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Evolution and the Law

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By Jacob Mark Lashly.*

Whether the trial of a religious issue in a court of justice ever satisfies anybody or settles anything is questionable, but the introduction of biology into court in the trial of John T. Scopes, a hitherto obscure teacher at Dayton, Tennessee, has at least resulted in nation-wide discussion of the subject of Evolution and has fired the forces in the Fundamentalist-Modernist controversy with renewed zeal for their respective sides.

But this case presented a very important legal as well as religious question, and there appears to arise a danger that some of the sincere and devoted exponents of the cause of Fundamental Religion may fall into an embarrassing difficulty by unwittingly allowing the two questions to become coupled together in their thinking and in their public utterances, so that should they in course of time find themselves arrayed upon the wrong side of the legal question they may unhappily find their influence upon the side of the religious question undeservedly diminished. For the legal question is susceptible of precise and final determination and is a matter for lawyers and the courts, whereas, by its very nature the doctrinal question is not, and is a matter for scientists, philosophers and theologians.

The indictment against the diffusion of the doctrine of Evolution is that it contradicts the principles of religion in the Bible story of creation and presently leads to general unbelief. When we consider the experience of Charles Darwin and his able and ardent disciples, Haeckel and Herbert Spencer, as well as Huxley, John Stuart Mill and even H. G. Wells, how they emerged from their studies and experiments in science absent that simple faith in God as the First Cause which has satisfied the minds and hearts of men of all degrees throughout the centuries, there would seem to be serious ground for the charge. As Charles Darwin, educated for the ministry, phrased his own experience: "Disbelief crept over me at a very slow rate, but was at last complete. The rate was so slow that I felt no distress." Even the fact that Mr. Darrow, who describes himself as an agnostic, was the leading counsel for Scopes and chief reliance of the Modernists at the Tennessee trial, seems to have deepened the popular suspicion that the intensive study of this branch of science generally results in agnosticism. A professor occupying the chair of psychology in one of our

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great universities said to the writer, "When you enter the door of psychology, you hang your religion outside." This laconic and revealing remark appears quite as applicable to the era which has just closed in the field of biology. Moreover, it cannot be doubted that the teaching of the doctrine of Evolution as an established fact to children of immature minds in such way as to contradict the Bible version of creation, resulting in the beginnings of incredulity and irreverence, is a matter of grave concern to parents. Upon the other hand there is already to be observed the dawn of a better understanding, and a place is being found in Christian thinking for the Evolutionary theory as an inferential description of the physical method or detail of the process of creation, unopposed to the Bible account of the Authorship of God. As Dr. Thomson has expressed it: "Modern investigation has shown the possibility of an evolution of matter," but he significantly adds, "it looks as if the creation had been, as we should say in human affairs, 'well thought out.'"

The differences which divide us resolve themselves largely into questions of proof. The same facts presented in precisely the same way frequently produce widely different impressions upon men of the same general experiences and walks in life. This is a fact well within the experience of every trial lawyer. But the "kivver-to-kivver" Fundamentalist is not without substantial support for the claim that the observable results of especial devotion to this branch of scientific investigation have in the past been a tendency away from religion.

The psychology underlying this fact savors of a certain egotistical development which accompanies and is in a measure peculiar to this field of study, tending toward an inordinate growth of intellectual self-sufficiency, which often seems to limit the horizon of its subject to science only instead of science plus God.

The resultant tendency toward pride of intellect inclines the student to rely more and more upon demonstrable evidence and to withhold his assent from religious interpretations formerly accepted as a matter of course. Being unable in the last analysis to satisfy the exactions of his intellect by concrete and material proofs of the infinite truths concerning the derivation and destiny of man, as well his mortal body as his immortal soul, he has turned agnostic.

In vain does the Christian religion hold out to him that treasure which was defined by the great apostle as "a comfortable assurance of attaining the hope of the human heart—an inflexible conviction of things unseen." Having chosen the more intellectual part, he too often achieves a contempt for the sacred beliefs of his less scholarly fellow-

men whose saintly lives may bear the strongest testimony of the efficiency of their religion to satisfy every need of this life and to train the spiritual personality for the life to come.

