge Raulston did not have the power to grant this extension:

In his discretion the trial judge restricted the time for filing a bill of exceptions to 30 days after July 21st, as appears from an order of that date and thereupon adjourned his court. The time in which a bill of exceptions might be authenticated thus became fixed. The discretion of the court in the matter had been exercised and exhausted. Upon the expiration of the 30 days the authority of the judge in the matter ceased. He could not on September 14th, 55 days after adjournment, sign a bill of exceptions or change his former order respecting same. Such an act was at that time beyond his jurisdiction. Consent of counsel could not then avail. Jurisdiction of subject-matter cannot be conferred upon a court by consent.<sup>235</sup>

The effect of this ruling was to prevent the defense from appealing any errors from the trial - such as the exclusion of expert testimony. The defense could only appeal the constitutionality of the Butler Act. This upset the defense's plan to use the case as a way to educate courts and the public. They had hoped to discuss Bible interpretations, the theory of evolution, freedom of thought and religious beliefs, and academic freedom. Realizing that this failure to meet the filing deadline ruined much of their appeal, the defense in its brief implored the Supreme Court of Tennessee to review the considerable evidence it had gathered:

[W]hile technically not a part of the present record, [the brief contains] a vast amount of scientific knowledge of which the Court must take judicial notice, but which the Court could probably find nowhere else in so convenient a compass. . . . In view of the action of the Court in striking out this bill of exceptions, we do not present these references and quotations as part of the record but we have retained them because we feel they are valuable in illustrating the argument. We ask the Court to take judicial notice of the statements of scientists referred to in the brief in the same way that it would take judicial notice of such statements if they appeared in encyclopedias.<sup>236</sup>

In October of 1925, the Tennessee Supreme Court granted the state's motion to strike from the record the bill of exceptions because it was not filed in time. However, the actual appeal from the Scopes trial did not occur until June 1926 and the Supreme Court of Tennessee did not issue its decision on the matter until January 1927.

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<sup>234</sup> *Scopes v. State*, 152 Tenn. 424, 278 S.W. 57 (Tenn. 1925).

<sup>235</sup> *Id.* at 58.

<sup>236</sup> Statement of Facts, Assignment of Errors, Br. and Argument in Behalf of John Thomas Scopes, Pl. in Error. In the Supreme Ct. of Tenn. at Nashville by Transfer from Knoxville, John Thomas Scopes, Pl.-in-Error, vs. State of Tenn., Def.-in-Error. No. 2. Rhea County, Criminal Docket Sept. Term, 1925.

## **Before the Tennessee Supreme Court**

Darrow recalled that the Tennessee Supreme Court doubled the time allowed for oral arguments. Darrow was selected by the defense to give the closing argument. Darrow wrote that when he began speaking:

The court and every one else paid the closest possible attention, as I aimed to put the matter plainly and simply without flourishes of any sort. I sympathized with my opponent about the sorrows of fathers and mothers when they found that the children were leaving them behind, but, that was the way of life, and the old have not right to stand in the way of the young. I made no effort at effect, but when I closed I was amazed that the whole room and adjoining offices broke forth in spontaneous applause far greater than had rewarded my opponent, and the court made no sign to check it; the previous outburst having been allowed to go unnoticed and unremarked, this received the same right.<sup>237</sup>

## **Scopes' Appellate Arguments**

Scopes' counsel appealed the conviction on several grounds. First, they argued the statute was overly vague because the term "evolution" was too broad. Second, they argued that Scopes' constitutional right to due process was violated because he could not teach evolution. Third, they reiterated their trial argument that the Butler Act violated the Tennessee State Constitution, which directed the General Assembly "to cherish literature and science." Finally, they argued that the statute was unconstitutional because it established a state religion in violation of the Establishment Clause of the First Amendment.

## **Supreme Court of Tennessee Rejects Scopes' Arguments**

The court rejected these arguments. As to the due process argument, the court placed great weight on the fact that the Butler Act applied only to public schools, just as the Tennessee legislature and many citizens of Tennessee had. According to the court:

[Scopes was] a teacher in the public schools of Rhea county. He was an employee of the state of Tennessee or of a municipal agency of the state. He was under contract with the state to work in an institution of the state. He had no right or privilege to serve the state except upon such terms as the state prescribed. His liberty, his privilege, his immunity to teach and proclaim the theory of evolution, elsewhere than in the service of the state, was in no wise touched by this law.<sup>238</sup>

According to a 1960 article, the statute's limited application to public schools "was a powerful consideration for the Tennessee court which saw only the freedom of the teacher as in issue and which saw the public school teacher as an employee of the state

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<sup>237</sup> STORY OF MY LIFE, *supra* note 4, at 274.

