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Medieval Theology in Modern Criminal Law

Frank Swancara

MEDIEVAL THEOLOGY IN MODERN CRIMINAL LAW

FRANK SWANCARA[1]

I. *Credibility of Dying Declarations*

During the formative period of our common law the class of individuals responsible for the course and development of that law was composed of persons professing belief in the doctrines of orthodox Christianity of the time. In many respects the law, on various subjects, came to conform to such doctrines. In a few particulars it does so even to this day, and in some matters it discriminates against those not having or professing the belief in question. The discrimination works a wrong upon them, and that too without any corresponding benefit to society or even to any other class. The wrong is inflicted not only upon atheists but also upon those religious persons who omit adherence to one or more of the 17th century doctrines and who have no objectionable religious practices. But if atheists alone were the victims, dictates of humanity would still suggest that discriminations on account of religious or non-religious beliefs ought to be removed.

Civilization has so progressed, in the matter of toleration of diverse opinions on religious subjects, that it is not impious to say that the individual who professes no religion whatever is not, on that account, any less deserving of respect and of rights and privileges than any one else. The atheist, when it is discovered that he really is an atheist, is generally found to be as good a citizen as his Christian neighbor, and to have been such previously. No one disputes his understanding of secular subjects. He is moral, from choice and natural bent, and in every way entitled to every civil right enjoyed by Christians.

Theoretically, the atheist does enjoy every civil right claimed by others, but in the matter of the protection of life, if not also in other respects, he is less secure than the believer. This situation arises from a seemingly harmless rule of evidence regarding the credibility of dying declarations. The rule concerns the use, as evidence in a trial for murder, of declarations made by the person assaulted when he was about to die from the injuries received. Such dying statements may, ordinarily, be treated as the testimony of the declarant and given effect as if they were statements made by a witness at the trial testifying

[1]Member of the Bar, Denver, Colo.

under oath. The particular rule, or law, in question is settled not only by the decisions of numerous state courts but also by an opinion of the Supreme Court of the United States. The tribunal last named stated it in this language:

"They (dying declarations) . . . may be *discredited* by proof that he (the deceased) did not believe in a future state of rewards or punishments." (*Carver* v. *U. S.*, 164 *U. S.* 694.)

This law has many times been invoked by Christians who have been on trial for the murder of "infidels," and a few instances may be cited. In a Mississippi case the victim had been killed by a shot fired by some person in ambush. There were no eyewitnesses to the homicide. The victim, not dying instantly, was able to make, and did make, a statement as to the identity of the assailant, naming him. On the trial of the named person for murder, the dying declaration was introduced in evidence. The accused was, as one would naturally suppose, convicted of murder. On appeal, the Supreme Court set aside the conviction because the trial court had refused to allow the defendant to introduce testimony tending to show that the deceased "was an infidel." The appellate court was of the opinion, expressed without reluctance, that if the victim was an "infidel" the jury could, on account of that fact alone, give the dying declaration "such weight as in their judgment they deemed proper." In 1920, in Christian county, Missouri, a jury found two men guilty of murder. They had killed a man who was sixty-four years of age, in poor health, physically weak, and disposed to be peaceable. Their assault had not produced instantaneous death, and when the victim's two sons found him lying by a roadside, with several bullet wounds in his body and other wounds upon his head, he was still alive and stated the cause of his condition. His dying declaration explained how, with what weapons, and by whom, the injuries were inflicted. The Supreme Court of Missouri later observed that the murder "was a brutal one" (279 S.W. 712). The dying declaration was introduced in evidence. The defendants thereupon offered to give testimony to show that the deceased was "a disbeliever in God and in a future state of man." The trial court excluded such evidence. The Supreme Court held the exclusion to have been reversible error, and the conviction was set aside. (*State* v. *Rozell, 225 S.W. 931*). The appellate court, following precedent, held that testimony tending to show that deceased was a disbeliever in a future state of man was "competent to affect the credibility of the dying declaration."

