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# Thomas More-- A Lawyer Martyr

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## THE SCOPES CASE

By DUDLEY G. WOOTEN, A. M., LL. D.

The trial last summer of the young school teacher at Dayton, Tennessee, for violation of the statute prohibiting the teaching of evolution in the public institutions of education in that State, furnished a "Roman holiday" for newspaper correspondents, scoffers at religion, tiros in scientific knowledge, and lawyers noted for sensational publicity rather than legal knowledge or professional repute. Endless comment in the public press traversed the fields of law, religion and science, regardless of the fact that neither religion nor science had any practical relevancy to the case, and that the principles and procedures of law involved were simple, well-settled, and obvious to any lawyer of practical experience and ordinary attainments; and also unmindful of the further fact that, even if these subjects had really been materially germane to the trial, there was no one connected with the case whose authority upon disputed questions of law, religion or science was entitled to very serious consideration. There was indeed no excuse for controversy over any essential issue of legal, religious or scientific truth and practice. It was demonstrated by all that was said and done and written before, during and after the trial, that the prosecution was conceived and instigated for the purpose of discrediting the Bible and the faith of those who accept that book as divinely inspired. The issues so vociferously urged by the counsel for the defendant were clearly feigned, false, and brought forward in order to enable the leading defense attorney to exploit his blatant blasphemy and sensational derision of religion and piety. The court brushed all of this aside, and displayed a practical good sense in its rulings and a firmness in its adherence to the direct and simple methods of criminal law procedure, highly creditable to the country judge who presided at the trial. Judge Raulston disposed of the case as if Scopes had been indicted for pig-stealing or assault and battery, as in truth it should have been. He refused to be daunted or dazzled by the intimidating tactics of defendant's attorney, and he likewise proved himself strong

enough in spite of his evident sympathy, to resist the beguiling eloquence of the distinguished "fundamentalist" who assisted the prosecution. A slight consideration of the real nature of the case will make obvious that its direct issues were clear and positive. Its ultimate or indirect issues were not properly before the court, and most likely will not arise in any future development of the case, although they are very vital and will eventually require settlement by the highest court in the land. The statute whose violation was charged against Scopes was entitled, "An Act to prohibit the teaching of the theory of Evolution in the public schools, universities and normals of the State of Tennessee". If the body of the Act had gone no further than this in defining the exact nature of the thing prohibited, it would unquestionably have been open to serious objection for vagueness and uncertainty, since there are so many phases of the doctrine or theory of Evolution, that not even the most learned scientists are agreed upon the definition of the word, and sincere religionists do not reject some of those phases as incompatible with the Scriptures. But the Act proceeds to make specific the very teaching which is interdicted by it, as follows: "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, to teach any theory that denies the story of the divine creation of man as taught in the Bible, and to teach instead thereof that man has descended from a lower order of animals."

There is no ambiguity or uncertainty in this language. It defines clearly both the method and the content of the instruction forbidden to be imparted by the teacher. To "teach" means something more than merely to state a thing; it implies the act of impressing by positive inculcation the thing sought to be expounded—it postulates an earnest and emphatic effort to lodge in the mind of the student the doctrine or truth involved. If a teacher merely told his pupils, what is the fact about Evolution, that it is a theory of cosmogony supported by demonstrated proofs as to certain phases of animal and vegetable life, but only of provisional validity as to other vital steps in the development of the various orders of life, and that it has not progressed to the point of disproving the divine creation of man by the special act of the