<sup>238</sup> *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363, 364 (1927).

whose constitutional position was like that of the janitor.”<sup>239</sup> This also deflected First Amendment concerns because the Butler Act “did not apply to evolution anywhere but in the schools. Presumably anyone in Tennessee was free under the statute to buy a copy of the Origin of Species if he so wished.”<sup>240</sup>

### **Judge-Imposed Fine Violates Tennessee Constitution**

Judge Raulston’s imposition of a fine against Scopes, a seemingly trivial legal event at the end of the trial, came back to haunt the defense. The Tennessee Supreme Court reversed Scopes’ conviction on the basis that the lower court exceeded its jurisdiction in levying a fine against the defendant; in addition, the trial court lacked the authority to correct the error.<sup>241</sup> According to the court, the jury found Scopes guilty of violating the statute but the judge assessed the \$100 fine that was provided for. Under the Tennessee Constitution, a fine in excess of \$50 must be assessed by a jury; the Butler Act did not permit the imposition of a fine smaller than \$100. As a result, the court did not have the power to correct the trial judge’s error. Thus it appears that even if Neal had met the filing deadline, the court would still have overturned the decision on the narrow grounds that the fine could only be imposed by the jury.

### **Butler Act Held Constitutional**

Despite its reversal of Scopes’ conviction, the court upheld the constitutionality of the Butler Act. Although it was never enforced again, it remained on the books until 1967 when it was repealed by the Tennessee legislature.<sup>242</sup> At the end of its ruling, the court sought to end Tennessee’s legal involvement in the controversy:

The court is informed that the plaintiff in error is no longer in the service of the State. We see nothing to be gained by prolonging the life of this bizarre case. On the contrary we think the peace and dignity of the State, which all criminal prosecutions are brought to redress, will be the better conserved by the entry of a *nolle prosequi*<sup>243</sup> herein. Such a course is suggested to the Attorney-General.<sup>244</sup>

Judge McKinney was the lone dissenter on the court. He quoted precedent from the Supreme Court of the United States interpreting criminal statutes, and would have held the Butler Act unconstitutional because it was “invalid for uncertainty of meaning”:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant

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<sup>239</sup> Harry Kalvern, Jr., *A Commemorative Case Note: Scopes v. State*, 27 U. CHI. L. REV. 505, 514 (1960).

<sup>240</sup> *Id.* at 515.

<sup>241</sup> *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

<sup>242</sup> Tenn. Pub. Acts, ch. 237 (1967).

<sup>243</sup> *Nolle prosequi* is a Latin phrase which means “not to wish to prosecute” and is pronounced “nahl-ee prahs-*<<schwa>>-kwI*.” It is a legal notice that a lawsuit or prosecution has been abandoned. BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>244</sup> *Scopes*, 289 S.W. at 367.

alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.<sup>245</sup>

After the court's decision, Darrow and the other defense lawyers wanted to have the case reassigned so they could appeal it again to try to overturn the Butler Act, since the case had ended on a technicality. They did not have this opportunity, as the Tennessee Supreme Court denied their motion for a new hearing.

### **Scopes and Hays Gain Darrow's Friendship**

Scopes developed a lasting friendship with Clarence Darrow. This is evident in Scopes' 1967 autobiography, which he began with a discussion of Clarence Darrow, who influenced him more than anyone but his own father.

After the trial, Scopes accepted a scholarship at the University of Chicago to study geology and became a petroleum engineer. He worked in Louisiana and also in Maracaibo, Venezuela, where he wrote at least one letter to Clarence and Ruby Darrow.

Arthur Garfield Hays also lauded Darrow:

The antievolution case in Tennessee gave me something better than a college education in questions of evolution and the Bible. There began my association with Clarence Darrow. Nothing in life do I treasure more than that, nothing has been more inspiring or humanly helpful than his company, his example, and his friendship.<sup>246</sup>

Their friendship would bring Hays and Darrow back together as co-counsel in another important case in 1925 and 1926. In the Detroit *Sweet* cases, Hays and Darrow successfully defended a black family against murder charges for shooting a white man trying to drive them from their home in a white neighborhood. Hays thus played an essential role in two of Darrow's most important cases.

### **The Scopes Trial and History**

"No stereotype of the Fundamentalist dies harder than the picture provided by the Scopes trial."<sup>247</sup>

According to several scholars, the legend of the Scopes trial grew out of two popular works about the trial. According to Edward Larson, the first of these influential works was the 1931 book *Only Yesterday: An Informal History of the Nineteen-Twenties* written

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<sup>245</sup> *Id.*

<sup>246</sup> ARTHUR GARFIELD HAYS, CITY LAWYER: THE AUTOBIOGRAPHY OF A LAW PRACTICE 227 (1942).