The reason for the rule is one that had been conceived in the Middle Ages, or probably even earlier, believed in at the time of the

compurgators, and which is still regarded as sound from the standpoint of orthodox Christianity, namely, that since an unbeliever fears no torment after death he is not terrified into telling the truth, and, therefore, may not tell it. It is assumed that the believer's theory of rewards and punishments in the hereafter (irrespective of any theory or belief as to vicarious atonement or forgiveness) exercises an overruling influence upon his mind, when he is conscious of the imminence of death, and compels him to tell the truth, and because such influence is lacking in the case of the unbeliever, the latter is presumed to be unreliable in his dying statements. Such are the reasons that prompted the Court of Appeal in California (*Peo.* v. *Lim Foon,* 155 Pac. 477) to say that a dying declaration of an unbeliever "should never be submitted to a jury unaccompanied by an explicit admonition by the court that it should be viewed *with great caution.*" A like reason was invoked to support the rule regarding qualifications of living witnesses. The New York court (*Jackson* v. *Gridley,* 18 Johns. 98) said:

"No testimony is entitled to credit, unless delivered under the solemnity of an oath, which comes home to the conscience of the witness, and will create a tie arising from his belief that false swearing would expose him to punishment in the life to come."

The reasoning in question operates not only against atheists but also against a class of Christians, such as the Universalists. In a later case the New York court (*Gibson* v. *Am. Life Ins. Co.,* 37 N.Y. 580) observed:

"We find a large class who believe in the punishment of sin in this world only and the ultimate salvation of the whole human race. These are all Christians."

If, as the Supreme Court of the United States said, dying declarations may be *discredited* by proof that the declarant "did not believe in a future state of rewards and punishments," the atheists are not the only class affected, but the rule can be invoked against other classes, including Christians, just as the rule which rendered atheists incompetent as witnesses was held to make Universalists also incompetent. As late as 1828 the Supreme Court of Errors of Connecticut held (*Atwood* v. *Welton, 7 Conn. 66*) a Universalist to be as disqualified as an atheist. The witness Scott "professed to believe in the doctrine of the Universalists, and in the existence of the Supreme Being; that men were punished, in this life, for their sins, but would all be made happy, immediately after death, by their Creator." The court held that one entertaining such opinions is not a competent witness, because, as in the case of the atheist, there is no belief in "a punishment, of some

duration, in a future state." The court observed: "If the witness who denies all future punishment, cannot be excluded . . . neither can the Atheist." Hence the court felt bound to apply to the Universalists the same rule as applied to atheists, and would have applied it to Unitarians and to all others who fail to believe in eternal damnation beyond the grave. The same view was taken as late as 1889 by the court of common pleas in Essex county, New Jersey (*State* v. *Powers, 17 Atl. 969*).

No such reasoning as that on which the rule in question is based has ever been successfully invoked against a Christian witness, even when the facts would invite it. In a trial of persons, presumably of the Protestant faith, charged with burglary and arson, committed in the burning of the convent of the Ursuline community at Charlestown, Massachusetts on the night of August 11, 1834, the prosecution was supported by testimony of witnesses of the Roman Catholic faith. Counsel for the prisoners contended that confession and absolution being parts of the Roman Catholic faith, a witness belonging to that sect might testify what was not true, in the expectation of afterwards obtaining absolution, and therefore that this was a matter for the consideration of the jury, as affecting the credibility of the witness. The official report of this case (*Com.* v. *Buzzell, 16 Pick. 153, 156*) shows that the court refused to uphold the contention, or to admit the supposedly discrediting evidence. In no reported case has a Christian witness been compelled to say whether he believes it possible to obtain Divine forgiveness for perjury, and yet a nonbelieving witness has often been forced to answer questions upon his disbelief in Divine vengeance. Apparently, in contemplation of law, belief in Divine forgiveness does not encourage perjury and disbelief in Divine vengeance does. The Christian witness must not be asked any questions regarding his faith, and the nonbelieving witness may be asked questions regarding his disbelief. The atheist, and agnostic, according to some decisions, dare not even object to the questioning. The New York Court of Appeals once referred to such objections as being "frivolous" (*Peo.* v. *Most, 27 N.E. 970*).