Creator, there would probably be no harm done by such an exposition; although it is doubtful if any practical benefit would ensue to the great majority of students from such a statement of the theory, inasmuch as they are not possessed of enough scientific knowledge and intellectual discernment to be able to discriminate between those portions of the theory that are sustained by established facts, and those which are yet purely hypothetical. Most likely they would simply be confused and unsettled in their minds by the difficulty of the problem, and end by doubting the Bible account of creation without being convinced of the scientific truth of the doctrine. At any rate, it is a subject involved in great doubt and open to endless disputation, and the practical benefits of the discussion, by teachers of limited knowledge and discretion, before students of more limited information and judgment, would be more than counterbalanced by the evils of sceptical or irreligious ideas engendered by it. The Legislature of a State, as the primary and exclusive judge of what shall be taught in its public schools, is vested with the function and authority to prescribe or to prohibit the teaching of such a subject therein. *Associated Schools v. School District*, 122 Minn. 254, 47 L. R. A. (N. S.) 200, *Ed. Note*; *State ex rel. Clark v. Haworth*, 122 Ind. 462, 7 L. R. A. (N. S.) 240; *Roach v. St. Louis Pub. Schools*, 77 Mo. 484; *Waugh v. Univ. of Miss.*, 237 U. S. 589; *Berea College v. Kentucky*, 211 U. S. 45; *Meyer v. Nebraska*, 269 U. S. 390.; *Pierce, Gov. of Oregon v. Sisters of the Holy Names*, 45 Sup. Ct. Rep. 571; *Bartels v. Iowa*, 262 U. S. 404; *Board of Education v. Minor*, 23 Ohio St. 211, 252, 13 Am. Rep. 233.

It is well known that there are several aspects in which the theory of Evolution is regarded by both scientists and religionists. The crucial point is, whether man occupies his present status as a creature possessing not merely physical and mental traits closely similar to the lower animals, but also a spiritual nature that is divine in its origin and essence, and which was imparted to him by the special act of his Creator; or whether he is in all respects simply the product of automatic evolution, without the intervention of any act of special creation in the matter of his soul or spirit. The former is the contention and belief of orthodox religionists, both Jews and Christians, while the

latter is the doctrine of the materialist, the atheist, and the agnostic; the one is based upon the authority of the Bible, as the inspired word of God, the other is founded upon partial and unproved premises, ostensibly scientific, but accepted by real scientists only as a conditional theory, liable to be disproved or modified by further investigation. Between these two viewpoints there are many disputed and doubtful questions, about which no conservative or prudent man attempts to dogmatize in the present state of human knowledge. Saint Augustine suggested the possibility that man's physical constitution might have developed from lower forms of animal life, but that his spiritual nature was the product of the direct and special act of his Creator; that when, as related in Genesis, God created man "to His own image", it was the spiritual and not the physical man that is meant—that it is absolutely true that the Lord God "breathed into his face the breath of life, and man became a living soul". Eminent Catholic scholars of our own times have expressed the same thought, such as Canon de Dordot and Father Wasmann, and Pope Leo XIII, in his Encyclical on "The Study of the Holy Scriptures", disposes of alleged conflicts between the Bible and Science by pointing out that the sacred writers "did not seek to penetrate the secrets of nature, but rather described and dealt with things in more or less figurative language, or in terms that were commonly used at the time, and which in many instances are in daily use at this day, even by the most eminent men of science"; that there cannot, in the nature of things, be any real conflict between the Bible and science, since they both emanate from the same source of truth, and truth cannot contradict itself; that whenever an apparent conflict arises, it must be weighed carefully and investigated thoroughly by competent and honest scholars, with the assurance that there has been some mistake, either in the interpretation of the sacred words, or in the polemical discussion itself; and that, pending further and authoritative examination of the disputed point, "we must suspend judgment for the time being". This is the utterance of a wise and liberal Christian authority—the highest among men—and is in striking contrast to the intolerant bigotry of *pseudo-scientists*, who demand immediate and unqualified acceptance of their radical theories.