Let it, therefore, be freely conceded for all the purposes of this discussion that the end intended to be promoted by legislation contrived to suppress the spread of the Evolution hypothesis holds much that is desirable, but the question remains as to whether such an end is to be advanced by means of prohibitory and suppressive laws rather than by the processes of education and reason.

Much of the comment emanating in these days from the Fundamentalist side of the argument may be summarized in the words of a leading New York clergyman in a recent widely circulated article. He puts it thus:

> "No fair-minded person can find any fault with the Dayton trial from a legal standpoint. The Tennessee Legislature had enacted a statute which was clear and explicit. In effect this law said that the teaching of Evolution in any of the schools of the State was forbidden, on the ground that it was contrary to the statement of creation as it appears in the Book of Genesis. Mr. Scopes acknowledged that he had violated this law. That ended the case."

But does the case end here? It were better stated that the legal phases of the case begin at this point.

It was contended by counsel for Scopes that the statute of Tennessee, under which he was being prosecuted, is unconstitutional and void for two reasons:

First—It is in violation of the Constitution of Tennessee, and

Second—Such an enactment by the Legislature of any state is prohibited by the Fourteenth Amendment to the Federal Constitution.

The question then is not whether the Tennessee statute was violated by one Scopes, but whether the Legislature of a state in the exercise of its undoubted power to provide and regulate a curriculum for the schools of the state may resort to the expedient of direct mandatory control over the religious opinions and utterances of the teacher.

The statute of Tennessee, which was enacted in March, 1925, under which Scopes was prosecuted, is in the following language:

> "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 descended from a lower order of animals.
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> 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.
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> Section 3. Be It Further Enacted, That this Act take effect from and after its passage, the public welfare requiring it."

The Constitution of the state provides, among other things, that "no human authority can in any case whatever control or interfere with the rights of conscience" of its people. Let us first examine the validity of this statute when measured by the limitation of the foregoing provision found in the Constitution of Tennessee.

If Mr. Scopes undertook an employment under a valid and lawful contract with the Board of Education to teach the subject of biology, he had the *right* to teach it as well as the duty. Nor could he be compelled by law to teach it only in accordance with a prescribed religious doctrine, assuming that such doctrine contradicted his conscientious opinion and belief upon that subject, without an obnoxious interference with his "right of conscience."

Furthermore, if the doctrine of Fundamentalism can arbitrarily be made a state doctrine, both logic and reason constrain the observation that a Protestant legislature, for example, could provide by law for the teaching of the History of the Reformation, including a penalty for failure of the teacher to agree with the theses of Luther. A conscientious Catholic teacher would in that case be obliged to choose the course of dishonor and cowardice or resign. On the other hand, a Catholic legislature could, if they saw fit, pass a law requiring, under penalties, the teaching in the public schools of the doctrine of transubstantiation as a fact. Such a consummation is obviously in gross repugnance to the whole temper and spirit of the American Republic and tends to tear down the ideals which have beckoned to our shores

the oppressed of every land and have given to the world a priceless example of freedom.

It would therefore seem rather obvious that if "liberty of conscience" means anything at all, it would be "interfered with," within the meaning of the Constitution of Tennessee, by such a law.

But an even more far-reaching question is that of the relation of such a law to the fourteenth amendment to the Constitution of the United States:

> "No state shall make or enforce any law which shall abridge the privileges or 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."

This great rampart of human liberty was frankly enacted in order to accomplish social liberty for the negroes, but the broad scope of its provisions was intended too by the radical Republican group which secured its ratification, at the bitterest period of the Civil War, to curb the encroachments of the states upon the civil and conscientious liberties of the freedmen under whatever guise or form.

Perhaps there is no part of the American Constitution which has played such an heroic role in safeguarding the liberties of the people and in the preservation of the genius of the American institution as the Fourteenth Amendment. It alone has earned the remark so aptly applied by Mr. Bryce to the whole document in saying "the American Constitution deserves the veneration with which the Americans have been accustomed to regard it."