Coming now to a case actually involving a dying declaration, we find an Illinois court (*North* v. *Peo., 28 N.E. 966, 972*) saying:

> "We do not think it was a proper inquiry, as it is insisted by counsel that it was, whether it is a tenet of the church to which (the dying declarant) belonged that there may be repentence at any moment before death."

This assumes that repentence would necessarily consume a definite and substantial period of time, and that a dying believer is convinced

that there is not time enough for repentence. Likewise the rule herein discussed presupposes that an atheist, after a mortal assault, has not sufficient time to change his opinion regarding a Deity. This assumption is contrary to the well-known evangelistic teaching, imparted chiefly to the young, that an atheist when conscious of impending dissolution suddenly regrets his previous opinions and in agony and terror sees and knows a Deity, and feels the heat of an approaching hell. If that teaching is sound, the atheist would be disposed to tell the truth, under such circumstances, in the hope of averting some measure of the expected punishment.

To *discredit* testimony is to disbelieve it. If a dying declarant is to have his declaration discredited he is worse off than if his declaration were simply excluded, for in addition to having his evidence nullified he is stigmatized as a liar. When the rule in question is applied, the dying declarant is stigmatized also as an "infidel" by the Christian jurors. The rule permits a jury to "discredit" and therefore to disbelieve the dying declaration upon proof that the declarant did not believe in Hell. The result is identically the same as if the declaration had been excluded entirely, unless it be more unfavorable to the declarant because of the stigma attached. The rule works as if it excluded the declaration, and produces the same results as the English rule that a dying declaration is not admissible if the declarant does not believe in "a future state," either because of extreme youth or on account of "infidel" views. How the English rule operated is illustrated by the case of *Rex* v. *Pike* (*3 Car. & P. 598*) where two persons were indicted for the wilful murder of their niece, a child aged four years, by brutally beating on the head. Shortly before her death the child made a statement to her mother as to the manner in which she had been treated by the two prisoners. The court would not allow the declaration to be admitted in evidence, for the reason that the statement did not show that the child "had any idea of a future state." The statement involved nothing which the child would wish to conceal, and in all probability the dying child told the truth to her mother as to the identity of her assailants. Yet the law would not permit the declaration to be used against the defendants. The accused were set free because of the absence of "competent" evidence.

If the reason given for the rule has any basis in truth, which is doubtful, even then this particular twig of the law should be clipped, for the reason that the only effect it has is to endanger the lives of those citizens who disbelieve in Hell after death. Such citizens may be religious. Atheists are not the only ones who dispute so-called "Funda-

mentalist" doctrines. The proposition that the rule of law discussed in this paper is a rule inviting the assassination of any person who has discarded Hell in his religious equipment is supported by high legal authority. The proposition is supported by statements of learned judges when they were considering the ancient rule that dying declarations of unbelievers are not admissible in evidence at all. Such statements are applicable in the present connection for the obvious reason that there is no difference in effect and in results, between excluding entirely a dying declaration and discrediting it if it is introduced in evidence. In other words, a discredited declaration amounts to no declaration; it is not given any probative effect. The injustice of excluding, or of discrediting, dying declarations of unbelievers, where they have named their assailants, ought to be recognized by every one, regardless of his creed. It has been recognized, and by judges who were orthodox Christians. The Supreme Court of Appeals of West Virginia in speaking of the effect of excluding the dying declaration of an unbeliever said:

"His goods may be stolen, his dwelling broken into by the midnight robber, or burned by the incendiary; his child may be beaten, or his wife murdered before his face, and the offender escape because of the incapacity of the injured man to give evidence against him. This very incapacity may have caused the calamity. And can he be told that he lives under a government of equal laws? That he has suffered nothing on account of his opinions?" (*State* v. *Hood,* 59 *S.E.* 971.)