The more the matter is considered, the more obvious it becomes that it is exceedingly dangerous, not to say foolish, to permit the teaching of so difficult and doubtful a subject to immature minds, by poorly-balanced and half-educated instructors, such as too often hold positions in our public schools and colleges; and especially when it is almost universally true that the radical evolutionist is at the same time a rabid materialist or an avowed atheist, denying the existence of God and the human soul. Discussing the Scopes case recently, G. K. Chesterton wrote: "An evolutionary education is something very different from an education about evolution. Just as a religious school openly and avowedly gives a religious atmosphere; so a scientific class does sometimes covertly or unconsciously give a materialistic atmosphere. A secularist teacher has just as much difficulty as a priest would have in not giving his own answer to the questions that are most worth answering. He tends more and more to turn his science into a philosophy, and this philosophy has in it something altogether alien, not only to all religions that refer back to the will of God, but even to all moralities that revolve upon the will of man." This states precisely the nature and purpose of the kind of evolutionary philosophy that Darrow and his associates wanted taught in the schools of Tennessee, and which the law of that State expressly prohibited. It is also the kind of scientific infidelity that they would have taught in all our schools, if they had the power. On the whole, it cannot be said that the Tennessee statute is arbitrary or unreasonable. It contains the protest of the preponderant religious and moral sentiment of the people of that commonwealth, against the sort of teaching Chesterton describes. Being prohibited by the law and constitution of the State from inculcating their own religious beliefs in the schools founded and supported by their own patriotism and patrimony, they naturally and reasonably objected to having those beliefs attacked and destroyed by a system of instruction that denied and defied the sovereignty of God and the spirituality of man, at their expense and to the eternal detriment of their children. The Tennessee legislature simply translated the protest into a written law, and in doing so they not only did nothing despotic or irrational, but they followed the judicial authority of the Supreme Court of Ohio in the case of

*Board of Education v. Minor*, above cited. That case involved the validity of a resolution of the board of education of the City of Cincinnati, rescinding a former resolution, which had been in force for nearly thirty years, under which the reading of the Bible in the public schools was required daily, the effect of the rescission being to prevent such reading. There were most able and exhaustive briefs and arguments by counsel, and a lengthy opinion by the court, the rescinding resolution being upheld as a reasonable and valid exercise of the board's power to regulate the instruction in the schools. The following sentence from the decision of the court is a clear and satisfactory solution of all such controversies, and applies exactly to the evolution question in Tennessee:—

“To teach the doctrines of infidelity and thereby teach that Christianity is false, is one thing; and to give no instruction on the subject is quite another thing. The only fair and impartial method, where serious objection is made, is to let each sect give its own instruction elsewhere than in the public schools where all of necessity must meet, and to put disputed doctrines of religion among other subjects of instruction, for there are many others, which can more conveniently, satisfactorily, and safely be taught elsewhere.”

If the radical evolutionists are so devoted to their theories, and so convinced of the necessity of having them taught, they are at perfect liberty to establish and maintain their own schools for that purpose, and cannot reasonably insist that the public schools shall exploit their doctrines at the expense of those who regard them as impious and destructive. The Catholics of this country are doing that very thing, in attestation of their loyalty to their religious faith, and their belief that religion and morality based thereon are absolutely essential to both the temporal and the eternal welfare of their children. Recognizing the wisdom of the American principle of religious freedom and the separation of state and church, they pay their proportion of public school taxes and then support their parochial schools at an enormous private expense. Their right to do this has recently been called in question and sought to be denied to them, but the Supreme Court of the nation vindicated it most emphatically, and in the same decisions that uphold that right it is declared

that the state has the right and power to regulate the studies and discipline of its own schools supported by public funds. See *Pierce v. Holy Names Sisters*, and *Meyer v. Nebraska*, above cited.