Since the day of the promulgation of the decision in the Great Slaughter House cases,[1] there is no limit at all to the "personal liberties" which have clutched at its skirts for protection. Moreover, it may be added, that not all of the decisions of the highest court have been altogether understandable as they have sought to define the boundaries beyond which the state cannot pass in *regulating* the conduct of its citizens, without *abridging* their privileges or immunities as citizens of the United States. But the policy of the court is undoubtedly discernible through them all. It has uniformly and consistently stricken down those acts of the various states which have aimed at arbitrary dictation to the people of their modes of speech, religion or the details of their private lives where the relevancy to the subject of the peace and safety of the state or nation does not plainly appear. This has been the policy of the government from the earliest days of its exist-

1. 83 U. S. Sup. Ct. Rep. 395 (1873).

ence. Never was the Union so seriously threatened with dissolution until the very hour of the Civil War as when the great indignant protest of the people, led by Thomas Jefferson, broke against the Alien and Sedition laws, and the courts have ever been vigilant in maintaining the security of minorities in the enjoyment of the integrity of their opinions and the rights of free speech.

The urge of the majority to impose its will upon disagreeable minorities was perhaps more intense during those trying periods of the World War than at any time since the enactment of the Fourteenth Amendment. In that day when a great friendly people awoke to the fact that our country was the hunting ground for the spies of a foreign people, the shock of realization was succeeded by a great wave of indignation and prejudice which manifested itself in some cases by intolerant legislation. In some of the states, notably Nebraska, Ohio and Iowa, laws were enacted proscribing the teaching of any modern language in the grade schools of the state except English, and in the case of *Meyer v. Nebraska*,[2] as also the case of *Bartels v. Iowa*, the question of the validity of such statutes reached the Supreme Court for decision in June of 1923. In the following language the Court applied the "life, liberty and due process" clause of the Fourteenth Amendment to the complete vindication of Mr. Meyer, who had been convicted of teaching German to the children of a certain parochial school, called Zion, located in Hamilton County, Nebraska:

> "The problem for our determination is whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. 'No state . . . shall deprive any person of life, liberty, or property without due process of law.'
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> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

2. 262 U. S. Sup. Ct. Rep. 390.

"The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."

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"The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve."

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"That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all,—to those who speak other languages as well as those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution,—a desirable end cannot be promoted by prohibited means."

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"The desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate. Unfortunate experiences during the late war, and aversion toward every characteristic of truculent adversaries, were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state, and conflict with rights assured to plaintiff in error. The interference is plain enough, and no adequate reason therefor in time of peace and domestic tranquillity has been shown."

While it might be admitted that the analogy is not altogether perfect, however, there would seem to be no serious difference in principle between a law which forbids a teacher to impart the German language to his students and a law which forbids the teaching of the theory of Evolution; and this would apply with equal force even although it should be admitted that Evolution is in contradiction to those doctrines of religion which are held to be fundamental truths

by a majority of the American people. For the test does not lie in the fact that the opinions of the teacher may be right or that they may be wrong; nor is it material whether they consist with the prevailing views of the time. It is that his opinions *belong* to him and that the right to freely express them is a liberty which is personal to him. This doctrine not only guarantees the integrity of opinions deemed at the time to be false or foolish, but it reflects the experience of history that the majority or prevailing view is often happily demonstrated to be error. Galileo was tried as an heretic and was convicted of the most abhorrent heresy for teaching and publishing the theory that the planets revolve around the sun, which was regarded as a wholly blasphemous contradiction of the tenth chapter of Joshua, wherein is the record that God, at the supplication of Joshua, arrested the movement of both sun and moon and caused them to stand still the whilst Joshua and his comrades completed the important business which they then had in hand. And yet the truth of Galileo's thesis would be attested by every schoolboy in our day.