<sup>247</sup> ERNEST R. SANDEEN, THE ROOTS OF FUNDAMENTALISM: BRITISH AND AMERICAN MILLENARIANISM 1800-1930, xi (1970).



by Frederick Lewis Allen, editor of Harper's magazine.<sup>248</sup> The second was *Inherit the Wind*, a play written by Jerome Lawrence and Robert Edwin Lee that was later turned into a movie. Larson wrote, "Far more than anything that actually happened in Dayton, these two works shaped how later generations would come to think of the Scopes trial."<sup>249</sup>

### *Only Yesterday*

Allen's book was a chronicle of the 1920s and not meant to be a work of history. Specifically, it covered "the eleven years between the end of the war with Germany (November 11, 1918) and the stock-market panic which culminated on November 13, 1929."<sup>250</sup> Depicting major news of events of that decade, he would naturally write about the Scopes trial. *Only Yesterday* was not only a best-seller with over a million copies sold, it was the best selling work of non-fiction in the decade of the 1930s.<sup>251</sup> Even more importantly for the subsequent history of the Scopes trial, "it influenced historians and remained widely used as a college history text for more than half a century."<sup>252</sup> A 1986 review of the book noted its impact: "More than any other single work, it has for longer than half a century shaped our understanding of American life in the 1920s."<sup>253</sup>

In 1932, a reviewer of the book wrote, "Mr. Allen knows also what the great masses who do not read histories but do read tabloids and attend movies are interested in; this makes the work not only a history but a historical document for future historians."<sup>254</sup> Allen deliberately used the phrase "informal history" in the title, and because it was informal:

[H]e was unconstrained by the respect for rules of evidence and argument that is beaten into graduate students. Years later, Allen acknowledged that his "best sources" for *Only Yesterday* had been "the daily magazines and news-papers of the period." Yet he conceded that these very sources "do not help much" in the effort "to observe clearly the life and institutions of one's own day," because "they record the unusual, not the usual."<sup>255</sup>

Allen's informal account of the Scopes trial "reduced fundamentalism to antievolution and antievolution to Bryan. Both reductions grossly oversimplified matters and forced Allen to reconstruct the story."<sup>256</sup> This allowed Allen "to become the first published

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<sup>248</sup> SUMMER FOR THE GODS, *supra* note 5, at 225.

<sup>249</sup> *Id.* at 225.

<sup>250</sup> FREDERICK LEWIS ALLEN, ONLY YESTERDAY: AN INFORMAL HISTORY OF THE NINETEEN-TWENTIES xi (1931) [ONLY YESTERDAY].

<sup>251</sup> *Id.* at 227.

<sup>252</sup> SUMMER FOR THE GODS, *supra* note 5, at 227.

<sup>253</sup> David M. Kennedy, *Review: Revisiting Frederick Lewis Allen's Only Yesterday*, 14 REVIEWS IN AMERICAN HISTORY 309-318 (June 1986).

<sup>254</sup> Preston Slosson, *Review: Only Yesterday: An Informal History of the Nineteen-Twenties by Frederick Lewis Allen*, 18 MISS. VALLEY HIST. REV., 602, 603 (Mar. 1932).

<sup>255</sup> David M. Kennedy, *supra* note 253, at 309-10.

<sup>256</sup> SUMMER FOR THE GODS, *supra* note 5 at 226.

commentator to transform Bryan's personal humiliation at Dayton into a decisive defeat for fundamentalism generally."<sup>257</sup> This helps explain why the book has taken on such significance in the history of the Scopes trial.

In summing up his coverage of the Scopes trial, Allen wrote:

Theoretically, Fundamentalism had won, for the law stood. Yet really Fundamentalism had lost. Legislators might go on passing anti-evolution laws, and in the hinterlands the pious might still keep their religion locked in a science-proof compartment of their minds; but civilized opinion everywhere had regarded the Dayton trial with amazement and amusement, and the slow drift away from Fundamentalist certainty continued.<sup>258</sup>

Allen's premature declaration that religious fundamentalism had been defeated at the Scopes trial actually hindered the cause he favored. It undercut the ACLU's ability to raise the alarm about the threat fundamentalism posed to civil liberties, and evolution scientists were not as diligent in refuting anti-evolutionists as they would have been had they known the movement had not ended in Dayton in 1925.<sup>259</sup>

### *Inherit the Wind*

The Scopes trial and the alleged defeat of religious fundamentalism continued to be misinterpreted in the years after Allen's *Only Yesterday* was published. This has happened primarily through the play *Inherit the Wind*, written by Jerome Lawrence and Robert Edwin Lee, which was later turned into an influential movie. The play opened on Broadway in January 1955 and in 1960 a Hollywood film was created based on the play. Even more than Allen's *Only Yesterday*, "the single most influential retelling of the tale" is *Inherit the Wind*.<sup>260</sup>

*Inherit the Wind* is set in a fictitious town in the South called Hillsboro, and the time period is given as "not too long ago." Its plot involves a young teacher named Bertram Cates who is arrested and tried for teaching evolution in a local school. Cates is prosecuted by Matthew Harrison Brady, a fundamentalist speaker who ran for President in several campaigns. Brady is obviously based on William Jennings Bryan. Cates is defended by a well known lawyer named Henry Drummond, who is the Clarence Darrow of this trial.