It is understood that no serious contention was made in the Scopes trial that the statute is in violation of the State Constitution, as indeed there could not be. As in all of the States of the Union, the legislature of Tennessee is vested with absolute control over the educational system of the State, and may exercise that control directly by statute, or indirectly through local boards and officials, to whom are committed the details of regulation. It has never been asserted that the Federal government possesses any jurisdiction over education in the States, and the only cases in which Federal authority can be invoked are those involving some question of Federal constitutional law. In the case of *Associated Schools v. School Dist.*, *supra*, the Supreme Court of Minnesota declared that public schools and institutions of learning by the Constitution are made a state-wide concern, to be treated as a unit, and the legislature has the duty and authority to establish, maintain, organize and regulate them, as a primary and exclusive function of state sovereignty, including the prescribing of what studies shall be taught, the mode of discipline, and all other incidents of the educational system. In *State ex rel. Clark v. Haworth* and *Roach v. St. Louis Public Schools*, *supra*, it was decided that when the legislature has acted under the Constitution, in the performance of its control over public schools and colleges, the courts have no power or discretion to interfere with the legislative action. Upon these and many similar precedents, it can reasonably be concluded that the Supreme Court of Tennessee will not disturb Judge Raulston's ruling upholding the validity of the state law against teaching evolution. His decision was in entire accord with the universal holding of the courts of last resort in all the States where the question has been adjudicated. Moreover, he acted in line with the universal practice of capable and prudent judges in all trial courts, in refusing to declare the statute unconstitutional, it being at least open to serious doubt and all presumptions being in favor of the validity of the legislative enactment. Some authorities have gone to the extent of holding that a trial judge

ought not to declare a statute unconstitutional unless it is clearly so, and "beyond a reasonable doubt".

If, then, on appeal, the judgment of the Dayton court is affirmed by the Supreme Court of Tennessee, the next step towards attacking the validity of the law will be a writ of error from the Supreme Court of the United States, to review the judgment of the Tennessee Court, which writ can only be sustained upon the grounds that the statute contravenes some provision of the Federal Constitution. The constitutionality of the law having been upheld under the State Constitution by Tennessee courts, the Federal courts will not undertake to inquire into the correctness of that decision, since the judgment of a state court upon the validity of a state law under the state constitution is final, unless, indeed, that constitution is itself in violation of the Federal Constitution, in which case it will have no more force in the U. S. Supreme Court than a state statute. But, in any event, before the Federal court will interfere with the decision of the state courts, it must clearly appear that some right secured by the Federal Constitution has been denied or abridged. What provision of the U. S. Constitution is violated by the Tennessee statute, in the *Scopes* case? Certainly not the First Amendment, guaranteeing religious freedom, for it is well settled that it applies only to Acts of Congress, and in no wise affects the legislation of the several states. For the same reason it does not contravene the Fifth Amendment. Does it violate the Fourteenth Amendment, which reads as follows: "No state shall make or enforce any laws which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"? It was decided directly after that Amendment went into effect, and has often been reaffirmed since then, that the "privileges and immunities" mentioned therein are only such as pertain to United States citizenship, and do not at all relate to state citizenship, which is exclusively a matter of state jurisdiction and legislation: and it has been repeatedly held that the guarantees contained in the first eight Amendments are not privileges and immunities of United States citizenship. *Slaughter House Cases*, 16 Wallace, 36,

78; *Spies v. Illinois*, 123 U. S. 131, 166; *Maxwell v. Dow*, 176 U. S. 581. Now, rights, privileges and immunities which pertain to education do not belong in the category of United States citizenship, since everything pertaining to that subject is exclusively under state control. Therefore, the Tennessee statute does not affect that part of the 14th Amendment.

It goes without saying that the statute does not deprive anybody of life. Neither does it take away any man's liberty or property without due process of law. It is no part of a man's liberty to teach in a public school, nor does the state owe him any duty to employ him in that capacity; his teaching therein is purely a matter of contract, and the state that employs him and pays his salary is at perfect liberty to prescribe the terms of the contract, as he is at liberty to refuse the employment if the terms do not suit him. If he wants to teach evolution or any other subject, not in itself unlawful or harmful to society, he can start a private school for that purpose, and the state cannot prohibit him from so doing, without depriving him of both liberty and the property of his gainful vocation as a teacher. That was decided in the case from Nebraska and the Oregon School Law Case, above cited. Those cases also announced the rule that the state has a perfect right to control its public schools and the course of studies in them. There is no inherent or constitutional right of the parents of public school students to have them taught any particular study, or to dictate the terms under which they shall send their children to school. So long as the law is uniform and universal, without local or personal discriminations, the patrons of the public institutions are not at liberty to complain of it, or to refuse to send to the schools if so required by the law. The fundamental fallacy of the argument as to deprivation of liberty or property is, that it assumes that teaching and being taught in public institutions of education are *rights*, rather than merely *privileges* to be enjoyed under such limitations and regulations as the state may prescribe and enforce.