If the foregoing reasoning which could be more forcibly and elaborately given shows the injustice of entirely excluding dying declarations of persons disbelieving in Divine vengeance, it likewise shows the injustice and inhumanity of effecting the same consequences by discrediting the declarations after they are introduced in evidence. But the courts persist in allowing defendants in murder cases to take advantage of this ancient rule, and the decisions are not disapproved, much less denounced. Who cares to plead for justice or protection to the "infidel"? There are other, and more respectable, fields for humanitarian deeds.

The rule in question may, technically, be invoked only for the purpose of discrediting the dying declaration, but it serves a murderer well in other respects also. When the declaration is discredited, it is not impeached in the sense that it is found unreliable on such grounds as that the declarant may have had a poor memory or was deficient in powers of accurate observation, but it is deemed worthless because the witness is deemed wilfully untruthful. The witness, as well as his declaration, is discredited. But there is still another result.

A jury of believers, hearing the so-called "impeaching" evidence and learning thereby that the victim of the homicide was an "infidel," might be disposed to acquit the murderer on the general principle, akin to that which frees wronged husbands under the "unwritten law," that the killing of an "infidel" is as laudable a service to society as the extermination of a rat. In 1820, the Supreme Court of Errors of Connecticut (in *Stow* v. *Converse*) assumed that the "infidel" lacks "the esteem of mankind," is excluded "from intercourse with men of piety and virtue," and is, to Christians, "odious and detestable." What jury is anxious to convict a murderer when it believes that his victim was "odious and detestable"? Even if the dying declaration is given weight and credence, still the declarant is stigmatized, in the eyes of orthodox Christians, as if the declaration had been impeached by proof that he had once been convicted of an infamous crime. Undoubtedly atheists are more obnoxious to the "Fundamentalists" than are mere "evolutionists," and the latter are sometimes referred to by excited ministers as fit subjects for a firing squad. Bibical quotations may be invoked, reasonably or otherwise, in support of a contention that atheists ought to be killed. It was once thought that there is Scriptural justification for the extermination of heretics. The original Connecticut statute punishing blasphemy with death cited a Biblical text. Courts in this advanced age, in spite of the political activity of ministers as concerns an elective judiciary, ought to strive to keep religious prejudices and hatreds entirely out of the administration of justice, and to prevent litigants, witnesses and declarants from being made to suffer for their opinions upon any subject pertaining to eternal agony or other matter involved in religion. Possibly the Court of Appeals of Kansas in *Dickinson* v. *Beal*, 62 Pac. 724, had some such humane idea in mind when ruling that a witness must not be questioned as to whether he is an "infidel," even in case the questioner desires to discredit the witness by that method. The court said:

> "To permit the question to be asked would assume that a stigma was cast upon a person who disbelieved in the existence of a God in accordance with the doctrines of the Christian church or churches, such as felons suffer by reason of the conviction of a crime."

What can be expected of a jury of orthodox or fundamentalist Christians, influenced by religious prejudices, when judges, presumably dispassionate, quote with apparent approval the following note in Christian's edition of Blackstone's Commentaries:

> "I have known a witness rejected, and hissed out of court, who declared that he doubted of the existence of a God, and a future state."

The quotation is found in a New York case (*Stanbro* v. *Hopkins, 28 Barb. 265*).

A jury has the passions and prejudices of the community from which it is drawn, and if the latter would cause a living witness to be "hissed out of court" the former would approve the action. While a dead declarant cannot be "hissed out of court," still his declaration, made while he was living, may be "rejected" as the result of the same influences. Why not expect jurors with religious prejudices to have the same impression of unbelievers as that possessed by the English judge who was quoted, without disapproval, by a Mississippi court (*Heirn* v. *Bridalut,* 37 Miss. 209, 226) as follows:

"The law presumes, not that they will be converted, that being a remote possibility, for between them, as with the devil, whose subjects they be, and the Christians, there is perpetual hostility, and can be no peace."