Given these characters and the narrative of a trial on teaching evolution, *Inherit the Wind* naturally appears to be based on the Scopes trial. However, it was actually written as a warning against Senator Joseph McCarthy's Red Scare, including the anti-communist investigations of the 1950s and the House Committee on Un-American Activities. Lawrence and Lee were not concerned about fundamentalist attacks on the theory of

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<sup>257</sup> *Id.* at 226-27.

<sup>258</sup> ONLY YESTERDAY, *supra* note 250, at 206.

<sup>259</sup> SUMMER FOR THE GODS, *supra* note 5, at 228.

<sup>260</sup> *Id.* at 239.

evolution. Instead, they were concerned about the Red Scare. McCarthy was very influential at the time, and writers and actors were accused of communist sympathies and faced blacklists that could ruin their careers. Drawing on the Scopes trial, they created *Inherit the Wind* to dramatize this danger. They explicitly stated that the play was not history, although the play and movie drown out this disclaimer. Generations of viewers, especially of the movie, have erroneously come to believe that *Inherit the Wind* is a truthful account of the Scopes trial.

*Inherit the Wind* has totally rewritten the Scopes trial. It is especially influential in its depiction of William Jennings Bryan:

In any event, the circus portrayed in *Inherit the Wind* casts Darrow as the ringmaster and Bryan as the clown. Bryan's reputation was ruined by both the movie and the play on which it was based. The film is every bit as entertaining as a trip to the circus and should be relished in that spirit. But history it ain't. The "trial of the century" known as *People v. John T. Scopes* featured plenty of circus clowns, but William Jennings Bryan was not among them.<sup>261</sup>

The respected science historian Ronald L. Numbers, who has written extensively about creationism and creation science, wrote in a review of *Inherit the Wind*:

[I]t grossly caricatures the stated opinions of the protagonists. It especially distorts Bryan's (that is, Brady's) views on Genesis and geology, falsely portraying him as a hidebound biblical literalist. For years before the trial Bryan had been publicly teaching that the "days" of Genesis represented vast geological ages rather than twenty-four-hour periods, and in private he had even conceded the possibility of prehuman evolution.<sup>262</sup>

The well-known law professor and lawyer Alan Dershowitz has also criticized the portrayal of Bryan in the *Inherit the Wind*:

Nor was Bryan the know-nothing biblical literalist of *Inherit the Wind*. For the most part, he actually seems to have gotten the better of Clarence Darrow in the argument over the Bible (though not in the argument over banning the teaching of evolution).<sup>263</sup>

## **John Scopes**

Ironically, John Scopes is perhaps the kindest in his remarks about the Scopes trial and William Jennings Bryan. While critical of Bryan's efforts to prohibit teaching evolution, Scopes viewed Bryan across his whole career, not just the trial in Dayton. "No fair man

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<sup>261</sup> Gerald F. Uelman, *The Trial as a Circus: Inherit the Wind*, 30 U.S.F. L. REV., 1221, 1224 (1996).

<sup>262</sup> Ronald L. Numbers, *Reviewed Work: Inherit the Wind*, 84 *ISIS* 763-764 (Dec. 1993).

<sup>263</sup> AMERICA ON TRIAL, *supra* note 221, at 265.

would judge Bryan's place in history by his actions at Dayton alone; he deserves better."<sup>264</sup>

Scopes asked, "Was Bryan a demagogue? I don't know; I don't think so. He seemed to be a basically honest man who was handicapped by narrow views."<sup>265</sup>

President of the school board Doc Robinson offered Scopes his old job back teaching math, physics and coaching. However, Scopes was offered a scholarship set up by the expert witnesses for the defense to pursue graduate study in any field he chose. Before the trial, he had intended to enter law school, but mixing with the expert witnesses renewed his interest in science, so he accepted a scholarship at the University of Chicago and earned a master's degree in geology. He later worked as a petroleum engineer in Venezuela.