The law upon this point was fully enunciated by the Supreme Court of the United States, in the case of *Waugh v. University of Mississippi*, 237 U. S. 589. Mr. Justice McKenna, delivering the opinion, held that attendance upon public schools, teaching therein, and the character of instruction are not absolute but con-

ditional rights, dependent for their exercise upon legislative discretion; that it matters not what other states may do, each state is the judge of its own standards and regulations; that when a state court has decided that a law is valid under the state constitution, on the subject of education, the Federal courts will consider that to be the correct and conclusive settlement of the matter; that is it for the legislature to determine what shall or shall not be the requirements of study and discipline in the state schools; and he concludes with this significant language: "It is not for us to entertain conjectures in opposition to the views of the State, and annul its regulations upon disputable considerations of their wisdom or necessity. The right to pursue happiness and to exercise rights and liberty are subject in some degree to the limitations of the law, and the conditions upon which the State offers free instruction in its university and other educational institutions, finds no prohibition in the Fourteenth Amendment."

To the same effect is the judgment of the same court in *Berea College v. Kentucky*, 211 U. S. 45. In the last named decision Mr. Justice Brewer said: "When a state court decides a case upon two grounds, one Federal and the other non-Federal, this Court will not disturb the judgment if the non-Federal ground, fairly construed, sustains the decision"; and he cites a number of supporting cases.

In view of the above authorities, and many more of the same tenor could be adduced, it can be predicted with reasonable certainty, that if the Scopes case ever reaches the U. S. Supreme Court, either by writ of error to the Tennessee Supreme Court, or by injunction proceedings in the inferior Federal tribunals, the Tennessee statute will be upheld upon the grounds that the case involves no question of Federal constitutional law, and that its validity has been conclusively determined by the State courts. In other words, that the Federal courts have no jurisdiction in the case.

A significant circumstance in the Scopes trial was the fact that the defendant and his attorneys made no *bona fide* defense upon the merits of the case, as they might easily have done, with fair prospect of success. The paragraphs in the school text-book, which it was charged that Scopes violated the law in

teaching, were these: "The development or evolution of plants and animals from simpler forms to the many and present complex forms of life have a practical bearing on the betterment of plants and animals, including man himself. The one name indelibly associated with the word evolution is that of Charles Darwin". Then appeared a picture of Darwin, entitled "The Grand Old Man of Biology", with a sketch of his life, in which it was stated: "His wonderful discovery of the doctrine of evolution gave to the world the proofs of the theory on which today we base the progress of the world". It is difficult to see how these statements violate the statute, which forbids teaching any theory that contradicts the Bible account of man's creation. The first sentence quoted is a very vague and harmless generalization, and the second is not only a preposterous exaggeration but a falsehood on its face. But the prosecution of Scopes and his defense were engineered for the malicious purpose of maligning the religion of the Bible, insulting the pious sentiments of the Tennessee people, and to advertise the ribald atheism of Clarence Darrow. It was not intended nor attempted to make an honest effort to clear Scopes, and the professional and personal character of the attorneys who thus trifle with courts of justice and the interest of their clients may readily be inferred.