What is the nature of the evidence whereby the dying declaration may be discredited? What are the "blasphemous" remarks that may be attributed to the deceased declarant? An example may be found in the court's opinion in a New York case (*Brink* v. *Stratton,* 68 N. E. 148). It was there sought to discredit a living witness because in answer to the question whether he believed in a Supreme Being he said:

"I do not know anything about it I am sure. . . . I will reply that I am an agnostic. I have no belief on that subject at all. I do not know anything about it."

Those were the words held by some of the judges to be sufficient to discredit the witness, and assumed by all of the judges to be so sufficient if the court were to apply the rule that non-belief can be shown to discredit a witness.

There is one objection to the rule in question, that is, concerning deceased declarants, which ought to appeal even to the most pious fundamentalist judge: It does not prevent a murderer from giving perjured testimony in an effort to show that the dying declarant and victim was "an infidel." The latter may have been a religious man, believing in a future state, but death having stilled his tongue he cannot contradict the defendant's evidence.

Moreover, the declarant may be deemed to have been an "infidel" merely because he denied some particular theological doctrine, while still beliving in a Deity and in a future state. The term "infidel" is an epithet that is sometimes hurled by believers against such an individual. Hawkins, the English writer, includes among infidels such as do not believe either in the Old or New Testament (Hawk. Pl. Cr. b. 2, c. 46, s. 128). Thomas Jefferson was denounced by some religious

persons as an "infidel." The Supreme Court of Alabama has recently recognized this situation, and consequently held that to discredit a dying declaration evidence that the declarant was an infidel would not be sufficient, but that it must be shown that the declarant did not believe in a Supreme Being "rewarding truth and punishing falsehood, here or hereafter." *Marshall* v. *State,* 121 So. 72. The court was in error in using the word "here," for a declarant believing that his death is imminent cannot fear punishment "here." The Supreme Court of the United States stated the rule correctly when it referred the declarant's belief to "a *future* state of rewards or punishments" (*Carver* v. *U. S.,* 164 U. S. 694).

Thus far the discussion has assumed that the reason for the rule in question is sound. Human experience, however, has shown that the supposed reason is not based upon truth. Persons dying of injuries received as the result of murderous assaults are naturally disposed to tell the truth concerning the assailants or any other matter. When the truth is not told the declarant is as likely to be a believer as not. Believers are as readily influenced by motives for falsehood as are unbelievers. Tests of credibility, applied in courts, are applied to witnesses regardless of their religious affiliations or opinions. The situation, above described, has been recognized, apparently, by one lone decision that held the rule to be inapplicable to a Chinaman, stating that "a religious belief or want thereof, or lack of confidence in future rewards or punishments, as the case may be, is not an adequate basis for" impeaching a dying declaration (*State* v. *Yee Gueng,* 112 Pac. 424). The situation has also been recognized by those courts that refuse to permit a living "infidel" witness to be discredited by evidence of his disbelief in Divine vengeance (*Brink* v. *Stratton,* 68 N. E. 148).

Cases are not numerous where it was shown that the victim of a homicide was an atheist or agnostic, but there are many cases of record where the dying declarant was known to be a Christian, yet whose declaration was discredited for reasons which apply to the testimony of living witnesses. Society does not trust believers to tell the truth, even when they are under oath to do so. Consequently the law books contain many rules for testing the credibility of witnesses, and treatises have been written on the art of cross-examination. We also have laws punishing the giving of false testimony under oath, and only believers are capable of taking an oath. The reports are full of cases where prosecutions for perjury have been instituted, and convictions obtained. Believers commit perjury frequently, and often when they tell the truth it is because of the danger of being convicted of perjury. A

United States Attorney writing in the November, 1927, issue of the *Century Magazine* said:

"For the bulk of witnesses, the fear of certain prosecution and imprisonment, sharpened by salutary public examples, would win more converts to the truth than the dread of damnation beyond the grave."