In the same century the eastern coast of the New World was studded with colonies of refugees from nearly every country where the old order prevailed—sturdy, indomitable men, willing to suffer the dangers and hardships incident to the great adventure. And they have woven into the fiber of our system of government those principles of liberty of conscience which urged them to cross the seas, and which have been zealously cultivated and valiantly guarded in the political policies and written law of the country as the very foundation of our freedom.

Perhaps the philosophy of the new world may be said to be essentially equivalent to that of the wise old Sanhedrist, Gamaliel, who counseled dismissal of the "false teachers" of his time with the profoundly tolerant observation: "For if this counsel or this work be of men it will come to naught; but if it be of God, ye cannot overthrow it; lest haply (unhappily) ye be found even to fight against God."

A somewhat different phase of this constitutional question was considered by the Supreme Court in the Oregon School case,[3] in which the opinion was delivered upon June 1, 1925. The right of the State of Oregon to compel its people to send their children to public rather than to private or parochial school of the same or equivalent standards was drawn in question in that case from the standpoint of the school and the parent rather than from that of the teacher, as in the German language case. And yet the case is not without its value as a precedent

3. Pierce v. Society of Sisters, 169 L. Ed. 688.

here. In an emphatic opinion, based squarely upon the authority of the Nebraska German language case, the Court held the Oregon statute under consideration to be void and in obvious contravention of the Fourteenth Amendment. One clause will suffice to convey the drift of the decision:

> "Under the doctrine of *Meyer v. Nebraska,*[4] we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state."

The opinion in this case was written by Justice McReynolds, who also wrote the opinion of the Court in the Nebraska case, and, curiously enough, it is in his native Tennessee that what appears to be the same fight is being waged by the Modernist minority that was waged by the German minority in Nebraska and the Catholic minority in Oregon.

That a state in the exercise of its police power may punish those whose abuse the freedom of speech vouchsafed in the Federal Constitution by utterances "inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace," is not open to question.[5]

To this line of decisions may be added those cases falling within the purview of the National Espionage Act, wherein utterances, the natural tendency and probable effect of which are to obstruct the recruiting of soldiers and sailors for the defense of the country in time of war, are proscribed.[6]

But the foregoing classifications comprise the only limitations upon the right of free speech which as yet have been sanctioned in our law, and to validate a restriction upon the rights of the people to hold and freely express their opinions upon a subject having no conceivable relevancy to any of the dangers contemplated in these classifications would be a substantial departure from the written law and previously established policy of the country.

It would probably be both fruitless and tactless to hazard a forecast of the decision in the Scopes case by the Supreme Court of Ten-

4. 262 U. S. 390, 67 L. Ed. 1042, 29 A. L. R. 1446, 43 Sup. Ct. Rep. 625.
5. Gitlow v. New York, No. 17 Adv. Ops., U. S. Sup. Ct., 69 L. Ed. 708; Fox v. Washington, 236 U. S. 277; Gilbert v. Minn., 254 U. S. 339.
6. Debs. v. U. S., 249 U. S. 566.

nessee when it reaches that body for argument. What effect a fervent devotion to the doctrine of state's rights, a sincere popular conviction that the dissemination of the doctrines of Evolution through the agency of the public schools is a serious menace to the youth of the state, and the well-known loyalty of the people of the South to accepted traditions of the past, may have upon the decision of that court in such a case, no one might safely venture a prediction.

Nor is it to be expected that the opinion of the bar of the country should be altogether undivided as to the view which ought to be taken of this case when it reaches the United States Supreme Court. But it would seem wholly conservative to suggest the possibility, if not the high probability, that the Court which decided the Nebraska and the Oregon cases will not deem itself to be without precedent to declare the Tennessee statute unconstitutional and void, and that in doing so the Court would in no wise contravene its established policy. In such event, it must be apparent that the champion of Fundamentalism who has rashly united the questions of Evolution and Law will suffer for his strategy, and the one will be dragged down with the other. Mr. Darrow and the other agnostic apologists for Scopes will not be slow to claim the victory. It seems an unnecessary exposure.