### **Effects of the Scopes Trial**

Popular history suggests that the defenders of evolution got the better of the anti-evolution movement, even though Scopes was convicted. But the aftermath of the case is more complicated. A historian writing in 1971 stated:

On the national scene, the dramatic events of the Dayton trial are often viewed as the high point of the American Fundamentalist and anti-evolution crusade. This, however, is open to serious doubt. Because of the reputation of the men involved, it received the most publicity, but instead of being the culmination of the movement it was really the beginning. Before Dayton, only the South Carolina, Oklahoma, and Kentucky legislatures had dealt with anti-evolution laws or riders to educational appropriation bills. With the publicity of the Dayton case, the rush began in earnest. After 1925 pressures on the state legislatures increased steadily until the peak year, 1927, when 13 states, both North and South, considered some form of anti-evolution law. All told, at least 41 bills, riders, or resolutions were introduced into the state legislatures, and some states faced the same issue time and time again.<sup>266</sup>

### **The Scopes Trial and High School Biology Textbooks**

The Scopes controversy focused scrutiny on Hunter's *Civic Biology* textbook, the book Scopes was convicted of using to teach evolution in the classroom. Shortly after Scopes was indicted, the Tennessee Textbook Commission dropped Hunter's book from its approved list of textbooks.<sup>267</sup> The commission chose a new textbook "that barely mentioned evolution."<sup>268</sup> Significantly, a new edition of Hunter's textbook published in 1926 was changed in response to the Scopes controversy. According to a 1974 study,

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<sup>264</sup> CENTER OF THE STORM, *supra* note 85, at 216.

<sup>265</sup> *Id.* at 215.

<sup>266</sup> Ferenc M. Szasz, *The Scopes Trial in Perspective*, 30 TENN. HIST. Q., 288, 289-90 (1971).

<sup>267</sup> SUMMER FOR THE GODS, *supra* note 5, at 231.

<sup>268</sup> *Id.* at 139.

“Hunter himself was concerned that the publicity would drive his book out of the classroom, so he was willing to make changes.”<sup>269</sup> The title was changed, the paragraph on “The Doctrine of Evolution and the evolutionary tree” was removed, the term “evolution” no longer appeared in the index, and the paragraph on the “Evolution of Man” was changed to the “Development of Man.”<sup>270</sup> Other changes were also made to downplay Darwin’s theory and influence. In an obvious move to make the book friendlier to religious communities, a new sentence was added: “Man is the only creature that has moral and religious instincts.”<sup>271</sup>

Importantly, the influence of the Scopes trial was not limited to Hunter’s textbook:

The impact of the Scopes trial on high school biology textbooks was enormous. It is easy to identify a text published in the decade following 1925. Merely look up the word “evolution” in the index or glossary; you almost certainly will not find it. About its place in the text itself, it is harder to make generalizations.<sup>272</sup>

The authors of this 1974 study pointed out that it was common to remove the word “evolution” from the index; if the text itself discussed the basics of evolution, it was done obliquely. Perhaps most surprisingly, the alteration or removal of information on the theory of evolution from high school textbooks was not restricted to the South:

Let us make it explicit that we are not speaking of special expurgated southern editions. The textbooks we have examined are all from northern college and public libraries. . . . Our subject is not outright censorship and repression, and the locale of our study is not the south alone. We are concerned with the self-censorship that shaped the content of high school biology courses for the 35 years following the Scopes trial.<sup>273</sup>

The authors concluded the conventional wisdom that the Scopes trial left the fundamentalists defeated was very wrong:

The evolutionists of the 1920’s believed they had won a great victory in the Scopes trial. But as far as teaching biology in the high schools was concerned, they had not won; they had lost. Not only did they lose, but they did not even know they had lost. A major reason was that they were unable to understand—sympathetically or otherwise—the strength of the opponents of evolution.<sup>274</sup>

## **Bryan College**

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<sup>269</sup> Judith v. Grabiner & Peter D. Miller, *Effects of the Scopes Trial*, 185 *SCIENCE* 832, 833 (1974).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 835.

<sup>274</sup> *Id.* at 836.

Conceived as a memorial to William Jennings Bryan soon after his death in 1925, Bryan College was founded in 1930 in Dayton. Originally named William Jennings Bryan University, the name was changed in 1958 to William Jennings Bryan College. In 1993, the name was shortened to Bryan College. During the Scopes trial, William Jennings Bryan had expressed his wish that a prep school and junior college for men be created in Dayton. A national memorial association was created after his death to establish Bryan College in his honor. Throughout its history, the school's mission has been to provide "for the higher education of men and women under auspices distinctly Christian and spiritual."<sup>275</sup>

## **The Ongoing Controversy of Teaching Evolution in Public Schools**

The original tension between religion and science, especially the theory of evolution, in public schools that played out in Dayton, Tennessee in the summer of 1925 has not gone away. The same basic issues arise today. Below are summaries of a few cases involving teaching evolution in schools that have been decided since 1925, in which the courts refer back to the 1925 Scopes trial.