Everyone knows that sometimes, and every lawyer knows that frequently, perjury is committed. The article in the periodical above mentioned further says:

"Criminal justice today is enmeshed in a web of perjury. . . . False swearing has become a daily, and therefore almost unremarked episode."

Mr. Justice Dawson, of the Supreme Court of Kansas, speaking before the Judicial Section of the American Bar Association in 1926 said:

"The real and crying hindrances to a correct and efficient administration of justice lie in the widespread prevalence of perjury practiced with impunity by litigants and witnesses, ..."

The law does, in most respects, so develop as to utilize the lessons of human experience and as to conform to public opinion. There has been, however, no effort to correct public opinion upon the subject of the veracity and good character of disbelievers in Divine vengeance, and the absence of any necessity or good reason for any discrimination against them. Consequently the law still allows the murderer to enhance his chances for acquittal by dragging into court evidence of his victim's alleged non-belief, so that a jury of believers may regard the crime as less heinous than it otherwise would appear to them, and the evidence of murder less probative.

The law has so advanced, as an instrument of justice, that in most states atheists, agnostics, and adherents of minority beliefs stand on an equality, as witnesses, with other classes, but dying atheists, agnostics, Universalists, and other disbelievers in Divine vengeance after death are still proscribed under the rule regarding their dying declarations. The law in question has been recognized by a court as late as 1926 (251 Pac. 515). It will be abrogated when, but not until when, the courts will dispassionately re-examine its reasons and foundations. Eventually that will be done, just as the Court of Appeals of New York re-examined and abrogated the rule with respect to impeaching living witnesses by questions affecting their religious opinions or lack of belief in damnation after death (68 N. E. 148).

Reformers who have searched for and discovered defects in criminal procedure, and who have proposed and secured the adoption of changes whereby the accused if guilty would be less likely to escape punishment, have given no thought to the rule of evidence herein discussed and, of course, never suggested its abrogation. By advocat-

ing such measures as that which would permit comment on the failure of an accused to testify, they have attempted to aid prosecutors in the conviction of friendless criminals, but nothing has ever been suggested in respect to the abolition of the rule of evidence that makes it possible, if not easy, under some circumstances for an influential person to escape punishment for the murder of an unoffending citizen who failed to believe in eternal damnation and pain after death. No reform, in the usual sense of that term, is necessary. The courts can, in the interest of both justice and humanity, with no offense to reason, simply assume that no such barbarous rule as that herein discussed exists. The common law, of which this rule is a part, is presumed to, and ordinarily does, gradually change to conform to the interests of society, and if it does not change of its own accord, through judicial decisions, a statute is passed to modify it. But law grows, or is made, according to the interests, and therefore the desires, of classes sufficiently strong to assert themselves. In the formative period of the law relating to witnesses and evidence, the ruling classes professed to believe in damnation and pain after death, and this accounts for the adoption and application of the rule which stigmatizes the person reputed to have doubts as to such damnation. There are probably but few cases of murder in recent times where the victims were reputed to be "infidels," and fewer still were the cases where the unbelieving person mortally wounded lived long enough after the assault to make a dying declaration. Common law rules are not apt to change if cases calling for their application are few and far between, but, even then, if a rule is obviously barbarous and serves no good purpose it is discarded as soon as its nature is observed. But Christian judges have thus far seen nothing abhorrent about the rule discussed in this paper, and Christian attorneys have not been disposed to argue against it. Thus far the bench and bar have been apparently willing that disbelievers in eternal agony after death shall be regarded, as they probably were by the Connecticut court, as "odious and detestable." In view of the fact, however, that Universalists and Unitarians are coming to have members upon the bench and at the bar, the probabilities are that this question may be argued some day with effect. In view of the further fact that many periodicals are publishing debates on religious questions, and permit even infidels to be heard, a course which tends to make the public tolerant of non-religious opinions, it is likely that the time will eventually arrive when the dying victim of a brutal murder, in naming his assailants, will not be stigmatized and have his dying declaration discredited in court merely because he disbelieved in Hell as described by orthodox Christians in the 17th century.