There is, however, a serious and potential aspect of this notorious case that is worth considering. The Tennessee law is a sample of similar statutes proposed in other states, and they foreshadow alarming possibilities. The principle of absolute religious freedom, and the inviolable separation of church and state, are fundamental in the constitutional law of both the nation and all of the States. Upon all questions involving religious belief and worship all of our governments are required to be neutral, and this applies not only to direct attempts to introduce religious issues into secular institutions and laws, but to indirect efforts to invoke religious feuds and controversies by promoting irreligious propaganda through secular channels. A law or practice that asserts freedom to teach doctrines destructive of religion is just as obnoxious to American principles, as one that seeks to intrude religion into our institutions; it is a negative way of provoking an affirmative antagonism, and if permitted will inevitably lead to bitter and disastrous innovations in our

system of government and legislation. Along with the guarantees of religious freedom and independence of church and state, so precious in our system, and which are embedded in the organic laws of the land, there is another influence equally as well recognized and fully as potential, but which finds expression in the traditions, habits, innate character and sacred sentiments of the masses of the American people, and that is the religious spirit, preponderantly Christian, which animates the national ideals and is written deep in the national heart. These two elements in the constitution of American society may be said to represent respectively the *body politic* and the *spirit politic* of the nation—for there is a spirit politic of any country as surely as there is a body politic—and the one is as essential and valuable in the composition of a country's civilization as the other. The tendency of the times is to create a war between the two—to pervert our institutions so as to arouse hostility between the written laws of the body politic and the unwritten laws of the spirit politic. In the foundation of the Republic there was harmony and concord between them—statesmen and jurists, as well as philosophers and patriots of every class and creed, regarded this unity of feeling, with separation of functions, as the most distinctive and priceless virtue of American nationality. Piety and patriotism, loyalty to liberty and law with devotion to faith and worship, were deemed twin jewels in the crown of our new civilization. Blasphemy was a felony under the Common Law of England, which all of the original colonies inherited, and some of them made it criminal by statute after the Revolution. The Supreme Court of Massachusetts defines it as “speaking evil of the Diety, with the impious purpose to derogate from the Divine Majesty and to alienate the minds of others from the love and reverence of God.” *Com. v. Kneeland*, 20 Pick. 213, 220. In Pennsylvania it was decided that Christianity “is a part of the common law of the land”. *Updegraph v. Com.*, 11 Serg. & Rawle, 394. Chancellor Kent decided, in the Supreme Court of New York, that to revile the Author of the Christian faith “is not only in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order”. *People v. Ruggles*, 8 Johnson, 289. As late as the case of *Church of the Holy Trinity v. U. S.*, 143 U. S. 470-472, the Su-

preme Court of the United States said "no purpose of action against religion can be imputed to any legislation, of State or Nation, because this is a religious people". After citing the historical evidence in support of this ruling, the Court further said: "There is no dissonance in these declarations. There is a universal language pervading them all, having but one meaning; they affirm and reaffirm that this is a religious nation. They are not individual sayings, declarations of private persons; they are organic utterances, they speak the voice of the whole people. These and many other matters that might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation". It is this consensus of authority, judicial and legislative, that represents the spirit politic of Americanism, and it is not at all incompatible with the law of the body politic, provided the two keep to their separate spheres of influence and action. But when a militant and malignant Secularism is seeking to align the forces and agencies of the body politic against the sentiments and faith of the spirit politic—to divide the house against itself—to use the laws and institutions of the country for propagating the impious theories and irreligious doctrines of rationalism, and materialism, at the public expense and under the guise of intellectual freedom and scientific research, it is not to be expected that the amity and concord of our constitutional system can long endure. When to this secularizing tendency there is added the ruinous bigotry and intolerance of warring religious sects, divided among themselves and desperate at the waning faith and fealty of their own followers, the prospect for the preservation of the proper equilibrium between church and state, religion and government, is not encouraging. The Tennessee law and others like it are premonitory of a menacing situation, for that sort of legislation, however warranted and innocent under normal conditions, once inaugurated, may easily develop into a dangerous invasion of religious and civil liberty, rendering public education the victim of popular clamor and unreasoning bigotry. Meantime, the only religious force in the country that occupies a safe and sensible attitude on the subject is the Catholic Church. The various Protestant sects, once identified with the religious spirit of the Republic by their many and capable private institutions of learn-