### ***Epperson v. Arkansas*, 393 U.S. 97 (1968)**

After the Scopes trial, the most important case in the battle between evolution and religion was *Epperson v. Arkansas*,<sup>276</sup> decided by the United States Supreme Court in 1968. Just as in *Scopes*, this case involved a high school biology textbook; however, the textbook at issue was adopted many years after the Scopes trial. The official textbook for a high school biology course at a public school in Little Rock did not have a section on Darwin's theory of evolution. This changed during the 1965-1966 school year with the adoption of a textbook that contained a chapter on a theory of origin in which man came from a lower form of animal. Susan Epperson was hired in 1964 to teach 10th grade biology. When the new textbook was adopted in 1965, she was faced with a dilemma. She was supposed to teach using the new textbook, but she faced criminal prosecution and dismissal because of a 1928 Arkansas anti-evolution statute still in effect.<sup>277</sup> Arkansas' anti-evolution statute was based on Tennessee's 1925 Butler Act.

Epperson took her case to the Chancery Court, which held that the statute violated the Fourteenth Amendment to the United States Constitution.<sup>278</sup> The Chancery Court ruled that the Fourteenth Amendment encompasses the prohibitions upon state interference with freedom of speech and thought which are contained in the First Amendment. The court held that the challenged statute was unconstitutional because, in violation of the First Amendment, it "tends to hinder the quest for knowledge, restrict the freedom to learn, and restrain the freedom to teach"<sup>279</sup>. Thus, the Arkansas statute was

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<sup>275</sup> History of Bryan College, <http://www.bryan.edu/history.html> (last visited Nov. 11, 2008).

<sup>276</sup> *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266 (1968).

<sup>277</sup> Initiated Act No. 1, 1929 Ark. Acts; ARK. STAT. ANN. §§ 80-1627, 80-1628.

<sup>278</sup> The Court noted that the opinion of the Chancery Court is not officially reported.

<sup>279</sup> *Epperson*, 393 U.S. at 101.

unconstitutional and void, a restraint upon the freedom of speech guaranteed by the Constitution.

In making its decision,

[The Chancery Court] analyzed the holding of its sister State of Tennessee in the Scopes case sustaining Tennessee's similar statute. But it refused to follow Tennessee's 1927 example. It declined to confine the judicial horizon to a view of the law as merely a direction by the State as employer to its employees. This sort of astigmatism, it held, would ignore overriding constitutional values, and "should not be followed," and it proceeded to confront the substance of the law and its effect.

In a two-sentence per curiam opinion, the Supreme Court of Arkansas reversed the Chancery Court and held:

[The statute] is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.<sup>280</sup>

Epperson then appealed to the United States Supreme Court, which described the case:

This appeal challenges the constitutionality of the "anti-evolution" statute which the State of Arkansas adopted in 1928 to prohibit the teaching in its public schools and universities of the theory that man evolved from other species of life. The statute was a product of the upsurge of "fundamentalist" religious fervor of the twenties. The Arkansas statute was an adaption of the famous Tennessee "monkey law" which that State adopted in 1925.<sup>281</sup> The constitutionality of the Tennessee law was upheld by the Tennessee Supreme Court in the celebrated Scopes case in 1927.<sup>282</sup>

According to the Court:

The Arkansas law makes it unlawful for a teacher in any state-supported school or university "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals," or "to adopt or use in any such institution a textbook that teaches" this theory. Violation is a misdemeanor and subjects the violator to dismissal from his position.<sup>283</sup>

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<sup>280</sup> State v. Epperson. 242 Ark. 922, 416 S.W.2d 322 (Ark. 1967).

<sup>281</sup> 1925 Tenn. Pub. Acts Chapter 27; TENN. CODE ANN. § 49--1922 (1966 Repl. Vol.).

<sup>282</sup> *Epperson*, 393 U.S. at 98.

<sup>283</sup> *Id.* at 98-99.

The Court also noted that the Arkansas law “was adopted by popular initiative in 1928, three years after Tennessee's law was enacted and one year after the Tennessee Supreme Court's decision in the Scopes case” and that “[i]n its brief, the State says that the Arkansas statute was passed with the holding of the Scopes case in mind.”<sup>284</sup> Writing in late 1968, the Court stated: “Only Arkansas and Mississippi have such ‘anti-evolution’ or ‘monkey’ laws on their books.”<sup>285</sup> There is no record of any prosecutions in Arkansas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact of life in these States.”<sup>286</sup> In one of several references to the Scopes trial, the Court stated:

Clarence Darrow, who was counsel for the defense in the Scopes trial, in his biography published in 1932, somewhat sardonically pointed out that States with anti-evolution laws did not insist upon the fundamentalist theory in all respects. He said: “I understand that the States of Tennessee and Mississippi both continue to teach that the earth is round and that the revolution on its axis brings the day and night, in spite of all opposition. *The Story of My Life* 247 (1932).”<sup>287</sup>

The Court noted that despite the Supreme Court of Arkansas’s “equivocation,” the counsel for the State Arkansas “would interpret the statute ‘to mean that to make a student aware of the theory \* \* \* just to teach that there was such a theory’ would be grounds for dismissal and for prosecution . . . and he said ‘that the Supreme Court of Arkansas’ opinion should be interpreted in that manner.”<sup>288</sup>

In addition, counsel for the state said, “‘If Mrs. Epperson would tell her students that ‘Here is Darwin's theory, that man ascended or descended from a lower form of being,’ then I think she would be under this statute liable for prosecution.”<sup>289</sup>

The Court held that the statute was contrary to the freedom of religion mandate of the First Amendment, and also in violation of the Fourteenth Amendment. According to the Court,

It is of no moment whether the law is deemed to prohibit mention of Darwin's theory, or to forbid any or all of the infinite varieties of communication embraced within the term “teaching.” Under either interpretation, the law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The overriding fact is that Arkansas' law selects from the body of knowledge a

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<sup>284</sup> *Id.* at 109.

<sup>285</sup> “Miss.Code Ann. ss 6798, 6799 (1942). Ark.Stat.Ann. ss 80--1627, 80--1628 (1960 Repl. Vol.). The Tennessee law was repealed in 1967. Oklahoma enacted an anti-evolution law, but it was repealed in 1926. The Florida and Texas Legislatures, in the period between 1921 and 1929, adopted resolutions against teaching the doctrine of evolution. In all, during that period, bills to this effect were introduced in 20 States. American Civil Liberties Union (ACLU), *The Gag on Teaching* 8 (2d ed., 1937).”

<sup>286</sup> *Id.* at 101-102.

<sup>287</sup> *Epperson*, 393 U.S. at 102.

<sup>288</sup> *Id.* at 102-03.

<sup>289</sup> *Id.* at 103.



particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.<sup>290</sup>

The Court referred back to the Scopes controversy:

In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence. Its antecedent, Tennessee's "monkey law," candidly stated its purpose: to make it unlawful "to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." Perhaps the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to "the story of the Divine Creation of man" as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man.<sup>291</sup>

***Wolman v. Walter*, 433 U.S. 229 (1977)**

*Wolman v. Walter* involved a challenge by citizens and taxpayers of Ohio to the constitutionality of an Ohio statute. The statute authorized various forms of aid to nonpublic schools, most of which were sectarian. Justice Stevens, concurring in part and dissenting in part, wrote:

The distinction between the religious and the secular is a fundamental one. To quote from Clarence Darrow's argument in the Scopes case: "The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve."<sup>292</sup>

***Edwards v. Aguillard*, 482 U.S. 578 (1987)**

In *Aguillard v. Edwards*, a group of Louisiana educators, religious leaders and parents of children in the public schools challenged the constitutionality of a Louisiana statute

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<sup>290</sup> *Id.* The Court cited *Scopes v. State of Tennessee*, 154 Tenn. 105, 126, 289 S.W. 363, 369 (1927) in which Judge Chambliss, concurring, "referred to the defense contention that Tennessee's anti-evolution law gives a 'preference' to 'religious establishments which have as one of their tenets or dogmas the instantaneous creation of man.'"

<sup>291</sup> *Id.* at 107-09.

<sup>292</sup> *Wolman v. Walter*, 433 U.S. 229, 264 (1977) (citation omitted).

called the "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act." The Court held that the Act served no identified secular purpose, and was unconstitutional because its primary purpose was the promotion of a particular religious belief.

In their dissent, Justice Scalia and Chief Justice Rehnquist referred back to the Scopes trial:

In sum, even if one concedes, for the sake of argument, that a majority of the Louisiana Legislature voted for the Balanced Treatment Act partly in order to foster (rather than merely eliminate discrimination against) Christian fundamentalist beliefs, our cases establish that that alone would not suffice to invalidate the Act, so long as there was a genuine secular purpose as well. We have, moreover, no adequate basis for disbelieving the secular purpose set forth in the Act itself, or for concluding that it is a sham enacted to conceal the legislators' violation of their oaths of office. I am astonished by the Court's unprecedented readiness to reach such a conclusion, which I can only attribute to an intellectual predisposition created by the facts and the legend of *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927)-an instinctive reaction that any governmentally imposed requirements bearing upon the teaching of evolution must be a manifestation of Christian fundamentalist repression. In this case, however, it seems to me the Court's position is the repressive one.

The people of Louisiana, including those who are Christian fundamentalists, are quite entitled, as a secular matter, to have whatever scientific evidence there may be against evolution presented in their schools, just as Mr. Scopes was entitled to present whatever scientific evidence there was for it. Perhaps what the Louisiana Legislature has done is unconstitutional because there is no such evidence, and the scheme they have established will amount to no more than a presentation of the Book of Genesis. But we cannot say that on the evidence before us in this summary judgment context, which includes ample uncontradicted testimony that "creation science" is a body of scientific knowledge rather than revealed belief. Infinitely less can we say (or should we say) that the scientific evidence for evolution is so conclusive that no one could be gullible enough to believe that there is any real scientific evidence to the contrary, so that the legislation's stated purpose must be a lie. Yet that illiberal judgment, that *Scopes* -in-reverse, is ultimately the basis on which the Court's facile rejection of the Louisiana Legislature's purpose must rest.

***Aguillard v. Edwards*, 765 F.2d 1251 (5th Cir. 1985)**

Before it reached the United States Supreme Court, the Fifth Circuit ruled that Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" statute in essence required that whenever evolution was taught in the Louisiana public schools, creation-science must also be taught. The court stated:

We approach our decision in this appeal by recognizing that, irrespective of whether it is fully supported by scientific evidence, the theory of creation is a religious belief. Moreover, this case comes to us against a historical background that cannot be denied or ignored. Since the two aged warriors, Clarence Darrow and William Jennings Bryan, put Dayton, Tennessee, on the map of religious history in the celebrated Scopes trial in 1927 courts have occasionally been involved in the controversy over public school instruction concerning the origin of man. With the igniting of fundamentalist fires in the early part of this century, "anti-evolution" sentiment, such as that in Scopes, emerged as a significant force in our society. As evidenced by this appeal, the place of evolution and the theory of creation in the public schools continues to be the subject of legislative action and a source of critical debate.

The court held the statute's purpose was the promotion of a religious belief, and therefore violated the Establishment Clause of the First Amendment.

***Kitzmiller v. Dover Area School Dist.*, 400 F. Supp. 2d 707 (M.D.Pa. 2005)**

In October 2004, the Dover Area School Board of Directors in Dover, Pennsylvania passed a resolution by a 6-3 vote that read: "Students will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design. Note: Origins of Life is not taught."

In November 2004, the Dover Area School District released a press announcement that, commencing in January 2005, teachers would be required to read the following statement to students in the ninth grade biology class at Dover High School:

The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution and eventually to take a standardized test of which evolution is a part.

Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.

Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, *Of Pandas and People*, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.

With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.

The press announcement was subsequently referred to as the “Intelligent Design” policy. Several parents of school-aged children and members of the high school science faculty brought an action against the school district and school board challenging the constitutionality of the district's policy.

The trial judge forcefully struck down the policy on three grounds: (1) the policy amounted to an endorsement of religion which violated the Establishment Clause of the First Amendment; (2) the policy violated the Establishment Clause under the Lemon test<sup>293</sup>; and (3) the policy violated the freedom of worship provision in Article 1, § 3 of the Pennsylvania Constitution, which provides:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

The court explained:

It is essential to our analysis that we now provide a more expansive account of the extensive and complicated federal jurisprudential legal landscape concerning opposition to teaching evolution, and its historical origins. As noted, such opposition grew out of a religious tradition, Christian Fundamentalism that began as part of evangelical Protestantism's response to, among other things, Charles Darwin's exposition of the theory of evolution as a scientific explanation for the diversity of species. *McLean*, 529 F.Supp. at 1258; *see also, e.g., Edwards*, 482 U.S. at 590-92, 107 S.Ct. 2573. Subsequently, as the United States Supreme Court explained in *Epperson*, in an “upsurge of fundamentalist religious fervor of the twenties,” 393 U.S. at 98, 89 S.Ct. 266 (citations omitted), state legislatures were pushed by religiously motivated groups to adopt laws prohibiting public schools from teaching evolution. *McLean*, 529 F.Supp. at 1259; *see Scopes*, 154 Tenn. 105, 289 S.W. 363 (1927). Between the 1920's and early 1960's, anti-evolutionary sentiment based upon a religious social movement resulted in formal legal sanctions to remove evolution from the classroom. *McLean*, 529 F.Supp. at 1259 (discussing a subtle but pervasive influence that resulted from anti-evolutionary sentiment concerning teaching biology in public schools).

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<sup>293</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).